THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Shirley C. Robinson, Administrative Law Judge

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

Grand Bees Development, LLC, ... Respondent,

v.

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

APPENDIX TO THE

RECORD ON APPEAL

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D H E C
PROMOTE PROTECT PROSPER

Catherine B. Templeton, Director
Promoting and protecting the health of the public and the environment

March 29, 2013

VIA USPS & ELECTRONIC MAIL
Honorable Shirley Robinson
Administrative Law Court
Edgar A. Brown Building, Suite 224
1205 Pendleton Street
Columbia, South Carolina 29201

Re: *Grand Bees Development, LLC vs. South Carolina Department of Health and Environmental Control and County of Charleston*
Docket No. 11-ALJ-07-0556-CC; OGC #21294.1

Dear Judge Robinson:

Enclosed for filing please find the original and one copy of Respondent DHEC's *Notice and Motion for Reconsideration* in the above-referenced matter. Kindly return the clocked copy in the self-addressed, postage-paid envelope provided.

By copy of this letter, and as evidenced by the Certificate of Service, we are serving counsel of record with a copy of the same.

With kind regards,

Very truly yours,

Connie S. Horger
Paralegal

/csh
Enclosures as stated.
cc: (w/Enclosure)
Jamie A. Khan, Esquire
G. Trenholm Walker, Esquire
Joseph Dawson, III, Esquire
Bernard E. Ferrara, Jr., Esquire
Kent Coleman, SC DHEC (via email)
Joan Litton, SC DHEC (via email)

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Grand Bees Development, LLC Petitioner, vs. South Carolina Department of Health and Environmental Control and County of Charleston, Respondents.	)	Docket No. 11-ALJ-07-0556-CC **RESPONDENT DHEC'S NOTICE AND MOTION FOR RECONSIDERATON**

PLEASE TAKE NOTICE that Respondent South Carolina Department of Health and Environmental Control ("DHEC" or "the Department"), pursuant to South Carolina Administrative Law Court ("SCALC") Rule 29.D., shall and hereby moves this Court to reconsider the *Final Order and Decision* ("Decision") issued by Administrative Law Court ("ALC") Judge Shirley Robinson, on March 19, 2013, in the above-captioned matter.

The grounds for this Motion for Reconsideration ("Motion") are as follows: the substantive rights of Respondent DHEC have been prejudiced because the administrative conclusions and decision are: **a)** in violation of statutory provisions; **b)** in excess of statutory authority or the agency; **c)** affected by other error or law; and/or **d)** clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or **e)** arbitrary and capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

I. ARGUMENT

CONSISTENCY WITH LOCAL LAND USE ORDINANCES

A. Section 10-22 of Ordinance 180 is not a proper ground for denial of the permit for modification of the Landfill.

The Department maintains that Section 10-22 of Charleston County Ordinance 180 ("Ordinance"), referenced in Conclusion 9 on page 12 of the *Decision,* is not an ***applicable*** local land use ordinance that required a consistency determination pursuant to S.C. Code Ann. § 44-96-290(F). (*Emphasis added*). The fact that the Zoning Land Development Regulations ("ZLDR") is a more specific ordinance regarding local zoning and land use requirements makes Section 10-22 inapplicable as an Ordinance for determining whether the proposed modification of the Landfill is consistent with local zoning and land use requirements. Therefore, *Conclusion of Law* # 9 on page 12 of the Decision is affected by error of law because the Department was not given deference regarding its decision to rely on the more specific ordinance, ZLDR, as opposed to the vague and non-specific language in Section 10-22 of Ordinance 180.

Section 10-22(b) is a local land use ordinance; however, the Department contends that there is no specific criteria included in the Ordinance that would allow the Department to evaluate the proposed modification to the Bees Ferry Landfill ("Landfill") against the Ordinance without doing so in conjunction with the more specific ZLDR. Specifically, the Ordinance states that "the disposal site shall: d. conform with the surrounding environment; and e. conform with future development of the area." Mr. Kent Coleman, Director of Solid Waste and Mining for DHEC, testified on March 20, 2012, at the hearing in the above-captioned matter, that the wording in the Ordinance was very general, not specific. **(Tr., P. 196, lines 9-10)**. This is further illuminated by the fact that there is no definition of the word "conform" in the Ordinance. Moreover, Mr. Coleman testified that in determining conformity with future uses, DHEC

reviewed the Charleston County ("County") ZLDR to ensure that the Landfill was properly zoned. (**Tr., P. 214, lines 10-12**). Furthermore, the Ordinance was passed in 1974, and since that time the ZLDR was developed (in 2001) and encompassed the updates to Charleston County's zoning and land development regulations.

The Department contends that the ZLDR "preempts, for the purposes of DHEC's consistency analysis, an otherwise applicable valid land use ordinance simply due to the latter's being more specific" (*Decision*, page 13, # 14); however, this is the Department's position because the Ordinance and the ZLDR (also an ordinance) involve the same issue – whether the proposed modification to the Landfill is consistent with "local zoning, land use, and other applicable local ordinances, if any." S.C. Code Ann. § 44-96-290(F) (2002). However, even if the Ordinance is applicable, Respondent DHEC's review of the ZLDR would satisfy the consideration of both ordinances.

The Department further contends that since the ZLDR specifies that the site where the Landfill is located is zoned "Industrial" and specifically outlines the standards to which a Landfill should adhere during its existence or in the event it is modified, and since there is no definition of the word conform in Section 10-22, it was reasonable and rational for the Department use the more specific ordinance, the ZLDR, to determine whether the proposed modification to the Landfill conformed with the surrounding environment or conformed with future development of the area. Therefore, the ZLDR is the more specific and applicable ordinance upon which the Department gauged the Landfill's consistency pertaining to the conformity issue. It is settled law that where two ordinance provisions deal with the same issue, one in a general and the other in a more specific and definite manner, the more specific prevails." (Mikell v. County of Charleston, 386 S.C. 153, 687 S.E.2d 326, 330 (2009), *quoting* Capco of

Summerville v. J.H. Gayle Constr. Co., Inc., 368 S.C. 137, 628 S.E.2d 38 (2006).

Pursuant to the foregoing, because there is no definition of conform in the Ordinance, and due to the vague and non-specific language stated in Section 10-22 of the Ordinance, Respondent DHEC was correct to apply the ZLDR. Section 10-22 was not applicable and should not have been considered in addition to the ZLDR; however, if the proposed Landfill modification is consistent with the ZLDR, it would also be consistent with Section 10-22. Therefore, the ALC's *Conclusion of Law* # 9, stating that Section 10-22 is an applicable local land use ordinance that requires the Landfill permit be denied, is an error of law, is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, and is arbitrary and capricious.

B. Respondent DHEC should be afforded deference by the ALC.

Respondent DHEC contends that its decision, determinations and its method of making such decisions and determinations must be afforded deference pursuant to Kim Murphy v. South Carolina Department of Health and Environmental Control and District 5 of Lexington and Richland Counties, 396 SC 633, 723 S.E.2d 191, 195 (2012). The Supreme Court gave deference to Jennifer Haynes, a DHEC project manager, when she interpreted the "vicinity of the project," when there was no definition for "vicinity" in the applicable DHEC regulation. The Court stated that Ms. Haynes "considered the vicinity [to include] more than just the 727 feet of stream and noted that although she did not have an exact area, it included many miles." (Murphy, page 4). Furthermore, the Court stated that "because this interpretation is both reasonable and consistent with the plain language of the regulation, we see no reason to deviate from DHEC's construction and application." 396 SC at 640-1, 723 S.E.2d at 195. Here, analogous to the foregoing, the Department made an interpretation of the language in Section 10-22 that was both reasonable and consistent. The Department determined that Section 10-22 of

the Ordinance is encompassed within the requirements outlined in the ZLDR.

