

STATE OF SOUTH CAROLINA

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APPEAL FROM THE ADMINISTRATIVE LAW COURT

S.C. Supreme Court

Carolyn C. Matthews, Administrative Law Judge

Case No. 07-ALC-07-0178-CC

York County and Nazareth Baptist Church of Rock Hill, Inc., Defendants,

of whom York County is Petitioner,

vs.

South Carolina Department of Health and Environmental Control and
C & D Management Company, LLC, Respondents.

**BRIEF OF PETITIONER ON
WRIT OF CERTIORARI**

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STATEMENT OF ISSUES ON APPEAL

- I. Did the lower courts err in concluding that DHEC properly disregarded York County's Emergency Ordinance, which was designed to maintain the *status quo* and to allow the County time to complete an update to its Solid Waste Management Plan ("the Plan"), and in concluding that the permit is thus consistent with the Plan and local ordinances, as required by § 44-96-290(F)?

- II. Did the Court of Appeals err in affirming the Administrative Law Court's conclusion that the permit issued by DHEC complied with Section 44-96-290(F) which requires consistency with a county's solid waste management plan, ordinances and land use, in light of the fact that:
 - A. The 2007 York County Solid Waste Management Plan does not authorize the proposed landfill?

 - B. The underlying zoning ordinance of the City of Rock Hill prohibits landfills in Planned Unit Developments?

- III. Did the Court of Appeals err in affirming the Administrative Law Court's conclusion that the applicant satisfied the "demonstration of need" requirement under Section 44-96-290(F) of the South Carolina Solid Waste Policy and Management Act, despite the fact that the only information provided by the applicant was the location of the proposed landfill, and no other factors were considered by DHEC?

STATEMENT OF THE CASE

This contested case arises from C & D Management, LLC's ("C & D Management") request for a solid waste management permit from the S.C. Department of Health and Environmental Control ("DHEC"). C & D Management seeks to construct and operate a commercial landfill accepting construction, demolition and land-clearing debris ("C & D") waste near the intersection of Rambo Road and Vernsdale Road in York County. DHEC issued the permit, and York County filed a request for final review conference before the DHEC Board, which was declined. The County then filed a request for contested case hearing in the Administrative Law Court ("ALC"). A request for contested case hearing was also filed in the Administrative Law Court by Barbara Polk. In July, 2008, Barbara Polk voluntarily withdrew her request. (Appendix (hereinafter "App." 34-35, 90). On September 29, 2008, the ALJ granted a motion to intervene filed by the Nazareth Baptist Church of Rock Hill, Inc. (App. 32-33 (Order Granting Intervention)).

Administrative Law Judge Carolyn C. Matthews conducted the contested case hearing on May 26, May 28 and June 1, 2009, in Columbia, South Carolina. The parties submitted proposed orders to the Court on August 5, 2009. The ALJ thereafter issued an order dated September 11, 2009, affirming DHEC's issuance of the permit for the proposed landfill. (App. 1-31, Order, September 11, 2009). Counsel for York County received a copy of the ALJ's order on September 14, 2009.

On October 12, 2009, York County filed an appeal of the ALC's Final Decision and Order to the Court of Appeals. On February 28, 2012, the majority upheld the ALC's opinion while Judge Lockemy filed a dissenting opinion explaining that he would reverse the ALC. (App. 2391-2392). A Petition for Rehearing was filed with the South Carolina Court

of Appeals on February 23, 2012, and the Order Denying Petition for Rehearing was issued on March 29, 2012.

ARGUMENT

Requirements of the Solid Waste Policy and Management Act

In order to obtain a solid waste management permit, C & D Management must meet the requirements of the Solid Waste Management and Policy Act (“the Act”). Specifically, C & D Management must:

1) show that its proposed facility is “consistent with local zoning, land use, and other applicable local ordinances, if any,” S.C. Code § 44-96-290(F);

2) show that its proposed facility is “consistent with the local or regional solid waste management plan and the state solid waste management plan.” S.C. Code § 44-96-290(F);
and

3) make a “demonstration of need” for the facility, S.C. Code § 44-96-290(E).

In promulgating the South Carolina Solid Waste Policy and Management Act of 1991, S.C. Code § 44-96-10, *et seq.*, the General Assembly found that:

(13) A coordinated statewide solid waste management program is needed to protect public health and safety, protect and preserve the quality of the environment, and conserve and recycle natural resources.

(14) The statewide solid waste management program should be implemented through the preparation of a state solid waste management plan and through the **preparation by local governments of solid waste management plans** consistent with the state plan and with this chapter.

S.C. Code § 44-96-20(A) (emphasis added).

The Act specifies that local governments play a role in managing their solid waste.

Section 44-96-80 of the Act requires local governments to prepare a solid waste management

plan that includes, among other things, estimates of the current disposal rates, the current capacity and **“an analysis of the existing and new solid waste facilities which will be needed to manage the solid waste generated within that county or region . . .”** S.C. Code § 44-96-80(A)(3). To implement this requirement, the Act authorizes the “governing body of a county [] to enact such ordinances as may be necessary to carry out its responsibilities under this chapter.” S.C. Code § 44-96-80(K).

York County’s Solid Waste Management Plans

In response to the requirements of Section 44-96-80, York County participated in the development of a Solid Waste Management Plan known as the 1994 Catawba Regional Plan (“the 1994 Plan”). The record contains no evidence that the County ever adopted the 1994 Plan as an Ordinance, but reflects that the County nonetheless considered the 1994 Catawba Regional Plan to be the County’s plan.

In 2003, York County hired Joyce Engineering to develop a needs analysis for C & D waste. (App. 204-205). The purpose of the needs analysis was to assist the County in the process of preparing a new Solid Waste Management Plan. (App. 204-205). Joyce Engineering provided the County with the results of its work in 2005, and then the County hired B.P. Barber & Associates to prepare a complete Solid Waste Management Plan using the Joyce work. (App. 206-208). B.P. Barber provided York County a draft of the plan in the summer of 2006, which called for allowing the proposed landfill which is at issue in this case. (App. 240-248, 1895).

The Plan received first and second reading and then, in August of 2006, the County conducted a public workshop on the Plan. The plan generated a great deal of controversy because of its inclusion of the proposed landfill. (App. 212-213). The day after the

workshop, Rudy Curtis of B.P. Barber sent an email to York County officials stating that there was in fact no need for additional C & D landfills in the County because the County has an excess capacity for C & D landfills. (App. 213, 217-18, 1087-88).

York County later learned that B.P. Barber was also working for C & D Management in seeking to obtain the landfill permit at issue here, and immediately took steps to terminate its contract with B.P. Barber. (App. 211-12). At that point the County directed staff to make changes to the draft plan in accordance with Mr. Curtis' assessment that no new C & D landfills were needed. (App. 220). York County kept DHEC informed as it made progress on the 2007 Plan. (App. 332-334).

On February 28, 2007, York County Council gave third reading approval to an ordinance adopting the York County Solid Waste Management Plan. (App. 1041-1046) The final form of the 2007 Plan calls for the continued operation of York County's C & D landfill and states that no additional C & D landfills are needed in York County. (App. 236-237, 898-991). The Plan presents data supporting the conclusion that no new C & D landfills are needed at this time. (App. 220-221, 898-991, 1041-1046). The County received no comments from DHEC, and the 2007 Plan is now in effect as the official York County Solid Waste Management Plan pursuant to S.C. Code Ann. § 44-96-80. (App. 231-232).

