

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

APPEAL FROM THE ADMINISTRATIVE LAW COURT  
Carolyn C. Matthews, Administrative Law Judge

Case No. 07-ALJ-07-0178-CC  
Appellate Case No. 2012-212041.

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S.C. Supreme Court

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

v.

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

JOINT BRIEF OF RESPONDENTS SOUTH CAROLINA DEPARTMENT  
OF HEALTH AND ENVIRONMENTAL CONTROL  
AND C&D MANAGEMENT COMPANY, LLC

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## COUNTER-QUESTIONS PRESENTED

- I. **DID THE COURT OF APPEALS CORRECTLY FIND THAT UNDER *SOUTHEAST RESOURCE RECOVERY* THE DEPARTMENT COULD NOT DEFER TO YORK COUNTY'S DECLARATION OF INCONSISTENCY WITH THE COUNTY SOLID WASTE MANAGEMENT PLAN IN THE EMERGENCY ORDINANCE?**
- II. **DID THE COURT OF APPEALS PROPERLY HOLD THAT THE REMAINING ISSUES WERE FACUTAL DETERMINATIONS FOR WHICH THERE WAS SUBSTANTIAL EVIDENCE IN THE RECORD BEFORE THE ALC?**

## COUNTER-STATEMENT OF THE CASE

On February 22, 2007, the South Carolina Department of Health and Environmental Control ("DHEC") issued a permit to C&D Management Company, LLC ("C&D Management") for construction and operation of a construction and demolition ("C&D") landfill to be located on Vernsdale Road in the City of Rock Hill ("Proposed Landfill"). (Pet. Ex. 10, R. pp. 1056-64). This permitting decision was the culmination of almost three years of the Department's review and consideration of C&D Management's application and requests for determination related to permitting of the Proposed Landfill.

On March 19, 2004, a request for a demonstration of need determination had been submitted to DHEC on behalf of C&D Management for the Proposed Landfill. (Pet. Ex. 1, R. pp. 794-96). At that time, there were fewer than two commercial Part IV C&D landfills within a ten-mile planning radius of the Proposed Landfill. (Tr. p. 172, ll. 9-23, R. p. 320). The Proposed Landfill thus met the requirements of the Demonstration of Need Regulation, S.C. CODE ANN. REGS. § 61-107.17 ("DON Regulation"), and on March 22, 2004, the Department issued a demonstration of need determination for the

Proposed Landfill with a “maximum annual tonnage limit of 58,300.” (Pet. Ex. 2, R. p. 797-99).

Pursuant to Section 44-96-290(F), DHEC may not issue a permit for a proposed solid waste management facility or expansion of an existing facility “unless the proposed facility or expansion is consistent with local zoning, land use, and other applicable local ordinances, if any . . . and the local or regional solid waste management plan.” S.C. CODE ANN. § 44-96-290(F) (2002). By letter dated May 25, 2004, C&D Management requested that DHEC make a consistency determination as required by Section 44-96-290(F) of the South Carolina Solid Waste Policy and Management Act of 1991, S.C. CODE ANN. §§ 44-96-10 *et seq.* (“Solid Waste Act”). (Pet. Ex. 11, R. pp. 1065-68; Tr. p. 175, ll. 1-6, R. p. 323). On August 31, 2004, DHEC issued a preliminary consistency determination, finding that the Proposed Landfill was consistent with the 2001 York County Solid Waste Management Plan. (Pet. Ex. 12, R. p. 1069). By letter dated June 24, 2005, the Public Works Director for York County advised DHEC that the 2001 plan submitted to DHEC was in draft form and that the local solid waste management plan for York County was the Catawba Regional Solid Waste Management Plan. (DHEC Ex. 20, R. p. 1235; Tr. p. 109, ll. 9-17, R. p. 257). The Catawba Regional Solid Waste Management Plan was developed by the Counties of York, Union, Lancaster, and Chester and had not been amended since its completion in 1994 (“1994 Catawba Regional Plan”). (DHEC Ex. 30, R. pp. 1236-1566). The Proposed Landfill was consistent with the 2001 draft plan and 1994 Catawba Regional Plan.