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

> DHEC's decision to refuse to conduct a Final Review Conference, pursuant to section 44-1-60(F) of the South Carolina Code, is analogous to the Panel decision in Coastal to affirm the ALC's decision without analysis. In both situations, regardless of the mechanism, the staff decision became the agency decision and was entitled to deference. Thus, the appropriate question is not whether DHEC's decision was entitled to deference, but instead whether there was a compelling reason for the ALJ not to defer to this decision." (Kiawah Development Partners at *3).

Here, analogous to the opinion in Kiawah, the *Request for Review* by Petitioner Grand Bees was denied by the Board on October 13, 2011. Thus, once Petitioner Grand Bees' RFR was denied, the DHEC Staff decision became the Agency's final decision and was entitled to deference. Further, there are no significant or compelling reasons why DHEC's interpretation of the ZLDR and the Ordinance's language should not be afforded deference.

VEGETATIVE BUFFER REQUIREMENTS (CHARLESTON COUNTY's ZLDR)

- **Respondent DHEC acted appropriately in regards to the vegetative buffer requirements.**

The *Decision's* Conclusion of Law # 25 on page 15, which states that "the Second Permit Modification is not compliant with local zoning and land use regulations, as it relates to the county's vegetative buffering regulations . . .," is affected by error of law, is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, and is arbitrary and

capricious, because determination of compliance with Article 9.5 of the ZLDR does not rest with Respondent DHEC.

Rather, Article 9.5 of the ZLDR places the decision of whether Respondent Charleston County was required to adhere to "the standards of this Article . . .," squarely upon the County's Planning Director, not DHEC. This is supported by Petitioner Grand Bees' own witness and in the Decision's Finding of Facts # 44 when it states that "the Petitioner's witness, Mr. Lester, testified that in practice, landscaping plans are submitted and required by **local government** to prove compliance with buffer regulations as a precondition to land development." (*Emphasis added*). (***Decision***, Page 9, # 44). No testimony was given stating that landscaping plans are required by Respondent DHEC, and in fact, DHEC is not required by statute or regulation to request landscaping plans from applicants, nor is it the Department's practice to request such plans from applicants, especially when this function, in Charleston County's case, rests with the County's Planning Director.

Section § 9.5.1 of the ZLDR states that: "When modifications or additions are being made to an existing non-residential building or site, the standards of this Article shall apply to those portions of the subject parcel that are directly affected by the proposed improvements, as determined by the Planning Director, ..." (ZLDR, P. 9-23). First, it is clear from this passage that it is within the purview and authority of the County's Planning Director to determine whether Respondent County's proposed modification to the Landfill affects those portions of the "subject parcel," which will require the implementation of landscaping, screenings, or buffers. Respondent DHEC's consistency review involves: 1) review of the application including maps, etc., to make sure there is nothing impeding the implementation of the referenced landscaping, screenings, and buffers, if required by the Planning Director or a person to whom this authority is

given; and 2) only issue a consistency determination of "not consistent" if it is determined from the Department's review that the implementation of the landscaping, screenings, and buffers would be impeded. During DHEC's review of Respondent's Second Permit Modification application, there was nothing from DHEC's review that suggested that landscaping, screenings, or buffers could not be implemented if and when the County's Planning Director made the determination that such implementation was required. **(Tr., P. 224, lines 1-8 and lines 18-24).**

Pursuant to the foregoing, *Conclusion of Law* # 25 in the ALC's *Decision* is affected by error of law, is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, and is arbitrary and capricious.

SETBACK REQUIREMENT (SOLID WASTE POLICY AND MANAGEMENT ACT)

A. Respondent DHEC performed a proper consistency determination regarding the setback regulation, 8 S.C. Code Ann. Regs. 61-107.19, Part IV, (B)(1)(a).

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

Conclusion of Law # 29 states that "there is no evidence in the record that DHEC ever performed a regulatory compliance determination with respect to its own 1,000 foot setback requirement at that time . . . the permit file of DHEC the parties stipulated into evidence does not disclose a written determination of compliance with this regulation." (***Decision***, P. 16, # 29). Respondent DHEC's own setback requirement states that "the waste disposal boundary of the landfill shall not be located within one thousand (1000) feet of any residence, school, day-care center, hospital or publicly owned recreational park area." 8 S.C. Code Ann. Regs. 61-107.19, Part IV, (B)(1)(a). The ALC's holding regarding this matter is incorrect, as the mere issuance of the permit modification is evidence that DHEC determined that the proposed modification to the

Landfill was consistent with the 1,000 foot setback requirement contained in R.61-107.19, Part IV(B)(1)(a). Moreover, Kent Coleman testified during the hearing that DHEC staff did site visits to make sure the Agency had the most up-to-date information to use in its consistency determination and that those visits did not reveal anything "new or different" from previous visits to the site as it related to the permit application or the permit decision. **(Tr., Page 194, lines 2-23, and Page 219, lines 2-10)**. There was no testimony on the record that any "residences" existed adjacent to the Landfill at the time the Second Permit Modification was issued on September 1, 2011. Therefore, if no "residences" existed, the only determination that could be rendered is that Respondent County's proposed Landfill modification was consistent with the referenced Regulation. Furthermore, there is no requirement that DHEC issue a written determination of compliance with each and every regulation that it uses to evaluate whether a proposed modification is consistent with the regulations. There are several reasons why the Court should have found that DHEC determined that the proposed Landfill modification was consistent with DHEC's "setback" Regulation: 1) during the Hearing, Kent Coleman attested to the proposed modification's consistency with the Regulation **(Tr., P. 219, lines 8-10)**; 2) the evidence on the record showing that there were no "residences" within 1000 feet of the boundary of the landfill; 3) the fact that Petitioner Grand Bees stipulated to the fact that there were only "proposed" and "planned" residences to be built onto the Grand Bees property **(Tr., P. 108, lines 14-16)**; and 4) the fact that Petitioner admitted that "residences do not exist at this time." **(Tr., P. 118, lines 7-8; Decision, P. 10, Findings of Fact # 51)**. The foregoing reasons, taken separately or together, are ample evidence to find that the proposed Landfill is consistent with the referenced Regulation and to conclude that DHEC did consider and determine that the proposed Landfill modification is consistent with the Regulation.

Additionally, there is no substantiation to the Court's assertion in *Conclusion* # 36 that to ignore any planned "residence" is a result the regulations seeks to avoid. Thus, this Conclusion is affected by error or law, arbitrary or capricious, and characterized by a clearly unwarranted exercise of discretion since the words "planned" or "proposed" residences are not words that are included in the statute or regulation, thereby creating no requirement or authority for Respondent DHEC to evaluate a "planned" or "proposed" residence in the context of a consistency review.