In the midst of adopting this new solid waste plan, York County learned that DHEC was on the verge of issuing a permit for the proposed landfill. In response to this information, County Council enacted an Emergency Ordinance at its meeting on January 9, 2007, finding an "imminent peril to public health, safety, welfare and property rights . . ."¹

¹ The Emergency Ordinance was passed in accordance with S.C. Code Ann. § 4-9-130 ("To meet public emergencies affecting life, health, safety or the property of the people, council may adopt emergency ordinances; . . . Every emergency ordinance shall be designated as

(App. 1047-1051). The Emergency Ordinance recites that the County has “expended substantial time and resources researching changes in the County’s solid waste stream in order to determine and project its current and future disposal needs. . .[,] considered the need for additional waste disposal sites and . . . determined that more protections are needed to ensure the proper and safe location of any future landfill operations.” (App. 1048). The Emergency Ordinance continues that:

In order to preserve the status quo and planning options during this period of study, review and, if necessary, ordinance or plan drafting and amendments, the Council hereby declares an emergency moratorium for a period of up to sixty one (61) days on the construction or expansion of any landfills in the incorporated or unincorporated sections of York County. **New or expanded C&D landfills are therefore declared inconsistent with the Plan until this emergency ordinance expires and/or the Plan is further modified.**

(App. 1050) (emphasis added).

DHEC initially acknowledged York County’s Emergency Ordinance, and wrote to Mike Griffin of Griffin Brothers (owner of C & D Management) on January 30, 2007, informing him that the Emergency Ordinance modified the 1994 Plan by placing a moratorium on construction or expansion of any landfills within the County and declaring any new C & D landfills inconsistent with the Plan. (App. 334-36, 1085-86).

Notwithstanding the Emergency Ordinance, and its modification of the 1994 Plan, the DHEC staff changed its position on February 22, 2007 and gave notice of its initial decision to issue a permit to C & D Management. (App. 336-37, 1056-64). The DHEC decision claims that the County only “purported” to place a moratorium on new landfills and only “purported” to declare new permits inconsistent with the 1994 Plan. (App.190, 1062).

such and shall contain a declaration that an emergency exists and describe the emergency. . . An emergency ordinance is effective immediately upon its enactment without regard to any reading, public hearing, publication requirements or public notice requirements. . .”)

On February 28, 2007, six days after DHEC issued its decision, York County Council gave third reading approval to an ordinance adopting the York County Solid Waste Management Plan. (App. 220-21, 1041-46). The 2007 York County Solid Waste Management Plan (“2007 Plan”) makes projections of future C & D waste based on generation data from the Office of Research and Statistics of the S.C. Budget and Control Board, and presents data supporting the Plan’s conclusion that no new C & D landfills are needed in the County at this time. (App. 233-37). The 2007 Plan was not utilized by DHEC or the ALC in determining whether the proposed landfill is consistent with the “local or regional solid waste management plan” or “local ordinances.” S.C. Code § 44-96-290(F).

City of Rock Hill Zoning

The City of Rock Hill (“City”) Zoning Ordinance states that Planned Unit Development (“PUD”) standards are as follows:

The uses that may be included in a PUD Zoning District and PU Master Plan include all the uses allowed in any zoning district, except the following uses which are prohibited: . . . sanitary landfills . . .

(App. 2164, 2237).

The City of Rock Hill’s 2004 zoning ordinance does not define the term “sanitary landfill;” however, the term “sanitary landfill” is defined by the S.C. Solid Waste Policy and Management Act of 1991 to include any and all disposal sites that dispose of solid waste. See S.C. Code Ann. § 44-96-40(44) & (47). C & D waste is “solid waste” as defined by the Act. S.C. Code Ann. § 44-96-40(6).²

The City of Rock Hill’s PUD documents for zoning of the subject property authorize

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The PUD ordinance was approved in May, 2005. The City of Rock Hill adopted a new Zoning Code in December, 2005, and effective March 1, 2006, which explicitly prohibits all landfills” in PD/PUD districts. (App. 1121, 1169-1178).

use only as a “compost and building material recycling center.” (App. 374-75). The PUD documents do not use the term “landfill” when describing the PUD zoning, thus the plain terms of the PUD ordinance do not authorize a landfill. (*Id.*)

In reviewing the proposed landfill for consistency with local zoning and land use pursuant to Section 44-96-290(F), DHEC initially concluded that the current PUD zoning for the property would not allow the landfill, and sent a letter to the applicant informing it of this conclusion. (App. 345-46, 1102). This conclusion was based on the City’s prohibition of sanitary landfills in PUD districts, the lack of a City definition of sanitary landfills, and the definition of sanitary landfills in the Act.

DHEC later reversed itself on the issue of zoning after receipt of letters from the staff of the City of Rock Hill, and issued a determination of consistency.

The Demonstration of Need

On Friday, March 19, 2004, C & D Management submitted a letter to DHEC requesting a “demonstration of need determination.” (App. 794). Three days later, on Monday, March 22, 2004, the Department issued a demonstration of need determination for the proposed landfill. (App. 797).

The only information included in this demonstration of need (“DON”) request was the location of the proposed landfill. (App. 794-796) In reviewing C & D’s request, DHEC utilized a formula set forth in the 2000 version of Regulation 61-107.17, which requires plotting the latitude and longitude on a map and then drawing a circle with a ten mile radius around that point. (App. 320-21). Next, the number of existing “commercial” C & D landfills within the circle is determined. If there are two or more landfills within the circle, the new landfill is deemed to be not needed without consideration of any other factors or

information.³ If no landfill or only one landfill is within the circle, DHEC considers the landfill to be needed. At the time of C & D requested demonstration of need approval, there were fewer than two “commercial” C & D landfills within the ten-mile radius of the proposed landfill.⁴

Regulation 61-107(D)(3)(d) authorizes DHEC to go beyond the “circle test” and consider “additional factors in determining need on a case-by-case basis.” S.C. Code Ann. Regs. § R. 61-107.17.D.(3).(d). But in this case, DHEC made its determination based solely on the “circle test” without considering any “additional factors” to determine whether the landfill was actually “needed” as required by § 44-96-290(E). (App. 317). DHEC did not revisit the question of “need” at any time after its March 22, 2004 determination. In determining need based solely on the formula, the DHEC staff failed to consider the capacity of the York County C & D landfill, which lies within the 10-mile circle, and failed to consider the Coltharp landfill, which is just slightly outside the 10-mile circle. (App. 349-350).

The 2007 DHEC Solid Waste Management Report indicates that statewide, South Carolina produces about 2 million tons of C & D waste per year, and that the existing C & D

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Under the current version of Regulation 61-107.17, which became effective June 26, 2009, the demonstration of need process uses a 20-mile radius circle and the definition of “commercial” is broadened. Under the 2009 version of R. 61-107.17, both the York County landfill and the Coltharp landfill fall within the circle and must be considered, so that there are at least three landfills within a 20-mile radius of the proposed landfill site. The current regulation, which was applicable at the time the ALC issued its opinion, would thus prohibit the permitting of this landfill, unless “additional factors” were considered sufficient to override the formula. (App. 368-369, 1103-1120).

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After finding “need” based on the circle test, DHEC then establishes the annual disposal rate for the proposed landfill at the rate at which waste is generated within all of the counties that are touched by the ten-mile radius circle. S.C. Code Ann. Regs. § R. 61-107.17.D.(3)(c) (App. 320-321, 812-813).

landfills within the state have a total permitted capacity of about 4.5 million tons per year. (App. 364-365, 1089-1090). DHEC similarly failed to consider those factors in making its determination that the landfill is needed.

Art Braswell, the DHEC official in charge of landfill permits at the time this permit was approved, testified that DHEC Regulation 61-107.17 does not really measure need, and that use of the formula set forth in that regulation could result in excess landfill capacity. (App. 355-357, 830-831, 846-847). Braswell referred to the DON regulation as a “misnomer,” (App. 355, lines 19-24), because a county could end up with over a million tons of excess capacity even though it produces less than 100,000 tons of waste. (App. 356-357).

The Court of Appeals and Administrative Law Court Opinions

The majority of the Court of Appeals affirmed the Administrative Law Court’s ruling in all respects. Specifically, the majority upheld the ALC’s conclusion that the County’s Emergency Ordinance was “an improper delegation of DHEC’s exclusive authority over permitting decisions,” and thus DHEC was justified in “disregarding the emergency ordinance.”⁵ (App. 2387-2395, Opinion p. 2). The majority concluded that there was no meaningful distinction between a duly enacted Emergency Ordinance and a letter of consistency, which was held as an improper delegation of DHEC’s authority under *Southeast Resource Recovery, Inc. v. S.C Dept. of Health & Environmental Control*, 358 S.C. 402, 595 S.E.2d 468 (2004).