With respect to the zoning, the Proposed Landfill is one component of a planned reclamation and recycling center. (Tr. p. 543, l. 19 – p. 558, l. 17, R. pp. 691-706). At

the time that C&D Management selected the site for its proposed recycling and reclamation center, the property was zoned by the City of Rock Hill as heavy manufacturing (“M-H”), which allowed for the siting of landfills. (DHEC Ex. 62, R. p. 1567-68; Tr. p. 617, ll. 3-6, R. p. 765). The City requested that C&D Management apply for rezoning to Planned Unit Development (“PUD”) so the City could impose additional conditions on the use of the property. (DHEC Ex. 62, R. p. 1567-68).

On May 23, 2005, the Rock Hill City Council (“City Council”) enacted an ordinance to rezone the property from M-H to PUD (“PUD Ordinance”). (Pet. Ex. 33, R. pp. 1179-87). The Conditions of PUD Zoning, attached to the PUD Ordinance included the following provisions:

Griffin Brothers will obtain a permit from South Carolina’s Department of Health and Environmental Control (SCDHEC) Bureau of Land and Waste Management Division of Mining and Solid Waste Management, under regulations 61-107.11 Part II and Part IV for C&D and LCD Facilities and 61-107.4 for Yard Debris, Land Clearing, and Compost Facilities.

\* \* \*

A maximum tonnage of 58,300 C&D material will be adhered to based on the Demonstration of Need letter issued by SCDHEC. This does not include land clearing debris and yard waste material tonnages.

\* \* \*

Griffin Brothers will accept City of Rock Hill C&D materials at a maximum of 500 tons per year at no charge.

(Pet. Ex. 33, R. pp. 1184-86). Additionally, the Conditions also define the “Acceptable Construction and Demolition Debris” which may be received at the facility. Section 5 of the PUD Ordinance provided that “all ordinances or parts of ordinances inconsistent with this Ordinance are hereby repealed to the extent of such inconsistency.” (Pet. Ex. 33, R. p. 1181).

The permit application for the Proposed Landfill was submitted to DHEC in

August 2005. (DHEC Ex. 68, R. pp. 1569-1879). Following a public meeting at which the issue of zoning was raised, the DHEC staff undertook a lengthy review of the zoning for the Proposed Landfill. (Braswell Dep., p. 57, ll. 1-9, R. p. 856). DHEC requested additional information from the City in order to make the zoning consistency determination for the Proposed Landfill. The DHEC staff met with City officials and the City attorney to examine further the zoning for the Proposed Landfill. (Braswell Dep., p. 59, l. 21 – p. 60, l. 2, R. pp. 858-59). The DHEC staff also received additional information and opinion from the City and from Christi Cox, an attorney representing individuals opposed to the Proposed Landfill. (DHEC Ex. 62, R. pp. 1567-68; Pet. Exs. 34, 35, 36, R. pp. 1188-1234).

The Zoning Ordinance in effect at the time of the rezoning of the property prohibited “sanitary landfills” in a PUD. (C&D Ex. 58, R. p. 2237). The Zoning Ordinance did not define “sanitary landfills.” (C&D Ex. 58, p. 79, R. p. 2121). During DHEC’s review of C&D Management’s permit application, the City advised DHEC that “sanitary landfill” was not a defined term under the Zoning Ordinance and that the City’s intent was to prohibit household garbage landfills in PUD zoning. (DHEC Ex. 62, R. p. 1567-68). Additionally, Art Braswell testified that “sanitary landfill” as used in the Solid Waste Act was a reference to municipal solid waste landfills subject to Subtitle D of RCRA (Tr. p. 214, l. 11 – p. 215, l. 17). Upon review of all the information submitted, the DHEC staff determined that the PUD Ordinance allowed for the siting of the Proposed Landfill. (Braswell Dep., pp. 59-68, R. pp. 858-67).<sup>1</sup>

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<sup>1</sup> On February 26, 2007, one of the original petitioners in this matter, Barbara Polk, filed an action in circuit court challenging the validity of the PUD Ordinance. The court thereafter granted summary judgment in that case, finding that the action was not timely filed under Section 6-29-760(D) of the South Carolina Local Government Comprehensive Planning Enabling Act of 1994, S.C. CODE ANN. §§ 6-29-310 *et seq.*