The Court states that Respondents' position "conflicts with the legislative intent and produces an absurd result." (***Decision***, P. 18, # 37). However, applying the plain language of the statute, the legislative intent is that there be a 1000 foot setback established from a "residence," not from a "planned" or "proposed" residence. Construing the statute to include "planned" or "proposed" residences is an unauthorized reading of the statute and will lead to unreasonable result because one cannot institute a setback from a residence that is non-existent – a "planned" or "proposed" residence is not a residence at all, pursuant to the common meaning of the word "residence." Unless there is something in the statute requiring a different interpretation, the words used in a statute must be given their ordinary meaning. Mid–State Auto Auction of Lexington, Inc. v. Altman, 324 S.C. 65, 476 S.E.2d 690, 692 (1996). When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning. *Id.* "When statutory language is unambiguous, this Court may not impose a contrary meaning." Bayle v. South Carolina Dept. of Transp., 344 S.C. 115, 542 S.E.2d 736, 739 (Ct.App.2001). Words should be construed according to common usage. DNR v. Wis. Power & Light Co., 321 N.W. 2d 289 (Wis. 1982). . Therefore, since there is no ambiguity, and because the word "residence" is not defined in Regulation 61-107, the words within the regulation must be read according to their

common meaning. If the term has a common, ordinary meaning (which can often be found in the dictionary), then that definition should be used. Edward F. O'Conner, American Bar Association Intell. Prop. L & Litig. Patents § 2.18 (2009). Here, the common meaning of *residence*, as found in Webster's Third New International Dictionary 1931 (1966) is "the act or fact of abiding or dwelling in a place for some time; an act of making one's home in a place; the place where one actually lives or has his home as distinguished from his technical domicile; the place where something is permanently established; a building used as a home." It is illogical that the Legislature intended for Respondent DHEC to take into consideration proposed, planned, or designated residential lots, because the intent of the regulation is to make sure that there is ample distance between the waste disposal boundary of the landfill and where people actually reside or gather, for their protection from adverse effects from a landfill or landfill activity.

If Petitioner Grand Bees' and the Court's expanded definition were to be accepted, then the landfill could be prohibited from expanding indefinitely because as long as the Grand Bees property is zoned "residential," it can continuously claim that there are "planned" or "proposed" residences to be built onto the site and such a designation would enjoin the Landfill from encroaching upon a non-existent setback, even if the "planned" or "proposed" residences were never actually built. This would be an unreasonable outcome from a forced and misconstrued construction of the referenced landfill regulation.

There is no testimony or evidence on the record that the Legislature intended Respondent DHEC to consider "planned" or "proposed" residences. Therefore, because the term "residence" is not defined in the regulation, and because the words "planned approved residential use" cannot be considered as part of the regulation due to the absence of those words from the regulation, the common meaning of the word "residence" must be applied in this situation. Therefore, the

ALC's holding that DHEC is not entitled to deference regarding its interpretation of the meaning of the word "residence" is error of law, clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, and is arbitrary and capricious.

B. Respondent DHEC is entitled to deference.

Regarding *Conclusion of Law* # 38, Respondent DHEC reiterates its earlier contention that the Court must afford deference to the DHEC's staff interpretation of the word "residence." Pursuant to the holding in Kiawah Development Partners, 2013 WL 696729 at *3, and contrary to *Finding of Fact* # 49 on page 10 of the *Decision*, it is not necessary for the DHEC Board to interpret how the Department defines residence before the Court can afford deference to the Department. It is well settled case law that if a statute, or in this matter a regulation, is unambiguous, we must give effect to the words within "according to their literal meaning." Carolina Power & Light Co. v. City of Bennettsville, 314 S.C. 137, 139, 442 S.E.2d 177, 179 (1994). Here, the regulation is not ambiguous. S.C. Code Ann. Regs. 61-107.19, Part IV(B)(1)(a), clearly sets out a 1000 foot buffer requirement from a "residence" for the waste disposal boundary of the landfill.

There is no compelling reason for the Court to ignore the literal meaning and common usage of the word "residence," or to construe the regulation to mean something other than a structure that is occupied or occupiable.

II. CONCLUSION

Pursuant to the foregoing, Respondent DHEC respectfully requests that the ALC's *Final Order and Decision* be reconsidered to alter or amend the *Decision* in the above-captioned matter to hold that:

1) Section 10-22 of Ordinance 180 is not an applicable local land use ordinance in light of the more specific standards stated in the ZLDR, and that it was not necessary for Respondent DHEC to review Section 10-22 to render a consistency determination for the proposed Landfill modification, or if applicable the record shows the permit Landfill modification met both requirements;
2) In its consistency review of the proposed Landfill modification, Respondent DHEC should be afforded deference in regards to the Agency's administrative decisions made in this matter with respect to its own regulations;
3) A Landscaping Plan from a landfill permit applicant is not required pursuant to statute or regulation in DHEC's review of a landfill application, and DHEC's determination that there was nothing to impede the implementation of vegetative buffers was proper;
4) The County's Planning Director is responsible for deciding whether a vegetative buffer is needed in regards to a non-residential building or site, not Respondent DHEC;
5) The literal meaning and common usage of the word "residence" must be used when there is no definition of the word in statute or regulation, and as such, a residence is a dwelling place that is occupied or occupiable;
6) Respondent DHEC's decision to issue the Second Modified Permit (DHEC # 101001-1201) is upheld; and

7) County is not required to submit a new and updated permit application.

Respectfully submitted,

Etta R. Williams Linen

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March 29, 2013
Columbia, South Carolina

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Grand Bees Development, LLC Petitioner, vs. South Carolina Department of Health and Environmental Control and County of Charleston, Respondents.	)	Docket No. 11-ALJ-07-0556-CC **CERTIFICATE OF SERVICE**

I, Connie S. Horger, Paralegal for the South Carolina Department of Health and Environmental Control, hereby certify that I have on this **29th day of March, 2013,** served a copy of *Respondent DHEC's Notice and Motion for Reconsideration* upon all parties and counsel of record in the above-captioned case, via United States Mail, First Class, postage prepaid, addressed as follows:

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Connie S. Horger

March 29, 2013
Columbia, South Carolina

D H E C
PROMOTE PROTECT PROSPER
Catherine B. Templeton, Director
Promoting and protecting the health of the public and the environment

May 29, 2013

Honorable Tanya Gee
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: *South Carolina Department of Health and Environmental Control vs. Grand Bees Development, LLC*
ALC Case No.: 11-ALJ-07-0556-C; OGC #21294.1

Dear Ms. Gee:

Enclosed for filing is a notice of appeal in the above case. Also enclosed are the following:

(1) Proof of service of the notice of appeal on the respondent; and
(2) A copy of the Order which is to be challenged on appeal.

Thank you for your assistance with this matter and should you have any questions or need additional information, please do not hesitate to contact our office.

Sincerely,

Etta R. Williams Linen

Etta R. Williams Linen
Assistant General Counsel

Enclosures

cc: Jamie Khan, Esquire
G. Trenholm Walker, Esquire
Joseph Dawson, III, Esquire
Honorable Jana E. Shealy, Clerk, Administrative Law Court

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Shirley C. Robinson, Administrative Law Judge

Case No. 11-ALJ-07-0556-CC

Grand Bees Development, LLC, Respondent,

v.

South Carolina Department of Health and Environmental Control, Appellant.

NOTICE OF APPEAL

South Carolina Department of Health and Environmental Control appeals the decision of the Honorable Shirley C. Robinson, dated March 19, 2013. Appellant received a copy of this decision on March 19, 2013.

May 29, 2013

Etta R. Williams Linen

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STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Grand Bees Development, LLC, Petitioner, vs. South Carolina Department of Health and Environmental Control and County of Charleston, Respondents.	Docket No. 11-ALJ-07-0556-CC FINAL ORDER AND DECISION

APPEARANCES:

For the Petitioner: G. Trenholm Walker, Esquire
Jamie A. Khan, Esquire

For the Respondent SC DHEC: Etta R. Williams, Esquire

For the Respondent County of Charleston: Bernard E. Ferrara, Jr., Esquire
Joseph Dawson, III, Esquire

This matter comes before the South Carolina Administrative Law Court ("ALC" or "Court") pursuant to S.C. Code Ann. §1-23-600(A) and S.C. Code Ann. §44-1-60(F)(2) upon the Request for a Contested Case Hearing filed by Grand Bees Development, LLC ("Petitioner"). Petitioner contests the September 1, 2011 final agency decision of Respondent South Carolina Department of Health and Environmental Control ("DHEC"), to issue a modified permit to Respondent Charleston County ("County") for the expansion of the Class II Landfill that is part of the County's Bees Ferry Landfill. On September 12, 2011, Petitioner filed a timely request for a Final Review Conference, and on October 13, 2011, the DHEC Board decided not to grant discretionary review. Thereafter, on November 2, 2011, Petitioner filed a Request for Contested Case Hearing with this Court.