The Court of Appeals further affirmed the ALC on a number of additional grounds

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The majority complains that the Emergency Ordinance does not explain the “scope or effect of the moratorium.” (App. p. 2390). In so concluding, the majority overlooks numerous statements in the ordinance that it is to “preserve the status quo” during a period of study and review to allow for adopting a new plan or drafting amendments, and that the moratorium expires once either the Solid Waste Plan is modified or the Emergency Ordinance expires sixty-one (61) days after the passage of the ordinance. (App. 2392-2393).

for appeal upon which relief should have been granted, on the basis that these additional grounds related to factual determinations and were thus governed by the substantial evidence standard. The Court of Appeals incorrectly determined that the additional grounds were factual in nature, ignoring the legal errors asserted by York County.

On one of these issues, the question of need, the ALC concluded that the “assertion that York County has sufficient disposal capacity does not constitute an ‘additional factor’ which precludes approval of a Demonstration of Need for a new facility.” (App. 13, ALC Order, CL #11). The ALC further concluded that “excess permitted capacity within an individual county” is not a “factor requiring denial of a Demonstration of Need,” (App. 12, ALC Order, CL #9), and that the Demonstration of Need Regulation expressly allows the permitting of excess capacity: “there could be any number of facilities located within the county – each with a permitted maximum annual capacity equal to the total annual waste generated in the host county.” (App. 12, ALC Order, CL #10). The Order did not address evidence demonstrating that DHEC had recently granted a permit to expand the existing York County C & D Landfill with an increased annual disposal rate of 95,632 tons per year. (App. 266-269, 1094-1101). Nor did the Order consider the 2007 York County Solid Waste Management Plan, which concluded that there is no need for additional C & D capacity in the county. Indeed, the ALC did not consider a host of other factors that bear upon need.

The ALC Order then addressed the requirement of Section 44-96-290(F) that the landfill must be consistent with local zoning and land use. The ALC did not address the undisputed evidence indicating that nothing in the PUD ordinance for the C & D Management property indicates that a landfill is an acceptable use, and that the PUD ordinance describes the proposed use as a “compost and building materials recycling

facility.” (App. 1179-1187). The ALC concluded that the proposed landfill is consistent with local zoning and land use, specifically the PUD zoning designation. The ALC did not make an independent determination of consistency based on the plain language of the PUD zoning ordinance, instead giving “great deference” to a City employee’s determination that the landfill was consistent with local zoning. (App. 16, ALC Order, CL #25).

The ALC’s conclusions relating to DHEC’s authority are perplexing when read together. On the one hand, the ALC ruled that DHEC can disregard an Emergency Ordinance because only DHEC has the authority to make consistency determinations; but on the other, the ALC ruled that DHEC can fully rely on the City’s interpretation of consistency with local zoning.

The ALC also relied upon the Court of Appeals decision in *Mikell v. County of Charleston*, 375 S.C. 552 654 S.E.2d 92 (Ct. App. 2007), *cert. granted* August 22, 2008, *reversed*, 386 S.C. 152, 687 S.E.2d 326 (2009), in ruling that the PUD ordinance overrode the underlying zoning ordinance. (App. 16-18, ALC Order, CL # 27-28). This Court reversed the Court of Appeals in *Mikell*, holding that where there is legislative intent to place limits on PD districts through a zoning ordinance, a PD zoning designation cannot override those limits established in the underlying zoning ordinance.

Summary of Argument

The lower court opinions result from a fundamental misconception of the legislative intent evidenced in the Solid Waste Policy and Management Act and a resulting misapplication of this Court’s ruling in *Southeastern Resources Recovery v. SCDHEC*, 358 S.C. 402, 595 S.E.2d 468 (2004). In holding that DHEC can disregard the County’s Emergency Ordinance as an invalid exercise of authority, the lower courts ignore the Act’s

mandate that local governments research and estimate solid waste disposal rates, analyze current and future needs and develop a plan for meeting its solid waste needs, as well as enact ordinances to carry out those goals. S.C. Code § 44-96-80(A)(3) & (K). The Court of Appeals and ALC effectively struck down the Emergency Ordinance in ruling that DHEC must disregard the ordinance. The ALC further exceeded its authority in declaring it “invalid.” (App. 27, ALC Order, CL #57). *See, Drummond v. State, Department of Revenue*, 378 S.C. 362, 662 S.E.2d 587 (2008) (holding that neither DHEC nor the Administrative Law Court has authority to determine whether a county ordinance is valid).

The Administrative Law Court and the Court of Appeals’ opinions have the practical effect of writing out local government’s role in managing their solid waste, despite the intent of the General Assembly made explicit the Solid Waste Management Act. In rejecting the Emergency Ordinance adopted by York County, the lower courts failed to recognize the distinction between a county quite literally making the permitting decision reserved for DHEC, which is unlawful, and York County’s effort to exercise its statutory right to establish and enact a plan for solid waste management.

The Court of Appeals further failed to address the additional errors of law raised by York County. Causally concluding that the remaining errors involve factual determinations, the Court failed to address the additional errors of law including: (1) whether the permit issued by DHEC was inconsistent with the plain language of the City of Rock Hill’s zoning and therefore in violation of Section 44-96-290(F); (2) whether the permit issued by DHEC was inconsistent with York County’s 2007 Solid Waste Management Plan and therefore in violation of Section 44-96-290(F)⁶; and (3) whether the landfill applicant satisfied the

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Judge Lockemy concludes that the permit is inconsistent with the County’s Solid Waste Management Plan because the Emergency Ordinance was passed to carry out the County’s

“demonstration of need” requirement under the Section 44-96-290(E), despite DHEC and the ALC’s failure to consider evidence that the proposed landfill is not needed.

I. The majority of the Court of Appeals and the ALC erred in concluding that DHEC properly disregarded York County’s Emergency Ordinance

A. The General Assembly Gave DHEC and York County Differing Responsibilities and Authority under the SWMPA

“[A]llowing some degree of overlap between the branches has been a feature of our government since the founding of the Republic. Our founding fathers embraced the celebrated writings of Montesquieu, yet concluded that a certain amount of encroachment was permissible.” *S. Carolina Pub. Interest Found. v. S. Carolina Transp. Infrastructure Bank*, 403 S.C. 640, 649-50, 744 S.E.2d 521, 526 (2013).

In passing the Solid Waste Management and Policy Act, the South Carolina Legislature gave both DHEC and local governments responsibilities for managing solid waste that overlap to some degree. The Act requires local governments to prepare solid waste management plans. S.C. Code Ann. § 44-96-20(A)(14). Those local plans must include an analysis of existing and new solid waste facilities that will be needed to manage solid waste generated within that county or region. S.C. Code Ann. § 44-96-80(A)(3). Local governments are authorized to enact ordinances to carry out these responsibilities. S.C. Code Ann. § 44-96-80(K). Thus, when DHEC is considering a permit application it must be guided in part by the local plans: “No permit to construct a new solid waste management facility or to expand an existing solid waste management facility within a county or municipality may be issued by the department **unless . . . the proposed facility or expansion is consistent with the local or regional solid waste management plan.**” S.C.

Plan and preserve the *status quo* while the Plan was being finalized. (App. pp. 2394-95).

Code § 44-96-290(F) (emphasis added).