The DHEC staff continued its review of C&D Management's permit application for the Proposed Landfill. As noted above, by letter dated June 24, 2005, the Public Works Director for York County advised DHEC that the 1994 Catawba Regional Plan was still the local solid waste management plan for York County. (DHEC Ex. 20, R. p. 1235; Tr. p. 109, ll. 9-17, R. p. 257). On August 14, 2006, the York County Council gave first reading to an ordinance authorizing the County to withdraw from the 1994 Regional Plan. (C&D Ex. 3). On October 16, 2006, the York County Council gave second reading to the ordinance. (Tr. p. 100, ll. 15-19). The draft plan attached to the ordinance on first and second readings expressly allowed the siting of the Proposed Landfill. (C&D Ex. 3, R. p. 1880; C&D Ex. 4, R. p. 2011, Tr. p. 99-101, R. p. 247-249).

On January 9, 2007, the York County Council attempted to enact an emergency ordinance, which purports to, *inter alia*, modify the 1994 Catawba Regional Plan "as it applies to York County" and place a moratorium on permitting of landfills within York County ("Emergency Ordinance"). (Pet. Ex. 7, R. pp. 1047-51). The relevant provisions of the Emergency Ordinance are as follows:

The Catawba Regional Solid Waste Management Plan of 1994 ("1994 Solid Waste Plan" or "the Plan") is hereby modified as it applies to York County. Section 15.4.5 of the Plan is hereby modified to place a moratorium 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.

\* \* \*

#### Section 4. Declaration of Moratorium

In order to preserve the status quo and planning options during this period of study, review, and if necessary, ordinance or plan drafting and

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("Comprehensive Planning Act"). (Respondent C&D Management, LLC's Motion in Limine, Ex. 1 of Ex. C, R. pp. 114-21). Ms. Polk subsequently withdrew her appeal of the summary judgment order.

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.

#### Section 5. Scope of Moratorium

During the time that the emergency moratorium is in effect, all proposed landfills and landfill expansions not yet permitted by DHEC are declared inconsistent with the 1994 Plan.

(Pet. Ex. 7, R. pp. 1047 & 1050). C&D Management filed an action challenging the validity of the Emergency Ordinance in circuit court in York County, seeking injunctive relief as to the effect of that Ordinance on DHEC's permitting decision on C&D Management's application. DHEC was a party in that action. (Final Decision and Order, pp. 25-26, R. pp. 25, 26). The Circuit Court ruled that "DHEC and DHEC alone has the duty for determining the granting or denial of a landfill permit, section 44-96-290 SC Code 1976, as amended. This court has neither the right, the expertise, the information or the desire to usurp DHEC's permitting authority." (Braswell testimony publishing a portion of the Circuit Court decisions at Hearing Tr., DHEC Ex. 2, p. 301, ll. 20-25, R. p. 449; Final Decision and Order, p. 9, R. p. 9, Finding 32). Accordingly, DHEC had the guidance of the Circuit Court with respect to the effect of the Emergency Ordinance on DHEC's permitting decision prior to making that decision. Based on that ruling, DHEC proceeded with the issuance of the permit to C&D Management. (Hearing Tr., p. 302, ll. 1-7, R. p. 450). The Proposed Landfill had been under review and consideration by DHEC for almost three years. DHEC had undertaken a thorough and comprehensive review of all concerns raised by individuals and the local government officials.

There can be no dispute that the Emergency Ordinance was an attempt by the

County Council to prevent the permitting of the Proposed Landfill by DHEC. Moreover, the means by which the County Council sought to affect DHEC's permitting of the Proposed Landfill was to proclaim that the Proposed Landfill was "declared inconsistent with the [County] Plan." (Pet. Ex. 7, R. pp. 1047). In accordance with this Court's ruling in *Southeast Resource Recovery, Inc. v. South Carolina Department of Health and Environmental Control*, 358 S.C. 402, 595 S.E.2d 468 (2004), the ALC and the Court of Appeals found that only DHEC had authority to make a consistency determination under the Solid Waste Act. DHEC could not delegate that authority to the County voluntarily through a letter of consistency, and the County could not usurp that authority through an Emergency Ordinance or any other means.