In its Request for Contested Case Hearing, Petitioner asserts that the County's proposed expansion of the Class II Landfill violates applicable regulations and statutes and that this Court should vacate the modified permit.

The Court conducted a hearing on the merits on March 20, 2012, at the Administrative Law Court in Columbia, South Carolina.

FINDINGS OF FACT

Having observed the witnesses and exhibits presented, weighed their credibility, and taking into consideration the burden of persuasion of the parties, I make the following findings of fact by a preponderance of the evidence:

1. Notice of the time, date and nature of the hearing was timely given to all parties.

2. Petitioner is the owner of a tract of land comprised of approximately 311 acres, located off Bees Ferry Road in the City of Charleston, South Carolina (Charleston County TMS# 301-00-00-035) (the "Grand Bees Property"). Petitioner purchased the Grand Bees Property on November 15, 2004.

3. The Grand Bees Property is zoned Planned Unit Development ("PUD") by the City of Charleston ("City") and is designated for residential land use. The Grand Bees Property is part of a larger PUD in the City called Bees Landing, which was first approved by City Council in March of 1993. Also known to the public as Grand Oaks Plantation ("Grand Oaks"), the Bees Landing PUD has been amended numerous times by City Council – most recently on February 14, 2012. At the time of the hearing, there were nine distinct and completed neighborhoods in Grand Oaks totaling approximately 1,500 homes, along with various city parks and other amenities.

4. The Grand Bees Property represents approximately twenty-five percent (25%) of the total land area in Grand Oaks. Under the Bees Landing PUD, the Grand Bees Property is designated for residential development. It is one of the last remaining components of Grand Oaks that is not yet fully built-out.

5. Petitioner has paid its share of dues and assessments of the Master Grand Oaks Association since acquiring the Property in 2004.

6. Various other residential developments are located in the vicinity of Grand Oaks including, but not limited to, The Hunt Club and Long Savannah (residential PUD's in the City of Charleston) located to the west and north of the Grand Bees Property.

7. The County operates the Bees Ferry Landfill (Charleston County TMS# 301-00-00-026) (the "Landfill"), located on Bees Ferry Road in the unincorporated part of the County. Bees Ferry Road abuts Grand Oaks and the Grand Bees Property. The Landfill and the Grand

Bees Property share a common boundary along the Grand Bees Property's southwest property line.

8. Charleston County disposes of various types of waste at the Landfill, and the portion of the Landfill adjacent to the Grand Bees Property is a DHEC Class II Landfill. This landfill had been classified under former DHEC regulations (prior to May 23, 2008) as a construction, demolition, and land clearing debris landfill ("C&D Landfill").

9. The Petitioner is in the business of residential development, and as such, purchases land, plans the residential project, obtains land plan approval, engineers the improvements to the land, obtains other necessary approvals and permits, builds the infrastructure, installs the utilities, subdivides the land into lots, and then sells the residential lots to home builders.

10. Prior to purchasing the Grand Bees Property, Petitioner conducted due diligence that included reviewing the Grand Bees Property's zoning, the C&D Landfill's DHEC Permit ("C&D Permit"), and the County regulations applicable to the Landfill. Petitioner's representatives also met with Charleston County solid waste officials prior to purchasing the Grand Bees Property. At the conclusion of its due diligence, the Petitioner determined that according to the County's zoning ordinances, the County would need to obtain a special exception from the Charleston County Board of Zoning Appeals as a prerequisite to expansion of the C&D mound adjacent to the Grand Bees Property.

11. Under the County's zoning ordinances a special exception requires a public hearing that allows comments from the public. A special exception would also require the County to directly notify adjacent property owners, such as Petitioner.

12. On November 15, 2004, Petitioner closed on the Grand Bees Property for $4,141,518.00.

13. Consistent with its zoning for residential use under the Bees Landing PUD, Petitioner obtained site plan approval from the City for 507 residential units in February 2006. After obtaining site plan approval, Petitioner proceeded to incur extensive engineering costs for the necessary infrastructure improvements to the Grand Bees Property to accomplish the residential development.

14. Taylor Bush, one of Petitioner's principals, testified that his company has so far invested approximately $8,000,000 in the acquisition and development of the Grand Bees

Property.

15. The County has operated the Landfill at its current location since approximately 1977. Pursuant to the S.C. Solid Waste Policy and Management Act of 1991 (the "Act"), the County has operated the C&D/Class II Landfill under DHEC Permit Number 101001-1201 since October 17, 1997.

16. In July 2007, the County applied to DHEC to amend its C&D Permit at the Bees Ferry Landfill, and in November 2007, the County revised its application. The County's application sought to enlarge the vertical height limitation from 74' above mean sea level ("MSL") to 168' MSL and to expand the footprint of the C&D by 5.5 acres. As stated in its application, the increases would expand the C&D Landfill's maximum disposal capacity from approximately 2.5 to 5.4 million cubic yards, more than doubling its size.

17. The vicinity map, included in the County's 2007 permit application as required by regulation, found at Page G-04 of the application, identifies the adjoining Grand Bees Property as zoned PUD with the land use specified as residential. The vicinity map (dated 2004) used in the 2007 application is based on a 2001 aerial photograph.

18. Although at the time of its application the County knew Petitioner was in the process of developing the Grand Bees Property for residential units, the County did not directly notify Petitioner of the County's application to DHEC to expand the size of the C&D Landfill.

19. DHEC granted the modification of DHEC Permit Number 101001-1201 (the "First Permit Modification") on January 17, 2008. The Petitioner learned of the County's application a few days after the First Permit Modification's issuance.

20. Thereafter, Petitioner requested a contested case hearing to challenge the issuance of the First Permit Modification. The Honorable Ralph King Anderson, III conducted a hearing on January 13th and 14th, 2009 (Docket No. 08-ALJ-07-0198-CC). Judge Anderson ultimately ruled that DHEC erred in granting the permit because the County failed to obtain a special exception in accordance with its own zoning ordinances and the Zoning and Land Development Regulations ("ZLDR"). As a result, the modified permit was inconsistent with local zoning, land use, and other applicable regulations in violation of S.C. Code Ann. § 44-96-290(F). By Order dated June 2, 2009, Judge Anderson vacated the First Permit Modification and remanded it to DHEC.

21. After Judge Anderson issued his order vacating the First Permit Modification, the

County amended its ZLDR to eliminate the requirement of a special exception for the expansion of the Bees Ferry Landfill.

22. The County's zoning amendment, eliminating the need for a special exception, was approved in 2010. DHEC considered the previously filed permit application from 2007 to re-issue the permit modification for expansion of the Class II landfill. The County did not submit a new permit application nor did DHEC require one. The County merely provided some additional information, primarily dealing with zoning, to supplement its 2007 application.

23. Since the County's initial 2007 application, the General Assembly substantially revised DHEC's regulations governing solid waste landfills. Specifically, DHEC reviewed the First Permit Modification in 2007 and 2008 under then applicable S.C. Code Regs. 61-107.11. S.C. Code Regs. 61-107.19 repealed and replaced S.C. Code Regs. 61-107.11 on May 23, 2008.