While DHEC is authorized to make the ultimate permitting decision as to whether a landfill is consistent with zoning, land use, other local ordinances and the county solid waste management plan, York County is given the authority to enact the plan and other appropriate local ordinances. S.C.Code Ann. § 44-96-80(A) & (K). The legislature clearly intended to give counties and municipalities a measure of control over their own destiny – to plot their own course for management of solid waste. And York County attempted to do just that. First, York County initiated development of its own Solid Waste Management Plan, which received first and second readings in 2006. DHEC was aware and informed of the progress and the County’s efforts to gather data and analyze future waste disposal need. Just as the County was nearing passage of a new Plan, it learned that DHEC was preparing to issue the permit. In response to this information, the County enacted an Emergency Ordinance declaring all landfills inconsistent with its outdated plan in order to maintain the *status quo* and allow it time to finalize its new solid waste management plan. This Emergency Ordinance was set in place for a very limited period of time, expiring after sixty-one (61) days. DHEC’s permitting decision came forty-three (43) after the Emergency Ordinance was passed, and the new, 2007 Plan was passed just six days after the DHEC permit decision.

Enacting an ordinance and adopting a plan is not an invasion of DHEC’s authority to make the permit decision. If a county’s plan states that no new landfills are allowed, DHEC must follow that plan in determining whether a proposed new landfill is consistent. S.C. Code Ann. § 44-96-290(E). Art Braswell, DHEC’s witness, testified that if the county’s Plans says no additional landfills are needed, then DHEC would not be able to permit the landfill: “That’s the authority they give to the counties under 44-96-80.” (App. 34–345).

The decision of DHEC, the ALC and the Court of Appeals to disregard and invalidate the Emergency Ordinance violates the letter, as well as the spirit of the law. The express terms of the Solid Waste Policy and Management Act demonstrate that the General Assembly intended to give local governments the ability to have a voice in the permitting of landfills through granting them the authority to enact ordinances in furtherance of the Act. Section 44-96-290(F) provides that if a county adopts a solid waste management plan, it will be able to affect DHEC's permitting decision based on the content of that plan. The Emergency Ordinance was a modification of the existing Plan and was meant to facilitate and enable the passage of a new, updated Plan. DHEC knew a new Solid Waste Management Plan was on the verge of being adopted, but rather than allowing the process to occur as it should have, DHEC usurped the County's statutory authority to have a say in the management of its solid waste by rejecting the Emergency Ordinance and finding the landfill consistent with the Plan and local ordinances. As Judge Lockemy points out in the dissent, DHEC knowingly waited until the virtual eve of York County's enactment of a new comprehensive solid waste management before issuing the permit under an old plan.⁷

Shortly after its Opinion in this case, the majority of the Court of Appeals recognized the role of counties in adopting Solid Waste Management Plans in the case of *Greeneagle v. DHEC*, 399 S.C. 91, 730 S.E.2d 869 (S.C. Ct. App. 2012), reh'g denied (July 23, 2012), a case in which DHEC did apply York County's 2007 Plan in denying a C & D landfill permit request. In determining that a proposed new landfill was *inconsistent* with the 2007 Plan,

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York County began the process of preparing a county solid waste management plan in 2000. The decision by DHEC to issue a landfill permit came just one week prior to the final enactment of the 2007 York County Solid Waste Management Plan, and one month after the January 2007 York County emergency ordinance declaring new landfills to be inconsistent with the county solid waste management plan.

DHEC and the Court of Appeals relied on the 2007 Plan's determination that the county's current and projected capacity needs for C & D waste could be adequately addressed with existing facilities and the potential for expansion of existing facilities. The only difference between that case and this one is that here, DHEC rushed to issue the permit six days ahead of the 2007 Plan and ignored the Emergency Ordinance.

B. The Emergency Ordinance is a Valid Exercise of the County's Authority

York County exercised its authority pursuant to Section 44-96-80(K) to pass an ordinance **“as necessary to carry out its responsibilities” to “prepare a solid waste management plan.”** The emergency ordinance was necessary to allow the County time to finalize its solid waste management plan and replace an old, outdated plan in light of recent study and analysis of the County's needs. Yet the ALC ruled that the Emergency Ordinance is invalid and DHEC properly disregarded it. The Court of Appeals affirmed concluding that the ordinance is **“an effort by the County to control DHEC's permitting decision.”** (App. 2390).

Taken to its logical conclusion, under the Court of Appeals' ruling a County could never, for example, adopt any ordinance that would prohibit landfills in certain zoning districts because it would be considered an **“an ordinance that is inconsistent with state law”** for attempting to affect a DHEC permit decision. (App. p. 2388). Moreover, a County could never adopt a Solid Waste Management Plan that prohibited additional landfills (despite the fact that York County did adopt such a Plan and DHEC did follow that Plan in denying another landfill) because that would **“control DHEC's permitting decision.”** (App. 2390). Certainly the court's interpretation is not consistent with the intent of the General Assembly as evidenced by the clear language of SWPMA directing counties to develop solid waste

management plans and giving them authority to pass ordinances necessary to implement those plans.

This Court previously addressed whether an ordinance passed pursuant to the Solid Waste Management Act is valid in *Sandlands C & D, LLC v. County of Horry*, 394 S.C. 451, 716 S.E.2d 280 (2011). In that case, the Court said that an ordinance is presumed to be constitutional, and that “the powers of local governments should be liberally construed.” *Id.* at 460 (internal quotations omitted). This Court ruled in *Sandlands* that if a county has the power to enact an ordinance, then it is valid as long as it is consistent with the Constitution and general law of this State. The Court ruled that the Solid Waste Management Act authorizes a County to regulate solid waste, and rejected the argument that DHEC has the exclusive authority to regulate the entire field of solid waste management. The Opinion states that:

Although there is no doubt the express language of the SWPMA provides for DHEC’s exclusive authority in the area of *permitting*, see S.C.Code Ann. § 44-96-290(E) (“No permit to construct a new solid waste management facility or to expand an existing solid waste management facility may be issued until a demonstration of need is approved by the department.”); *id.* § 44-96-260(2) (DHEC may “issue, deny, revoke, or modify permits, registrations, or orders under such conditions as the department may prescribe”), we glean no similar express language in the statute concerning the *flow* of solid waste within the counties. Therefore, *Southeastern Resource Recovery* is inapposite.

Sandlands C & D, LLC v. County of Horry, 394 S.C. 451, 463-64, 716 S.E.2d 280, 286 (2011). The take away from *Sandlands* is that “the SWPMA does not prohibit county regulation of solid waste management” and counties can pass ordinances that affect the management of solid waste within their borders. *Id.* at 463, 286.

The Emergency Ordinance has language similar to the Horry County Ordinance relating to its powers. Specifically, the Ordinance states that:

Based upon information reviewed by Council and provided by consultant engineers, Council is informed and believes that substantial changes and amendments must be made to the 1994 Solid Waste Plan before any new/additional landfills are needed in the incorporated and unincorporated areas of the County. Council is further informed and believes that permanent changes and amendments to the existing 1994 Solid Waste Plan and a temporary moratorium on landfills in York County is required in order to protect the safety, welfare and property rights of the citizens of York County.

(App. 1048-1049). The Solid Waste Management Act is laden with references to the counties' involvement in the management and regulation of solid waste. *See, e.g.*, 44-96-80(A), (J), (K). And the Emergency Ordinance represents York County's valid exercise of its statutory authority to be involved in the management and regulation of its solid waste.

The ALC cites the case of *Simpkins v. City of Gaffney, et al.*, 315 S.C. 26, 431 S.E.2d 592 (Ct. App. 1993), as a basis for concluding that the Emergency Ordinance is invalid. *Simpkins* is inapposite. *Simpkins* did not involve a duly passed ordinance, but rather a moratorium on new construction of duplexes which was passed by a motion. The motion declaring the moratorium suspended the effect of the existing ordinance and had no expiration. The Court in *Simpkins* explained that to "suspend operation of the existing . . . ordinance . . . the ordinance must be either repealed or succeeded by another ordinance or an instrument of equal dignity." *Id.* at 29. The case at hand is clearly distinguished because the moratorium was passed by "another ordinance," not by motion.