On February 28, 2007, after DHEC issued its permitting decision on the Proposed Landfill, the County Council called a special meeting to give third reading to Ordinance No. 207 and thus purportedly adopted a new separate York County Solid Waste Management Plan. The draft plan attached to Ordinance No. 207 was the first draft plan which did not expressly provide for siting of the Proposed Landfill. (Pet. Ex. 4, R. p. 949). This action by York County Council was a complete about-face with respect to the Proposed Landfill. At the time of the permitting decision by DHEC on February 22, 2007, all draft plans submitted to York County Council had expressly provided for the siting of the Proposed Landfill. (C&D Exs. 3 and 4, R. pp. 1925 & 2010-11; Braswell Dep., p. 439, ll. 18-25, R. p. 587). Only the 2007 York County Solid Waste Plan, which Council purported to adopt on February 28, 2007, 6 Days after the DHEC decision, states that the existing York County C&D landfill and other landfills meet the C&D disposal needs for the county, and therefore, no new landfills are needed for the various service

areas as defined by the Plan. (R. pp. 46-48). Ironically, according to the 2007 Solid Waste Management Annual Report, a C&D landfill owned and operated by York County had only one and a half years of remaining disposal capacity. (Pet. Ex. 23, R. p. 1090; Tr. p. 259, ll. 7-24, R. p. 407). In fact, in early 2007, while opposing C&D Management's Proposed Landfill as not needed, York County was seeking an expansion for its own York County C&D Landfill, but DHEC had not made a decision on this expansion prior to the issuance of the permit to C&D Management. (Tr. p. 113, l. 22 – p. 118, l. 1, R. pp. 261-66). The Emergency Ordinance and the Ordinance No. 207 were merely efforts to prevent the permitting of the Proposed Landfill or any other C&D landfill to be operated by a private party.

## ARGUMENT

### **I. THE COURT OF APPEALS CORRECTLY FOUND THAT UNDER *SOUTHEAST RESOURCE RECOVERY* THE DEPARTMENT COULD NOT DEFER TO YORK COUNTY'S DECLARATION OF INCONSISTENCY WITH THE COUNTY SOLID WASTE MANAGEMENT PLAN IN THE EMERGENCY ORDINANCE.**

The Court of Appeals opinion correctly held that the Emergency Ordinance was “an effort by the County to control DHEC’s permitting decision.” (Court of Appeal Opinion, hereinafter “Opinion,” p. 4, App. p. 2390). DHEC may not issue a permit for a proposed solid waste management facility or expansion of an existing facility “unless the proposed facility or expansion is consistent with local zoning, land use, and other applicable local ordinances, if any . . . and the local or regional solid waste management plan.” S.C. CODE ANN. § 44-96-290(F) (2002). Pursuant to the holding in *Southeast Resource Recovery*, DHEC is prohibited from deferring to a county with respect to its consistency determination on a proposed landfill. *Southeast Resource Recovery, Inc.*,

358 S.C. at 408, 595 S.E.2d 471. By the express language of the Emergency Ordinance, it is unquestionable that York County attempted to make a consistency determination for the Proposed Landfill, stating as following: “New or expanded C&D landfills are therefore **declared inconsistent with the Plan** . . . .” (Pet. Ex. 7, R. pp. 1047) (emphasis added). The Court of Appeals found as follows:

Looking past the emergency ordinance’s “moratorium” label and focusing instead on its content and actual effect, we find no meaningful distinction between the emergency ordinance and the letters of consistency that *Southeast Resource Recovery* prohibits DHEC from following. In both situations, a county makes a consistency determination regarding a proposed landfill—a power only DHEC may exercise. The only difference here is that instead of DHEC willingly delegating its authority to local government, as it did in *Southeast Resource Recovery*, local government has attempted to usurp that authority.

(Opinion, pp. 405, App. Pp. 2390-91). The Court of Appeals thus held that DHEC could not give effect to the Emergency Ordinance in denying the permit for the Proposed Landfill as such decision would have been an improper delegation of its authority in violation of *Southeast Resource Recovery*.