24. Kent Coleman, Director of DHEC's Division of Mining and Solid Waste Management testified that, on remand from this Court, it evaluated the 2007 permit application under the new regulations. Since the new regulations contained new groundwater monitoring regulations, DHEC required the County to supplement its application in this regard. However, DHEC did not otherwise require the County to update its application.

25. Mr. Coleman further testified that in addition to the vicinity map based on the 2001 aerial photograph, DHEC subsequently consulted "numerous aerial photographs throughout the process ... that were more updated through time." However, none of these other aerial photographs are in the record.

26. As for DHEC's consistency determination after the First Permit Modification was vacated, on April 12, 2011, Mary Varga with DHEC sent an internal memorandum with the subject line "Review of Charleston County ZLDR" to Tim Eleazer with DHEC (the "Consistency Memorandum") stating that "[s]taff initiated a review that included the Charleston County's Zoning Ordinance, last amended on December 16, 2010, the Charleston County zoning map, and a letter dated February 3, 2005, from the Charleston County's Planning Department to determine if [the Bees Ferry Class II Landfill Expansion] is consistent with local zoning."

27. The Consistency Memorandum concluded that DHEC "has determined that the proposed expansion is consistent with the Charleston County land-use planning and zoning." However, the Consistency Memorandum does not state that any other local ordinances, including any contained in other chapters of the Charleston County Code of Ordinances, were consulted in

addition to the ZLDR during DHEC's consistency review process. The Consistency Memorandum represents the only written documentation of DHEC's official consistency determination in the record.

28. DHEC approved a draft permit modification on April 18, 2011; and on April 18, 2011, DHEC published public notice of the draft permit modification in *The Post & Courier*, the Charleston daily newspaper. A public hearing on the draft permit modification was held on July 13, 2011. Petitioner's representative along with other individuals from Grand Oaks and the community attended and offered comments.

29. On September 1, 2011, DHEC rendered its final decision on remand and issued a new permit modification of DHEC Permit Number 101001-1201 (the "Second Permit Modification"). The Second Permit Modification authorizes the County to make the same modifications to the Class II Landfill as the First Permit Modification, i.e. increasing the height of the Class II Landfill from 74 feet MSL to 168 feet MSL, increasing the annual disposal limit from 182,000 tons per year to 200,000 tons per year, more than doubling its overall capacity, and expanding the footprint by 5.5 acres. Mr. Coleman approved and signed both the First and Second Permit Modifications.

30. During the hearing, Mr. Coleman testified that DHEC's permitting authority is subject to the requirements of the Act and its implementing regulations, namely S.C. Code Regs. 61-107.19. He further testified that under S.C. Code Ann. § 44-96-290(F) and S.C. Code Regs. 61-107.19, a permit cannot be issued by DHEC unless the expansion allowed by the permit is also consistent with local zoning and land use ordinances.

31. S.C. Code Regs. 61-107.19, Part I (D)(1)(a) requires that prior to the submittal of a permit application for a new or expanded landfill, the applicant must demonstrate, among other things, that the activity is consistent with local zoning, land use, and other applicable ordinances under S.C. Code Ann. § 44-96-290(F). Additionally, S.C. Code Regs. 61-107.19, Part I (D)(1)(b) provides that consistency determinations made pursuant to Part I (D)(1)(a) "prior to the effective date of this regulation . . . shall remain applicable and become the agency's final determination . . . subject to the appeal provision in Part I (D)(1)(c) . . . ."

32. In his testimony, Mr. Coleman stated that DHEC deemed the consistency requirement of S.C. Code Ann. § 44-96-290(F) satisfied once DHEC learned that the County had amended the ZLDR to eliminate the need for a special exception for expansion of the landfill.

Therefore, DHEC did not consider other applicable County ordinances.

33. Also, during the hearing before this Court, the Petitioner offered into evidence a certified copy of County Ordinance #180, adopted by County Council on March 5, 1974, which is presently codified (with minor typographical modifications) at Section 10-22 of the Charleston County Code of Ordinances (hereinafter, "Section 10-22"). Counsel for both the County and DHEC stipulated that Section 10-22 (titled "Disposal Sites and Facilities") was in effect when the original permit application was filed in 2007 and when the Second Permit Modification was issued. Moreover, wording in this Section shows that it applies to "[a]ll owners or operators of solid waste disposal facilities including governmental units or agencies." The Section also provides that certain site design regulations are triggered "[w]hen a new sanitary landfill is constructed or an existing site is extensively re-designed." (Emphasis added.)

34. The site design regulations include Section 10-22(2)(d), which provides that all disposal sites shall "conform with the surrounding environment." Section 10-22(2)(e) provides that solid waste disposal sites must also "conform with future development of the area." The County never brought Section 10-22 to DHEC's attention. Furthermore, Mr. Coleman testified that DHEC did not consider Section 10-22 when deciding whether to grant the Second Permit Modification and he did not become aware of it until his deposition in preparation for this hearing. There is also no mention of Section 10-22 in the Consistency Memorandum.

35. The Consistency Memorandum does not reference the Charleston County Code of Ordinances – it only references the ZLDR. There 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.

36. According to Mr. Coleman, Section 10-22 was irrelevant to DHEC's consistency determination because its "generalized language is not applicable . . . in the sense that it doesn't change anything and doesn't specify anything about . . . the requirements that the local zoning does not already cover."

37. Petitioner's expert, John S. Lester, P.E. ("Lester") (the President of HLA, Inc., a civil engineering and landscape architecture firm in Charleston), Mr. Bush, and Wallace A. Jack ("Jack") (a board member of the Grand Oaks Boulevard Association), all testified to the rapidly expanding and residential character of the area surrounding the landfill since 2001. These witnesses testified that increasing the maximum height of the Class II Landfill from 74 feet to

168 feet (in addition to the other modifications allowed by the Second Permit Modification) would neither be compatible with nor conform to current and future development in the area. They expressed concerns about noise, dust, aesthetics, and increased traffic from operations associated with the requested expansion of the Class II Landfill. Specifically, Mr. Bush testified that the Second Permit Modification would have a "significant impact" on his ability to develop and market the Grand Bees Property due to the expansion's incompatibility and nonconformance with adjacent residential development.

38. Mr. Lester testified that the 168-foot maximum height of the Class II Landfill, allowable by the Second Permit Modification, would match or exceed many of the tallest structures in Charleston County, including the driving surface of the Arthur Ravenel, Jr. Bridge (the New Cooper River Bridge) as well as what is possibly Charleston's tallest building, the Holiday Inn along the Ashley River. In addition, he testified that based on the to-scale, engineering models his firm had produced, a 168-foot Class II Landfill would be clearly visible over the tree lines and buffers of the surrounding neighborhoods, including both the Grand Bees Property and other parts of the Grand Oaks community.

39. In addition to these models, Petitioner offered two updated aerial photographs of the landfill and its surrounding area, depicting the status of existing and planned residential development as of 2008 and 2012. These developments include, but are not limited to, the Grand Bees Property, the several other neighborhoods in Grand Oaks, and other residential developments adjacent to the Landfill. The updated aerials show vast changes in the surrounding areas since 2001.

40. After Judge Anderson vacated the First Permit Modification in 2009, DHEC never required and the County never provided a vicinity map with aerial photography updated from 2001. The vicinity map DHEC relied on in making its permitting decision does not reflect the substantial growth in residential development the area has experienced over the last ten years and will experience in the coming years. In contrast, the updated aerials depict the state of existing and future residential development as of 2008 and 2012.