C. *Southeastern Resource Recovery is Not Applicable*

The case relied on by the Court of Appeals and the ALC, *Southeast Resource Recovery, Inc. v. South Carolina Department of Health and Environmental Control*, 358 S.C. 402, 595 S.E.2d 468 (2004), considered DHEC's former practice of wholesale delegation to counties of the consistency determination under Section 44-96-290(F) ("DHEC's practice has

been to delegate to the counties the authority to determine consistency through the counties' issuance of LOCs. We conclude this delegation of authority is impermissible" at 408.) Under DHEC's former practice, the agency required "an applicant for a C & D landfill permit to obtain a LOC [Letter of Consistency] from the county prior to reviewing the applicant's request for approval." *Pressley v. Lancaster County*, 343 S.C. 696, 701, 542 S.E.2d 366, 368 (Ct. App. 2001). This Court noted that DHEC is granted final permitting and certification authority under our State's Solid Waste Management Act, thus, the County cannot issue a consistency determination for a specific landfill by way of a letter.

The lower courts' errors in relation to the Emergency Ordinance stem from a misapplication and misinterpretation of this Court's opinion in *Southeast Resource Recovery, Inc.* The majority of the court of appeals and the ALC erred by equating a duly enacted ordinance with a "letter of consistency," thereby eliminating the County's ability to carry out its responsibilities under the Solid Waste Management Act. Those responsibilities include developing a solid waste management plan and enacting ordinances in furtherance of that plan, pursuant to Sections 44-96-80(A) & (K). The Court of Appeals misapprehends the distinction between a county quite literally making the permitting decision, as in *Southeast Resource Recovery*, and York County exercising its statutorily-given right to affect DHEC's permitting decision, as it did here. The Court of Appeals held that "DHEC was required to disregard" the Emergency Ordinance. (App. 2391). The court of appeals' conclusion that, had DHEC considered and applied the Emergency Ordinance in making its determination of consistency with the County's Solid Waste Plan and local zoning ordinances, it would have improperly delegated its authority, leads to a result that DHEC can *arbitrarily* disregard any ordinance, including a Solid Waste Management Plan adopted by ordinance, if a proposed

landfill is inconsistent with that ordinance.

The Court of Appeals exercises legal gymnastics to explain its conclusion that York County did not have the authority to enact the Emergency Ordinance because Section 44-96-80(K) “prohibits a county from enacting an ordinance that is inconsistent with state law.” (App. 2391). The lower court apparently concludes that the Emergency Ordinance is inconsistent with state law in the form of *Southeast Resource Recovery*’s holding that DHEC cannot delegate its authority to counties to issue consistency determinations. (App. 2391). The Court of Appeals’ confusion on the *Southeast Resource Recovery* case in relation to York County’s Emergency Ordinance is illustrated by its statement that it “can make no meaningful distinction” between the letters of consistency and the emergency ordinance because in “both situations, a county makes a consistency determination regarding a **proposed** landfill.” (App. 2390) (emphasis added). In reality, the Emergency Ordinance here says nothing about the proposed landfill at issue in this case or any other proposed landfill, instead containing a blanket moratorium on any and all landfills until the Plan is completed or sixty-one (61) days pass. The letters of consistency discussed in *Southeast Resource* were specific to a proposed landfill and included a determination of consistency of a specific, proposed landfill with the County’s Plan or ordinance. The lower court essentially converts the Emergency Ordinance to an affirmative determination of consistency for this particular proposed landfill, rather than what it actually is: a moratorium on all landfills to allow the County no more than sixty-one (61) days to adopt a new, updated Plan which analyzes the County’s existing and future C & D disposal needs, as required by the Act.

In response to the misapplication and misinterpretation, Judge Lockemy issued a vehement dissent concluding that the county has the authority “to determine the contents of

its Solid Waste Management Plan and to enact ordinances to carry out its responsibilities under their plans.”⁸ (App. p. 2392). Judge Lockemy concluded that York County acted within its authority in enacting the Emergency Ordinance pursuant to Section 44-96-80(K) and pointed out that the majority opinion allows DHEC to “ignore legislation adopted and duly passed by representatives of the people of local government.” (App. p. 2394).

D. DHEC and the ALC Lack Authority to Invalidate an Ordinance

“The legislative department makes the laws[,] the executive department carries the laws into effect, and the judicial department interprets and declares the laws.” *State ex rel. McLeod v. Yonce*, 274 S.C. 81, 84, 261 S.E.2d 303, 305 (1979). “One of the prime reasons for separation of powers is the desirability of spreading out the authority for the operation of the government.” *Id.* at 84, 261 S.E.2d at 304. This delineation of powers amongst the branches “prevents the concentration of power in the hands of too few, and provides a system of checks and balances.” *State ex rel. McLeod v. McInnis*, 278 S.C. 307, 312, 295 S.E.2d 633, 636 (1982).

In *State ex rel. McLeod v. McInnis* this Court noted that “conflicts . . . have arisen relative to the usurpation of power by one of the three branches of government,” but “there is tolerated in complex areas of government of necessity from time to time some overlap of authority and some encroachment to a limited degree.” Such is the case here, where there is overlap between the County’s role in developing plans and enacting ordinances to manage its solid waste and DHEC’s role in overseeing the permitting process for solid waste facilities. This Court has explicitly acknowledged such overlap and held that “**we know of no**

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Judge Lockemy noted that he would grant rehearing in the Court of Appeals Order denying rehearing. (App. p. 2421).

law allowing [an] agency to ignore valid, local zoning requirements and therefore they may not ignore such.” *City of Charleston v. S. Carolina State Ports Auth.*, 309 S.C. 118, 121, 420 S.E.2d 497, 499 (1992).

Yet ignoring a valid, local ordinance is exactly what DHEC did in this case, despite it – and the ALC’s – lack of authority to determine whether a county ordinance is valid.⁹

Drummond v. State, Department of Revenue, 378 S.C. 362, 662 S.E.2d 587 (2008). There is no evidence nor any legal authority providing any basis for the DHEC staff or the Administrative Law Court to question the validity of either York County’s emergency ordinance of January 30, 2007, nor the February 28, 2007, ordinance adopting the 2007 Plan.

This Court set forth an analysis for determining the validity of a local ordinance in *Sandlands C & D, LLC v. County of Horry*, 394 S.C. 451, 716 S.E.2d 284 (2011) (citing *S.C. State Ports Auth. v. Jasper County*, 368 S.C. 388, 629 S.E.2d 624 (2006)). First, a court must determine “whether the county had the power to enact the ordinance.” *State Ports Auth.* at 395. Where, as here, the county does have the power to enact an ordinance, then the court must ascertain whether the “ordinance is inconsistent with the Constitution or general law of this state.” *Id.*

Statutory construction and interpretation is squarely the role of the South Carolina judiciary. DHEC is not allowed to pick and choose which laws it believes are lawfully enacted and override the plain directives of an ordinance, as it did here. Section 44-96-290(F) expressly requires consistency with “other applicable local ordinances.” Regardless of DHEC’s conclusions as to whether the emergency ordinance was valid and applicable, it

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The Court of Appeals did not explicitly invalidate the Emergency Ordinance, but in sanctioning DHEC’s disregard for the ordinance and allowing DHEC to ignore it, the court effectively invalidated the Ordinance by failing to give it force and effect.

was obliged to follow the ordinance.

Judge Lockemy noted this dilemma in his dissent: that an agency of the executive branch is not permitted to disregard laws of a legislative body on its own determination prior to any judicial review. This includes both DHEC and the ALC. The plain language of Section 44-96-80 of the Act gives the governing body of each county the authority to determine the content of the county's solid waste management plan. S.C. Code § 44-96-80. DHEC's authority does not extend to nullifying county ordinances enacted in the course of carrying out the county's responsibilities under the Act. DHEC's decision to ignore the duly enacted emergency ordinance was arbitrary and capricious based on the facts as DHEC encountered them at the time.

II. The Proposed Landfill is Inconsistent with Local Zoning, the County's Emergency Ordinance and the County's Solid Waste Management Plan and thus Violates Section 44-96-290(F)

"No permit to construct a new solid waste management facility . . . 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; [and] the proposed facility or expansion is consistent with the local or regional solid waste management plan . . ." S.C. Code Ann. § 44-96-290(F).