York County further contends the lower courts’ rulings improperly deprive counties of their statutory authority with respect to all matters relating to solid waste and the siting of solid waste facilities in the boundaries of a county. York County argues that “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 ordinance that is inconsistent with state law.’” (Brief, p. 17 (citing to Opinion, p. 2, App. p. 2388)). York County’s argument appears to arise from the Court of Appeals’ ruling that based on the holding in *Southeast Resource Recovery*, “it is inconsistent with state law for DHEC to follow a county’s consistency determination.” (Opinion, p. 5, App. p. 2391 (citing to *Southeast Resource Recovery*, 358 S.C. at 408, 595

S.E.2d at 471)). There is simply no basis for reading this as a potential encroachment on a county's zoning authority. Section 44-96-290(F) of the Solid Waste Act expressly requires DHEC to make a determination that a proposed facility is consistent with "local zoning" prior to issuance of a permit. S.C. CODE ANN. § 44-96-290(F). Pursuant to the Comprehensive Planning Act, York County may enact ordinances to effect zoning in any or all of the unincorporated areas of the county. S.C. CODE ANN. § 6-29-330. Prior to issuing a permit for a proposed landfill in those areas of the county, DHEC must determine that the proposed landfill is consistent with the applicable zoning ordinances. The Court of Appeals' ruling in this case does not in any manner diminish the authority of York County or any other local government to enact zoning, including zoning which may prohibit the siting of landfills in certain zoning districts. In this case, where the proposed landfill is to be located in the City of Rock Hill, the ALC correctly found that DHEC made a determination that the Proposed Landfill was consistent with the City's zoning ordinances, and the Court of Appeals affirmed that finding. Such findings cannot be perceived as placing any limitations on the County's zoning authority. Indeed, as noted above, the Proposed Landfill is located in the City of Rock Hill, and therefore, the County has no jurisdiction over the zoning applicable to the Proposed Landfill.

Conversely, York County reads the South Carolina Supreme Court ruling in *Sandlands* to place no limits on a county's authority to enact legislation affecting solid waste. York County quotes the following from the *Sandlands* decision:

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.

(Brief, p. 18 (citing *Sandlands C & D, LLC v. County of Horry*, 394 S.C. 451, 463, 716 S.E.2d 280, 286 (2011) (emphasis in original)). York County argues that this Court’s reasoning in *Sandlands* precludes the application of *Southeast Resource Recovery* in the instant case. To the contrary, the *Sandlands* ruling in fact supports the application of *Southeastern Resource Recovery* by the Court of Appeals. The *Sandlands* ruling clarified that the *Southeastern Resource Recovery* holding is limited to those matters, such as permitting, for which the Solid Waste Act has granted DHEC exclusive authority. In declining to apply *Southeastern Resource Recovery* holding in *Sandlands*, the Court held that while the Solid Waste Act granted exclusive authority over permitting to DHEC, it did not grant such authority to DHEC with respect to the “*flow* of solid waste within the counties.” *Id.* (emphasis in original). The “flow of solid waste” is the movement of solid waste from the point of generation to the site of disposal. The Emergency Ordinance did not purport to regulate the movement of waste within the county. As the ALC and the Court of Appeals correctly held, the purpose of the Emergency Ordinance was to “control DHEC’s permitting decision” with respect to C&D landfills in the county. (Opinion, p. 4, App. p. 2390).

The *Sandlands* decision did not overrule the decision in *Southeast Resource Recovery*. This Court merely found that the *Southeast Resource Recovery* decision was not applicable to the analysis of the validity of the ordinance at issue in *Sandlands*. As this Court unequivocally stated in *Sandlands*, “there is no doubt the express language of the SWPMA provides for DHEC’s exclusive authority in the area of permitting.” *Id.* In

purporting to enact the Emergency Ordinance, York County was unquestionably attempting to usurp DHEC's permitting authority. The ALC and the Court of Appeals correctly applied *Southeast Resource Recovery* in holding that the Emergency Ordinance could have no effect on DHEC's consistency determination.