41. Aside from Section 10-22 of the Charleston County Code of Ordinances, Chapter 9 of the ZLDR contains Development Standards which are generally applicable to new and expanding development. These Standards are intended "to protect the public health, safety, and general welfare;" "to promote harmonious and orderly development;" and "to foster civic beauty

by improving the appearance, character and economic value of civic, commercial and industrial development within the unincorporated areas." Article 9.1, ZLDR. These Development Standards are also designed to: "Implement the use of vegetated buffers in order to mitigate the effects of incompatible adjacent uses, to provide transition between neighboring properties and streets, to moderate climatic effects, and to minimize noise and glare." Article 9.1, ZLDR.

42. The landscaping, screening, and buffering regulations provide that "[w]hen modifications or additions are being made to an existing non-residential building or site, the standards of this Article shall apply to those portions of the subject parcel that are directly affected by the proposed improvements, as determined by the Planning Director . . . ." Article 9.5, ZLDR. In essence, the landscaping, screening, and buffering requirements are applicable to modifications of non-residential sites in Charleston County, including "waste-related uses." Article 9.5.1 and Article 9.5.4(A)(4), ZLDR.

43. In this instance, the County's regulations require a one hundred (100) foot vegetative buffer between the Class II Landfill and Petitioner's property, specifically nine (9) canopy trees, eleven (11) understory trees and fifty (50) shrubs per one hundred (100) feet of linear buffer along the property line. However, 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.

44. The Petitioner's witness, Mr. Lester, testified that in practice, landscaping plans are submitted and required by local government to prove compliance with buffer and landscaping regulations as a precondition to land development. However, no landscaping plan or similar documentation was included either in the County's 2007 application, as supplemented, or the Second Permit Modification itself.

45. Mr. Lester further testified that in 2009 and 2012, his firm physically inspected the one hundred (100) foot space between the Class II Landfill and Petitioner's Property, and observed that it does not meet the specific requirements of the ZLDR, by not containing the vegetative buffering requirements. Additionally, the 100 foot space is utilized as an access road by the County around the Landfill.

46. Beyond consistency with the ZLDR and the County's Code of Ordinances, under S.C. Code Regs. 61-107.19 Part IV (B)(1)(a) a landfill's fill area boundary may not be located

within one thousand (1,000) feet of any "residence." As previously mentioned, the City approved the Grand Oaks PUD and the Petitioner's site plan for residential development several years before the County applied to DHEC for the expansion permit for its Class II landfill.

47. According to testimony provided by Mr. Bush, the planned development for the Grand Bees Property consists of various engineering phases, including Phase 7 adjacent to the Class II Landfill's common boundary. Mr. Bush further testified that Phase 7 has been both permitted for residential development by the City and engineered for water, sewer, storm system, and roadway infrastructure improvements.

48. Mr. Lester surveyed the common boundary between the Grand Bees Property and the Class II Landfill. He testified to the measurements performed, computer aided design ("CAD") plats produced, and the location of approximately 130 approved and planned residential lots on the Grand Bees Property located within 1,000 feet of the fill area boundary of the Class II Landfill Permit. Mr. Lester's analysis was based on the residential development approvals as well as Phase 7's engineering.

49. As set forth below, S.C. Code Regs. 61-107.19 neither defines "residence" nor provides a test for determining when a "residence" will be considered to be within 1,000 feet of a Class II Landfill. Additionally, the DHEC Board has no reported decision that interprets how the Department defines "residence" for purposes of its Solid Waste Act and the regulations propounded thereunder.

50. The Department's permitting decision in this case was based on the dictionary definition of "residence" that personnel interprets to mean a structure where someone lives or could live, as evidenced by a certificate of occupancy ("CO") granted by local government authorities. According to the Department's witness, Mr. Coleman, if a CO was granted within 1,000 feet of a residence "like a day prior to [a permit being issued], we would have to consider that in our decision . . . ."

51. The parties do not dispute that "there are proposed and planned residences . . . at this property."

CONCLUSIONS OF LAW

Based on the foregoing, I make the following legal conclusions:

1. The Administrative Law Court has jurisdiction over this contested case matter pursuant to S.C. Code Ann. §§ 1-23-600(A) and 44-1-60(F)(2) (Supp. 2012).

2. In contested case hearings, the Administrative Law Judge is the fact finder and makes a *de novo* determination regarding the matters at issue. Brown v. S.C Dep't. of Health and Envtl. Control, 348 S.C. 507, 520, 560 S.E.2d 410, 417 (2002).

3. The Petitioner, as the party challenging the issuance of the Permit to the County, bears the burden of proving, by a preponderance of the evidence, that the Permit issued by DHEC to the County did not meet the requirements of S.C. Code Ann. § 44-96-10 *et seq.* and S.C. Code Regs. 61-107. See Leventis v. S.C. Dep't. of Health and Envtl. Control, 340 S.C. 118, 132, 530 S.E.2d 643, 651 (Ct. App. 2000).

CONSISTENCY WITH LOCAL LAND USE ORDINANCES

4. S.C. Code Ann. § 44-96-290(F), contained in the Act, provides that: "[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."

5. Compliance with local zoning, land use, and other applicable local ordinances is a condition precedent to DHEC issuing a permit for an expansion of an existing solid waste facility. Southeast Resource Recovery, Inc. v. S.C. Dep't. of Health and Envtl. Control, 358 S.C. 402, 407-08, 595 S.E.2d 468, 471 (2004).

6. Our courts have held that "consistent with" means "comply with" in this context, and the two terms are regularly used interchangeably when discussing the requirements of S.C. Code Ann. § 44-96-290(F). See Southeast Resource Recovery, Inc., 358 S.C. at 408, 595 S.E.2d at 471.

7. A consistency determination by a county applicant does not control; the law requires that the permitting agency determine consistency for purposes of a state statute that requires consistency as a condition of permitting. Southeast Resource Recovery, Inc., 358 S.C. at 407-08, 595 S.E.2d at 471 ("[a]lthough Section 44-96-290(F) requires a proposed facility comply with local standards, it does not designate the county as the final arbiter on whether the proposed facility complies with its local zoning, land use, and other ordinances."). Clearly, DHEC is prohibited from delegating the consistency determination to local governments through letters of consistency or other means. Id. DHEC has the ultimate responsibility to ensure that it surveys and considers all local zoning, land use, and other applicable ordinances. Id.

8. The ALC, as *de novo* fact finder in contested case hearings, similarly must determine whether DHEC made a proper consistency determination. To decide whether DHEC made a proper consistency determination, this Court must determine whether DHEC reviewed all applicable local ordinances and whether the permit, as granted, is consistent with these ordinances. S.C. Code Ann. § 44-96-290(F); See Southeast Resource Recovery, Inc. v. South Carolina Dept. of Health and Environmental Control, 358 S.C. 402, 595 S.E.2d 468 (2004).

9. As a matter of law, Section 10-22 is an applicable local land use ordinance under S.C. Code Ann. § 44-96-290(F). It specifically governs solid waste disposal facilities (both new and expanded), including those owned and operated by governmental entities, including the County.

10. Section 10-22(1) applies various rules and regulations to "[a]ll owners or operators of solid waste disposal facilities including governmental units or agencies" (emphasis added). Additionally, Section 10-22(1)(c) provides that these site design regulations are triggered "[w]hen a new sanitary landfill is constructed or an existing site is extensively re-designed" (emphasis added). Among other things, Section 10-22(b) provides that the disposal site shall "conform with the surrounding environment" and "conform with future development of the area."