A. The proposed landfill is not authorized by the underlying zoning ordinance of the City of Rock Hill, which prohibits landfills in Planned Unit Developments

The landfill site was zoned Planned Unit Development ("PUD") by the City of Rock Hill on May 23, 2005. The PUD ordinance describes the site as approved for a "Compost & Building Material Recycle Facility." (App. 1179, 1183). Attached to the PUD ordinance is Exhibit A, which consists of two maps and a four page document entitled "Conditions of

PUD Rezoning.” (App. 1179-1187). The first map simply identifies the PUD site. The second map is entitled “Vernsdale Road Compost & Building Material Recycling Center.” The “Conditions of PUD Rezoning” set forth site conditions, such as set-backs, “Public/Private Partnership Conditions,” including “yard waste debris recycling at no charge to the City of Rock Hill” and other conditions. *Id.* The word “landfill” does not appear anywhere in the PUD ordinance or its attachments. (App. 375).

The owners of the proposed landfill agreed that “everything that was in the zoning ordinance that was passed, and including the map that was attached to the zoning ordinance, describes this as a compost and building materials recycling facility.” (App. 775-776). DHEC’s Art Braswell concurred. (App. 383).

The City of Rock Hill zoning ordinance in effect at the time that the PUD designation was approved expressly prohibited “sanitary landfills” in PUD zones. (App. 2164, 2237). The City’s ordinance does not define “sanitary landfill;” however, that term is defined by the S.C. Solid Waste Policy and Management act to include any and all disposal sites that dispose of solid waste. S.C. Code Ann. § 44-96-40(44), (47) and (6). C & D waste proposed to be disposed of at the landfill at issue in this appeal is “solid waste.”¹⁰ S.C. Code Ann. § 44-96-40(6). DHEC’s Art Braswell testified that DHEC staff wrote a memo acknowledging that the term “sanitary landfill” includes “all solid waste disposal areas.” (App. 346).

Based on the prohibition of sanitary landfills in PUD districts, DHEC initially concluded that the landfill was not allowed under the City’s zoning ordinance. (App. 1102).

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Following enactment of the PUD ordinance, the City of Rock Hill’s zoning ordinance was re-written on March 1, 2006, to explicitly prohibit all “landfills” in PUD districts. (App. pp. 1179-80, 1188; R. pp. 1169-70, 1178). The Petitioner asserts that the ALJ erred in failing to admit the 2006 zoning ordinance into evidence given that it is indicative of the City’s legislative intent, as well as the ordinance in place at the time of the contested case hearing.

DHEC later reversed itself after receipt of a letter from staff of the City of Rock Hill asserting that C & D landfills are not “sanitary landfills,” and issued a consistency determination.

The ALJ concluded that “Conditions of the PUD rezoning, attached to the PUD ordinance, clearly recognized that the property would be used as a C&D landfill.” This conclusion was based on 1) deference to a City employee, 2) a provision in the “Conditions” that does not contain the word “landfill,” and 2) language in the PUD ordinance that repeals “all ordinances or part of ordinances inconsistent with this Ordinance.” (App. pp. 4-5, 15). The ALC erred in a number of respects.

i. The ALC erred in failing to apply the rules of statutory interpretation to determine whether the proposed landfill was consistent with the PUD zoning designation

The ALJ erred in deferring to City staff’s interpretation of its ordinance. “Although great deference is accorded the decisions of those charged with interpreting and applying local zoning ordinances, a broader and more independent review is permitted when the issue concerns the construction of an ordinance.” *Charleston County Parks & Recreation Comm. v. Somers, et al.*, 319 S.C. 65, 459 S.E.2d 841 (1995) (internal quotations omitted; citing *Sea Island Scenic Parkway Coalition v. Beaufort County Bd. of Adjustments and Appeals*, 316 S.C. 231, 449 S.E.2d 254, 256 (Ct. App. 1994)). While the City’s interpretation of its own ordinance is generally entitled to deference, where the terms of the ordinance are clear, the court should apply those terms according to their plain and literal meaning. *Brown v. DHEC*, 348 S.C. 507, 560 S.E.2d 410 (2002); *Paschal v. State Election Comm’n*, 317 S.C. 434, 436, 454 S.E.2d 890, 892 (1995).

The interpretation relied on by DHEC and the ALJ was not made by City Council or

any other zoning official, but made by a City employee, months after the PUD ordinance was adopted, in a letter to DHEC actively arguing in favor of the landfill permit.¹¹ And the City staff's interpretation is contrary to the plain language of the ordinance prohibiting "sanitary landfills." The ALC committed reversible error by deferring to City staff's interpretation and failing to perform an independent determination of whether the proposed landfill is allowed under the plain language of the ordinance. The Court of Appeals compounded this error by adopting the ALC's conclusions.

ii. The ALC erred in concluding that the PUD overrides the underlying zoning ordinance

The ALJ further erred in ruling that the PUD ordinance overrode the City's underlying comprehensive zoning ordinance. The ALJ cited *Mikell v. County of Charleston*, 375 S.C. 552, 561-62, 654 S.E.2d 92, 97 (Ct. App. 2007), as authority for the proposition that a PUD ordinance is not limited by the provisions of the underlying zoning ordinance. *Mikell*, however, has since been reversed by this Court. *Mikell v. County of Charleston*, 386 S.C. 153, 687 S.E.2d 326 (2009).

In *Mikell*, the underlying county Zoning and Land Development Regulations set density limits, specifying that the density could be altered, within certain limits, if a request is processed through the Planned Development process. The property owners made a request for Planned Development zoning, and the request was approved by an ordinance. The ordinance as approved, however, increased the density beyond the maximum allowed by the

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The PUD requires the owners to "provide normal yard waste debris recycling at no charge" and to "accept City of Rock Hill C & D materials at a maximum of 500 tons per year at no charge." (App. 498-99, 502-03, 514, 1179-1197). The fact that the City of Rock Hill has an economic stake in the proposed landfill provides a compelling reason not to defer to an employee's interpretation. In addition, that interpretation was not made by City Council, the City Planning Commission or any other zoning official.

Zoning and Land Development Regulations. This Court concluded that the specific limits on density in the Zoning and Land Development Regulations evidenced a legislative intent to place limits on PD zones, and that by exceeding these limits, the PD ordinance violated the underlying regulations and thus must fail.

The *Mikell* ruling was reaffirmed by this Court's ruling in *Sinkler v. County of Charleston*, 387 S.C. 67, 690 S.E.2d 777 (2010). In *Sinkler*, the Court noted that where the PD process is utilized by a zoning authority to re-zone a particular parcel of property, the zoning authority cannot "arbitrarily fail to meet the requirements for a PD."

The same situation is presented here. The landfill site is zoned PUD and the adopted PUD ordinance describes the site as a "Compost & Building Material Recycle Facility." (App. 1179-1187). The word "landfill" does not appear in the PUD ordinance. The City of Rock Hill zoning ordinance in effect at the time the PUD designation was approved prohibits "sanitary landfills" in PUD zones, and the City of Rock Hill zoning ordinance that became effective in March 2006 unequivocally prohibits all "landfills" in Planned Development districts. The City of Rock Hill's zoning ordinances do not define "landfill" or "sanitary landfill." The South Carolina Solid Waste Policy and Management Act defines "sanitary landfill" as including all types of solid waste landfills, including C & D landfills.

In the instant case, the underlying Rock Hill zoning ordinance established the basic rules for PUDs, including the prohibition of landfills in PUD districts. Thus, the prohibition of landfills must control the interpretation of the PUD Ordinance, and the PUD Ordinance cannot repeal the requirements of the underlying zoning ordinance. *See Mikell; Sinkler.*

Accordingly, the ALJ made an error of law in finding and concluding that the proposed landfill is consistent with the local zoning ordinances. The Court of Appeals'

opinion compounded that error of law by failing to address this issue in any meaningful fashion.