11. According to the South Carolina Supreme Court, zoning ordinances are not the only means by which local governments can regulate land use. 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) ("[W]hile the Comprehensive Planning Act governs zoning, it simply does not evince a legislative intent to completely prohibit any other local enactments from touching upon zoning or land use."). The terms of S.C. Code Ann. § 44-96-290(F) acknowledge this distinction as well by expressly differentiating between zoning and general land use ordinances: "No permit . . . may be issued by the department unless the proposed facility or expansion is consistent with local zoning, land use, and other applicable local ordinances . . . ." (emphasis added).

12. In this case, DHEC was required to consult *all* applicable land use ordinances in the Code, especially those specifically dealing with solid waste facilities, in addition to the ZLDR in order to fulfill the consistency requirement of S.C. Code Ann. § 44-96-290(F). However, DHEC never considered Section 10-22 in its consistency review.

13. DHEC's failure to review Section 10-22 is significant. Unlike other County ordinances including the ZLDR, Section 10-22 requires consideration of conformity with the surrounding environment and *future* development of the area. Given 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. It is apparent in this instance that DHEC's consistency determination is materially incomplete and, therefore, facially invalid. As a result, DHEC violated the applicable law in granting the Second Permit Modification. S.C. Code Ann. § 44-96-290(F); Southeast Resource Recovery, Inc., 358 S.C. at 407-08, 595 S.E.2d at 471.

14. The Court rejects Respondents' argument that Section 10-22 is less specific and more vague than the ZLDR and therefore superseded by the ZLDR, making Section 10-22 irrelevant for the purposes of consistency review. It is the conclusion of this Court that Section 10-22 is a valid land use ordinance that exists in addition to the ZLDR. Respondents have presented no authority to support the view that the ZLDR preempts, for the purposes of DHEC's consistency analysis, an otherwise applicable valid land use ordinance simply due to the latter's being more specific. See e.g., Mikell v. County of Charleston, 386 S.C. 153, 687 S.E.2d 326 (2009) ("Where two ordinance provisions deal with the same issue, one in a general and the other in a more specific and definite manner, the more specific prevails.").

15. Respondents also argue that "broad, general statement of goals" cannot be relied upon in a consistency determination. Southeast Resource Recovery, Inc., 358 S.C. at 409, 595 S.E.2d at 472 (holding goals "to preserve, protect and enhance the environmental quality of Newberry County" is a broad, general statement of goals). The Court in Southeast Resource Recovery, Inc. noted that "[t]o hold otherwise would invite a reviewing court to conclude, on an arbitrary and capricious basis, any proposed landfill facility falls within the ambit of such general language." Id.

16. I conclude that 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, Inc. Rather, the requirements of Section 10-22 are not broad and general "goals," but rather specific standards, requirements and criteria of the ordinance which simply do not lend

themselves to more precise, quantitative measures. Moreover, said requirements and criteria are sufficiently specific and fact-based to guard against an arbitrary and capricious determination that *any* proposed landfill violates Section 10-22.

17. Respondents also argued that Section 10-22 was irrelevant to the consistency determination because DHEC's only charge was to review the permit application to ensure consistency with the ZLDR. Respondents base this argument on the provision in Judge Anderson's Order that "this case is remanded for review in accordance with the ZLDR" and S.C. Code Regs. 61-107.19, Part I (D)(1)(b), which provides that consistency determinations made prior to the effective date of the new regulations shall remain applicable upon adoption of the new regulations.

18. I conclude that, pursuant to the Act and its implementing regulations, DHEC may only issue permits that are consistent with local law (zoning or otherwise) and that all other applicable substantive and procedural requirements of the Act and the regulations must be complied with anytime DHEC issues a permit. S.C. Code Ann. § 44-96-290(A), (B) and (F). Therefore, when considering issuance of a permit, on remand or otherwise, DHEC must make sure that the proposed permit complies with the law in all respects.

19. Neither DHEC's permit review nor the scope of review of this Court is confined to an analysis of whether DHEC properly reviewed the ZLDR. Rather, as *de novo* fact finder, this Court's role is to determine whether DHEC granted the Second Permit Modification in compliance with *all* applicable laws. E.g. Brown, 348 S.C. at 520, 560 S.E.2d at 417. This determination includes compliance with both S.C. Code Ann. § 44-96-290(F) and S.C. Code Regs. 61-107.19.

20. Respondents are correct that S.C. Code Regs. 61-107.19, Part I (D)(1)(b) provides that consistency determinations, pursuant to S.C. Code Ann. § 44-96-290(F), previously made under the old regulations "remain applicable" for permits issued under the new regulations. However, there is no evidence in the record that DHEC ever performed the consistency determination with respect to Section 10-22 and the ZLDR (specifically, the vegetative buffering regulations) at that time. The permit file of DHEC the parties stipulated into evidence does not disclose a written determination of compliance with this regulation.

21. Additionally, when the First Permit Modification was vacated by Order of this Court in 2009 after the new regulations had taken effect, DHEC's prior consistency

determination no longer remained applicable because it had been vacated. This required DHEC to again perform a consistency determination, and in so doing, ensure that upon reissuance of the permit, the permitted activity was consistent in all respects with the applicable local zoning and land use ordinances and other applicable law.

VEGETATIVE BUFFER REQUIREMENTS (CHARLESTON COUNTY ZLDRs)

22. As mentioned above, S.C. Code Ann. § 44-96-290(F) requires permits issued by DHEC to be consistent with local zoning and land use ordinances. In this case, 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 ZLDRs. These regulations, as applied, require a one hundred (100) foot vegetative buffer between the Class II Landfill and Petitioner's property. Based upon this finding, the Second Permit Modification is not consistent with the County's vegetative and landscaping standards because no landscaping plan or other documentation demonstrating compliance was made part of the permit application or the Second Permit Modification. Rather, only a one hundred (100) foot setback from the Landfill property line is indicated on the plans submitted with the application; however, this setback alone is insufficient to establish consistency because it neither shows nor requires the vegetative screen required by local zoning regulations.

23. The one hundred (100) foot setback depicted in the County's application reflects a DHEC regulatory requirement separate and apart from the County's landscaping and buffer regulations. S.C. Code Regs. 61-107.19, Part IV(B)(1)(e). The 100 foot setback is a DHEC siting requirement for any landfill of this type, no matter what the local ordinances require.

24. Respondent argues that the language "as determined by the Planning Director" in Article 9.5.1 of the ZLDR means the requirement of vegetative buffering can be waived by the Planning Director. However, neither the application nor DHEC's file include any demonstration of authority or proof that the buffer requirements had been or would be waived by the Planning Director.

25. Because the Second Permit Modification is not compliant with local zoning and land use regulations, as it relates to the County's vegetative buffering regulations, DHEC erred in granting the Second Permit Modification. S.C. Code Ann. § 44-96-290(F); Southeastern Resource Recovery, Inc. v. S.C. Dep't. of Health and Envtl. Control, 358 S.C. at 407-08, 595 S.E.2d at 471.

SETBACK REQUIREMENT (SOLID WASTE POLICY AND MANAGEMENT ACT)

26. No person may initiate the construction or expansion of a solid waste management facility except in accordance with the requirements established by DHEC pursuant to the Act. S.C. Code Ann. § 44-96-290(B).

27. S.C. Code Regs. 61-107.19, Part IV(A) requires that the siting, design, construction, operation, and closure activities of Class II Landfills shall conform to the standards set forth in Part IV.

28. S.C. Code Regs. 61-107.19, Part IV(B)(1)(a) imposes the following mandatory setback 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." (Emphasis added).