B. The proposed landfill is inconsistent with York County's Solid Waste Management Plan

On the issue of consistency with the local or regional solid waste management plan and the state solid waste management plan, DHEC concluded that the landfill is not inconsistent with a 1994 solid waste plan prepared by the Catawba Regional Planning Council.¹² Although DHEC knew that York County was actively involved in the process of enacting a new county solid waste plan, DHEC rejected efforts by York County Council to delay the permitting decision until the county could complete the process of adopting an ordinance establishing the 2007 York County Solid Waste Management Plan. DHEC also rejected the county's January 2007 emergency ordinance which states that new landfills are inconsistent with the county's plan and establishes a moratorium on new landfills until the new Plan was completed and adopted. That ordinance was passed because it was necessary to allow the County to carry out its responsibilities under the Act and complete a Solid Waste Management Plan. S.C. Code Ann. § 44-96-80(K).

The 2007 Plan concludes that the county's current and projected capacity needs for C & D waste can be adequately met with existing facilities. In adopting the 2007 Plan, York

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A binding norm cannot validly be adopted without a proper legislative act. *See, e.g., Captain's Quarters Motor Inn v. South Carolina Coastal Council*, 306 S.C. 488, 413 S.E.2d 13 (1992) There is no evidence that York County Council ever passed an ordinance adopting the 1994 Catawba Regional Solid Waste Management Plan. Indeed, the evidence indicates that York County Council merely passed a resolution, at a single meeting of Council, giving conditional approval of the plan, subject to revisions and further review by the Council. It is true that county officials repeatedly made statements indicating that the 1994 plan was the applicable plan, and that the ordinances adopted in January and February assume that the 1994 plan was approved by the county. But the 1994 plan was never adopted by ordinance.

County found that “Additional new solid waste management facilities are not needed at this time but may be required in future years to replace older facilities as they reach capacity or are required to be closed.” (App. 1043). The Act requires each local plan to include “an analysis of the existing and new solid waste facilities which will be needed to manage the solid waste generated within that county or region during the projected twenty-year period.” S.C.Code Ann. § 44-96-80(A)(3) (2002). The County’s Plan meets that objective, providing criteria for future management of its solid waste and the circumstances under which a new landfill might be needed.

The final agency decision on this permit did not come until after February 28, 2007, when the 2007 Plan was adopted, because the DHEC decision did not become final agency action until after the Board failed to conduct a final review conference pursuant to S.C. Code § 44-1-60. (“staff decision becomes the final agency decision fifteen calendar days after notice of the staff decision has been mailed to the applicant, unless a written request for final review accompanied by a filing fee is filed with the department by the applicant, permittee, licensee, or affected person;” “If the board declines in writing to schedule a final review conference or if a final review conference is not conducted within sixty calendar days, the staff decision becomes the final agency decision”). York County’s 2007 Plan, adopted on February 28, 2007, indicates that this proposed landfill is inconsistent with that Plan, and therefore the issuance of this permit violates Section 44-96-290(F) of the Act. As discussed above, the 2007 Plan has been used by DHEC to find another proposed landfill inconsistent with that Plan. *See, Greeneagle*, 399 S.C. 91, 730 S.E.2d 869 (Ct. App. 2012), reh'g denied (July 23, 2012).

III. The Proposed Landfill Does Not Meet the Statutory Requirement for a Demonstration of Need

Section 44-96-290(E) provides that “[n]o permit to construct a new solid waste management facility or to expand an existing solid waste management facility may be issued until a demonstration of need is approved by the department.” In seeking approval of its “demonstration of need,” the only thing C & D Management submitted to DHEC was a letter designating the latitude and longitude of its proposed landfill. (App. 794-796). One working day later, using only this information, DHEC issued a letter stating that C & D Management had satisfied the “demonstration of need” requirement. (App. 797).

Section 44-96-290(E) of the Act also directs DHEC to “promulgate regulations to implement this section.” Regulations codified as S.C. Code. Regs. § R.61-107.17, entitled “Solid Waste Management: Demonstration-of-Need,” were promulgated in 2000. These regulations were re-written and a new version became effective June 23, 2009. (S.C. State Register, Vol. 33, Issue 6, pp. 119-130).

No definition of the terms “demonstration” and “need” are provided in either the Act or the DHEC regulation. Under the Demonstration of Need (“DON”) Regulation an applicant for a solid waste permit need only provide the latitude and longitude coordinates for the proposed facility site. As the regulation is applied by DHEC, the DHEC staff uses the latitude and longitude to establish a point on a map. Then the staff draws a circle around the point. For C&D landfills, under the 2000 version of the regulations, the circle has a 10-mile radius, and under the 2009 version of the regulations, the circle has a 20-mile radius.¹³ Once

¹³

The Appellants assert that the 2009 Regulations should apply under *Ziffrin v. United States*, 318 U.S. 73, 63 S.Ct. 465 (1943), in which the United States Supreme Court ruled that where there is a change in the law prior to a final decision on a permit, the new law must be applied: “A fortiori, a change of law pending an administrative hearing must be followed in relation to permits for future acts. Otherwise the administrative body would issue orders

the circle is drawn on the map, the DHEC staff determines how many existing commercial C&D landfills fall within the circle. If the number of existing landfills within the circle is less than two, DHEC considers the proposed new landfill to be needed. If there are two or more existing landfills within the circle, DHEC deems the proposed new landfill to not be needed.

If the landfill is deemed “needed,” the annual disposal capacity of the landfill is determined first by looking at the circle to see what counties have land lying within the circle. Then DHEC adds up the total amount of waste that is generated in the whole of all counties having land within the circle. The sum is set as the maximum annual disposal rate for the new landfill.

Section 61-107.17(D)(3)(d) of the 2000 regulation, and Section 61-107.17(D)(2)(b) of the 2009 regulation both state: “The Department reserves the right to review additional

contrary to the existing legislation.” 318 U.S. at 78, 63 S.Ct. at 469.

The rule of the *Ziffrin* case was followed in a New York case, *In re Solomon*, 46 A.D.3d 370, 847 N.Y.S.2d 568 (N.Y.A.D. 1 Dept., 2007). The New York court said:

We further reject petitioner’s argument that he is entitled to have his license application considered under the standards existing before certain modifications to the statutes in 2003. Just as a reviewing court rules on the basis of the law in effect at the time of the decision (see *Matter of Demisay, Inc. v. Petito*, 31 N.Y.2d 896, 897, 340 N.Y.S.2d 406, 292 N.E.2d 674 [1972]), “a change of law pending an administrative hearing must be followed in relation to permits for future acts. Otherwise the administrative body would issue orders contrary to the existing legislation” (*Ziffrin, Inc. v. United States*, 318 U.S. 73, 78, 63 S.Ct. 465, 87 L.Ed. 621 [1943]). Applications are generally determined based on the law as it exists at the time of the decision, and petitioner’s stated reasons for relying on the outdated standards do not warrant a different conclusion.

46 A.D.3d at 372, 847 N.Y.S.2d at 570.

Where a permit has not yet been issued, and where the administrative appeals process has not concluded a decision on a contested case hearing, a permit applicant has no basis for claiming a vested right based on out-dated regulation that has been replaced with a new regulation.

factors in determining need on a case-by-case basis.” DHEC’s spokesman in this case, Art Braswell, testified that the Department did not utilize this provision in making its determination that the proposed Vernsdale Road landfill is needed. Mr. Braswell further testified that DHEC Regulation 61-107.17 does not measure need, and that use of the formula set forth in that regulation could result in excess landfill capacity. (App. pp. 365, 839-40; R. pp. 357, 830-831).

A. DHEC Applied the Demonstration of Need Regulation in a Manner that is in Direct Conflict with the Plain Language of the Act

“[T]he primary rule of statutory construction is that the Court must ascertain the intention of the legislature . . . [, and] [t]hus, the court will reject the agency’s interpretation where it is specifically contrary to the statute or regulation.” *Commissioners of Public Works v. DHEC*, 372 S.C. 351, 359 (Ct. App. 2007) (quotations omitted). Courts will reject statutory interpretations that lead to absurd results clearly unintended by the legislature or that defeat the plain legislative intent. *Peake v. SCDMV*, 375 S.C. 589, 599, 654 S.E.2d 284, 289; *Kiriakides v. United Artists Commc’ns, Inc.*, 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994)). Furthermore, the appellate court must presume the legislature intended to accomplish something with an enacted statute and did not intend for a section or provision to be purposeless or futile. *Duvall v. S.C. Budget and Control Bd.*, 377 S.C. 36, 42, 659 S.E.2d 125, 128 (2008).

When a statute’s terms are clear and unambiguous, the Court should look to the “plain and ordinary” meaning of these terms.¹⁴ *New York Times Co. v. Spartanburg County*

¹⁴

In *EAGLE v. DHEC*, Case No. 08-ALC-07-0425-CC, Administrative Law Judge Ralph K. Anderson, III, used the plain language rule in applying Section 44-96-290(E) to a landfill permit, concluding that because there is enough capacity to meet the public’s demands the landfill was not needed. The Court of Appeals overturned Judge Anderson’s Order by unpublished opinion on August 4, 2011, citing discretion to the agency’s interpretation.

School Dist. No. 7, 374 S.C. 307, 649 S.E.2d 28 (2007). In this case, the Court should look to the plain and ordinary meaning of the terms “demonstration” and “need.”

“Demonstration” has been defined to mean:

1. The act of showing or making evident.
2. Conclusive evidence; proof.
3. An illustration or explanation, as of a theory or product, by exemplification or practical application.
4. A manifestation of one’s feelings.
5. A public display of group opinions, as by a rally or march: *peace demonstration*.

The American Heritage Dictionary of the English Language (4th Ed. 2000), p. 484.

“Need” has been defined to mean:

1. A condition or situation in which something is needed or wanted: *crops in need of water; a need for affection*.
2. Something required or wanted; a requisite: “*Those of us who led the charge for these women’s issues . . . shared a common vision in the needs of women*” (Olympia Snowe).
3. Necessity; obligation: *There is no need for you to go*.
4. A condition of poverty or misfortune: *The family is in dire need*.”

The American Heritage Dictionary of the English Language (4th Ed. 2000), p. 1175. “Need” has been defined in Black’s Law Dictionary as follows: “A relative term, the conception of which must, within reasonable limits, vary with the personal situation of the individual employing it. Term means to have an urgent or essential use for (something lacking); to want, require.” Black’s Law Dictionary, Abridged Sixth Edition, 1991, p. 715.

The ALC failed to look at the “plain and ordinary” meaning of the word “need” in determining whether the required “need” had been demonstrated and the Court of Appeals compounded that error by affirming the ALC’s conclusion.

Unpub. Op. No. 2011-UP-380 (August 4, 2011). A Writ of Certiorari was granted by this Court, and oral arguments were conducted on October 3, 2013. The Petitioner asserts that this case presents the same question of whether the DON Regulation actually measures need, as required by the Act.

B. The DON Regulations as interpreted by DHEC materially alter and add to the Act's requirement that an applicant demonstrate need

It is well-settled that an agency's authority to promulgate regulations, and a court's deference to the agency's interpretation of the statute, are limited to circumstances where the agency regulation and interpretation are "reasonably related to the purpose of the enabling legislation." *Young v. SC Dep't of Highways and Public Transp.*, 287 S.C. 108, 112, 336 S.E.2d 879, 882 (Ct. App. 1985). If DHEC has promulgated a regulation that turns the mandate of "need" into a mandate for "excess capacity," then the regulation is in direct conflict with the statute and must fall.

The South Carolina Supreme Court has consistently overruled regulations which are in conflict with statutes. In *Milliken and Company v. South Carolina Department of Labor*, 275 S.C. 264, 269 S.E.2d 763 (1980), the South Carolina Supreme Court noted:

It is well settled that an administrative order which materially alters or adds to the law is void. *Lee v. Michigan Millers Mut. Ins. Co.*, 250 S.C. 462, 158 S.E.2d 774 (1968). The same principle applies to administrative rule-making. *See Hay v. S.C. Tax Comm'n*, 273 S.C. 269, 255 S.E.2d 837 (1979); *Lee v. Michigan Millers Mut. Ins. Co.*, supra; *Heyward v. S.C. Tax Commission*, 240 S.C. 347, 126 S.E.2d 15 (1962).

275 S.C. at 267-268, 269 S.E.2d at 764. In *Society of Professional Journalists v. Sexton*, 283 S.C. 563, 324 S.E.2d 313 (1984), the Court said: "Although a regulation has the force of law, it must fall when it alters or adds to a statute." 283 S.C. at 567, 324 S.E.2d at 315, *citing Banks v. Batesburg Hauling Co.*, 202 S.C. 273, 24 S.E.2d 496 (1943). Therefore, DHEC regulations are valid only when they are consistent with the underlying statutory provisions.

Here, DHEC's regulation includes a provision that allows the "need" determination to be made on a case by case basis so as to avoid excess capacity. Yet under the agency's

standard operating procedure, the “additional factors” test is never applied by the agency staff. By consistently ignoring the “additional factors” provision, the DHEC interpretation has effectively negated this provision, resulting in the permitting of rampant excess capacity that is in direct conflict with the statutory mandate of permitting only those facilities that have made a “demonstration of need.” Art Braswell said that DHEC used only the formula in approving C & D Management’s “demonstration of need,” and that no evidence of need was submitted. (App. pp. 324-25, 819; R. pp. 316-317, 810). Braswell acknowledged that this regulation does “not actually [look at] what is needed in that county.” (App. 846-847, lines 2-3).

The evidence shows that within the ten-mile radius of the proposed Vernsdale Road landfill, York County operates a C & D landfill that in 2007 took in over 63,000 tons of C & D waste, and that the County recently received a permit for an expansion of the landfill and an increase in annual disposal capacity to 95,000 tons. The record also shows that the Coltharp landfill, located just outside the 10-mile circle, took in over 57,000 tons of C & D waste in 2007 and is licensed for 60,000 tons of waste per year. (App. 1090). Under the current version of Regulation 61-107.17, a 20-mile radius planning circle is used, and the York County and Coltharp landfills would have to be taken into account, which would preclude this landfill. Finally, the record shows that the County’s 2007 Solid Waste Plan finds that no new C & D landfills are needed to meet the County’s waste because it has sufficient capacity.

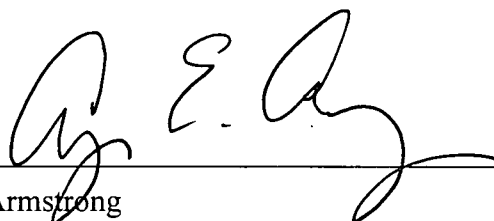
Yet DHEC and the ALC ignored this evidence and instead interpreted the DON Regulations in a manner that is inconsistent with the Act’s requirement that C & D Management demonstrate a need for the proposed landfill. The DHEC regulations set out a

formula which effectively eliminates this “demonstration of need” requirement, and both DHEC and the ALC interpreted the DON regulations in that manner. The Court of Appeals erred in affirming this error of law, which allows Regulation 61-107.17 to materially alter and add to the statutory “demonstration of need” requirement.

CONCLUSION

For the foregoing reasons, the Petitioner York County respectfully requests that this Court reverse the Opinion of the Court of Appeals and conclude that the proposed landfill fails to comply with the requirements of Section 44-96-290.

Respectfully submitted,



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January 6, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

JAN 09 2014

APPEAL FROM THE ADMINISTRATIVE LAW COURT **S.C. Supreme Court**

Carolyn C. Matthews, Administrative Law Judge

Case No. 07-ALC-07-0178-CC

York County and Nazareth Baptist Church of Rock Hill, Inc., Defendants,

of whom York County is Petitioner,

vs.

South Carolina Department of Health and Environmental Control and
C & D Management Company, LLC, Respondents

CERTIFICATE OF SERVICE

I hereby certify that on this date I served copies of the Petitioner York County's Brief on Writ of Certiorari upon counsel for the Respondents, by placing same in the United States mail, first-class postage prepaid, addressed to:

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