29. Respondents are correct that S.C. Code Regs. 61-107.19, Part I (D)(1)(b) provides that certain DHEC regulatory compliance determinations, specifically pursuant to S.C. Code Regs. 61-107.19, Part IV(B)(1)(a), previously made under the old regulations "remain applicable" for permits issued under the new regulations. However, there is no evidence in the record that DHEC ever performed a regulatory compliance determination with respect to its own 1,000 foot setback requirement at that time. The permit file of DHEC the parties stipulated into evidence does not disclose a written determination of compliance with this regulation.

30. What is meant by "residence" for purposes of measuring the minimum regulatory buffer is neither defined by S.C. Code Regs. 61-107.19, Part IV, nor elsewhere in the regulations.

31. Petitioner argues that the 1,000 foot setback applies to residences that are planned and shown on an approved site plan. The Respondents argue that the setback applies only to fully constructed and occupied residential dwellings.

32. The rules of statutory construction apply to regulations. Converse Power Corp. v. S.C. Dep't. of Health and Envtl. Control, 350 S.C. 39, 564 S.E.2d 341 (Ct. App. 2002). In construing statutory language, the statute must be read as a whole and sections which are part of the same general statutory law must be construed together and each one given effect. Jackson v. Charleston County School Dist., 316 S.C. 177, 181, 447 S.E.2d 859, 861 (1994). Moreover, the true guide to statutory construction is not the phraseology of an isolated section or provision, but the language of the statute as a whole considered in light of its manifest purpose. Id., citing

Browning v. Hartvigsen, 307 S.C. 122, 125, 414 S.E.2d 115, 117 (1992) ("[A] statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers. The real purpose and intent of the lawmakers will prevail over the literal import of particular words.").

33. The 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 Commc'ns of S. 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). 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). Courts will reject statutory interpretations that lead to absurd results clearly unintended. S.C. Coastal Conservation League v. S.C. Dep't. of Health and Envtl. Control, 380 S.C 349, 369, 669 S.E.2d 899, 909 (Ct. App. 2008).

34. Regulations are construed using the same canons of construction as statutes. S.C. Dep't of Rev. v. Blue Moon of Newberry, Inc., 397 S.C. 256, 261, 725 S.E.2d 480, 483 (2012); Murphy v. S.C. Dep't of Health and Envtl. Control, 396 S.C. 633, 639, 723 S.E.2d 191, 195 (2012).

35. The purpose of the regulations relevant to this case is to establish a setback distance to protect residences, schools, hospitals, and publicly owned parks from the obvious, adverse effects of landfills on surrounding property. Moreover, the purposes and findings of the 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 located next to landfills.

36. Under the Respondents' interpretation, if the permit applicant to DHEC can "win the race" – that is, succeed in obtaining a permit before a planned house, school, hospital, or park is finished with construction - these neighbors will be ignored for the purposes of S.C. Code Regs. 61-107.19, Part IV(B)(1)(a). The logical extension of the Respondents' argument is that any planned "residence" – no matter how far along the development or construction process – must be ignored. And since many of these ignored, planned developments are likely to

ultimately be constructed and occupied after the permit has been granted, under Respondents' interpretation, they will end up being located within 1,000 feet of the Class II Landfill a result the regulations seeks to avoid.

37. Respondents' position that no unconstructed or incomplete residences (lacking a certificate of occupancy) should ever be considered regardless of the circumstances, including the circumstances in this case, conflicts with the legislative intent and produces an absurd result. Under this interpretation, the necessity of having a CO 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. This 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.

38. The Court rejects the Respondents' argument that this Court must afford its staff's interpretation of "residence" deference. DHEC staff's interpretation of the regulation is not entitled to deference because only the interpretation of DHEC's Board is entitled to deference by this Court. S.C. Coastal Conservation League, 363 S.C. at 75, 610 S.E.2d at 486; Waste Management of the Carolinas, Inc., 2008 WL 4659522 at 11 (holding that deference is only due to the construction or determination of a statute or regulation when the DHEC Board formally adopts such construction).

39. Respondents point to a case recently decided by the South Carolina Supreme Court to suggest that DHEC Staff's regulatory interpretations of undefined terms and phrases are entitled deference. In Murphy v. South Carolina Department of Health and Environmental Control, 396 S.C. 633, 723 S.E.2d 191 (2012), the Court relied on staff's interpretation of "vicinity of the project," finding the interpretation to be "both reasonable and consistent with the plain language of the regulation." Murphy, 396 S.C. at 640-41, 723 S.E.2d at 195.

40. However, Murphy is distinguishable from this case. Unlike the staff member's interpretation of the regulation applicable in Murphy, DHEC staff's interpretation of "residence" in this case is neither reasonable nor consistent with S.C. Code Regs. 61-107.19.

ORDER

Accordingly, based on the foregoing, **IT IS HEREBY ORDERED** that DHEC'S decision on the Second Modified Permit (DHEC #101001-1201) is **REVERSED** and the Second Modified Permit is hereby **VACATED.**

IT IS FURTHER ORDERED that should the County wish to continue pursuing a Class II Landfill expansion permit, an entirely new and updated permit application must be filed, 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.

IT IS FURTHER ORDERED that any arguments of the parties not specifically addressed herein are hereby deemed to be denied.

AND IT IS SO ORDERED.

SHIRLEY C. ROBINSON
Administrative Law Judge

March 19th, 2013
Columbia, South Carolina

CERTIFICATE OF SERVICE
This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid or in the interagency Mail Service addressed to the party(ies) or their attorney(s).
This 19 day of March 2013
By: Judges Law Clerk

THE STATE OF SOUTH SCAROLINA

In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Shirley C. Robinson, Administrative Law Judge

Case No. 11-ALJ-07-0556-CC

Grand Bees Development, LLC, Respondent,

v.

South Carolina Department of Health and Environmental Control, Appellant.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Grand Bees Development, LLC, by depositing a copy of it in the United States Mail, postage prepaid, on **May 29, 2013,** addressed to the attorneys of record: Jamie Khan, Esquire, McCullough Kahn, LLC, 68½ Queen Street, Charleston, South Carolina 29401; G. Trenholm Walker, Esquire, Pratt-Thomas Walker, PA, 16 Charlotte Street, Charleston, South Carolina 29403; and to counsel for Co-Appellant Charleston County: Joseph Dawson, III, Esquire, Bernard E. Ferrara, Jr., Esquire, Charleston County Attorney's Office, 4045 Bridge View Drive, North Charleston, South Carolina 29405.

May 29, 2013
Columbia, South Carolina

Sandra R. Wessinger

Sandra R. Wessinger

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Shirley C. Robinson, Administrative Law Judge

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

Grand Bees Development, LLC, ... Respondent,

v.

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

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Appendix to the Record on Appeal, together with the Record on Appeal, contains all material proposed to be included by any of the parties and not any other material.

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Shirley C. Robinson, Administrative Law Judge

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

Grand Bees Development, LLC, ... Respondent,

v.

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

PROOF OF SERVICE

I certify that I have served the **Appendix to the Record on Appeal** on Respondent Grand Bees Development, LLC and South Carolina Department of Health and Environmental Control by depositing a copy of the same in the United States Mail, postage prepaid, on October 21, 2013, addressed to their counsel of record as follows:

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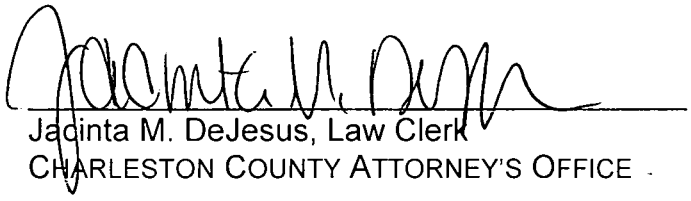

Jacinta M. DeJesus, Law Clerk
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