York County asserts that DHEC improperly issued the permit to C&D Management because DHEC knew the County was in the process of adopting a new solid waste management plan. York County asserts that the purpose of the Emergency Ordinance was to "allow the County time to finalize its new solid waste management plan." (Brief, p. 17) As a preliminary matter, as the ALC found, C&D Management's proposed landfill was expressly allowed under the solid waste management plan attached to the proposed ordinance on first and second reading. (Final Order and Decision, p. 7, R. p. 7). Moreover, the Emergency Ordinance did not address any changes to the plan approved on first and second reading. In purporting to enact the Emergency Ordinance, the County Council attempted to step into DHEC's shoes and "declared inconsistent" any new or expanded C&D landfills to be located in the county. Finally, as the ALC found, York County had provided a "proposed" York County plan to DHEC in 2001. Under York County's reasoning, DHEC should have taken no action with respect to permitting of facilities after 2001 because DHEC knew the county was in the process of amending its plan. To the contrary, mere knowledge that York County may have been working on a revised plan (since 2001) cannot prevent DHEC from exercising its statutory authority to permit landfills pursuant to Section 44-96-290 of the Solid Waste Act. At the time of DHEC's permitting decision on the Proposed Landfill on February 22, 2007, the 1994 Catawba Regional Plan was the plan of record for York County, and York County had

confirmed that in the June 24, 2005 letter from the Public Work Direct for York County to DHEC. The DHEC staff thus appropriately made the determination that the Proposed Landfill was consistent with the 1994 Catawba Regional Plan.

Citing to the dissenting opinion in the Court of Appeals, York County argues that the ALC improperly upheld DHEC's decision to issue the permit for the Proposed Landfill because "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." (Brief, p. 24). The dissenting opinion states that if DHEC had concerns regarding the validity of the Emergency Ordinance, "then a challenge, including injunctive relief, should have been instituted in circuit court." (Opinion, p. 8, App. p. 2394 (Lockemy, J. dissenting)). As set forth in the ALC's findings, the validity and effect of the Emergency Ordinance was challenged in circuit court prior to DHEC's decision on the permit. C&D Management did in fact bring an action challenging the validity of the Emergency Ordinance in circuit court in York County, seeking injunctive relief as to the effect of that Ordinance on DHEC's permitting decision on C&D Management's application. DHEC was a party in that action. (Final Decision and Order, pp. 25-26, R. pp. 25, 26). This finding is supported by substantial evidence in the record before the ALC. For example, the testimony of Arthur D. Braswell, DHEC's Director of the Division of Mining and Solid Waste at the time of the permitting decision on C&D Management's application, includes the following:

- Q: Okay. Thank you. Now, I would like to now turn to DHEC's Exhibit Two. Mr. Braswell, can you identify that?
- A: It's an order from Judge Hayes in the Court of Common Pleas, Sixteenth Judicial Circuit. Addressed as C&D Management v. York County and the South Carolina Department of Health and Environmental Control.

Q: Okay. Did you attend the hearing that that order resulted from?

A: Yes, I did.

Q: Okay. Would you please publish for the Court the second paragraph in the quote to the end of the next paragraph out of Judge Hayes' order? Well, first, I'm sorry, before I ask you that. What was the context of this hearing?

A: It was basically, it was a – they were seeking a restraining order. I guess, to keep the county from enforcing the emergency order of January 9, 2007.

Q: Was the City of Rock Hill there?

A: Yes, they were.

Q: Okay. And C&D Management?

A: And C&D Management also.

Q: Okay. York County? Was York County represented?

A: Yes.

Q: Okay. And was Department of Health and Environmental Control?

A: Yes.

Q: Okay. And would you please publish that section?

A: "DHEC's not a legislative body. DHEC is part of the executive branch of our state government. Limited research has not produced any case on this instance – on this instant issue for the court's guidance. Therefore, the court relies on Article 1, Section 8 of the South Carolina Constitution, which provides when the government of this state, legislative, executive and judicial powers of the government shall forever be separate and distinct from each other and no person or persons exercising the functions of one of said department shall assume or discharge the duties of any other." Want me to continue to read?

Q: Uh-huh (affirmative response).

A: "DHEC and DHEC alone has the duty for determining the granting or denial of a landfill permit, Section 44-96-290 SC Code 1976, as amended. This court has neither the right, the expertise, the information or the desire to usurp DHEC's permitting authority."

Q: Okay, thank you. Was this letter received by the Department prior to the decision to issue the permit in this case?

A: Yes, it was.

Q: Okay. And did this order factor in that decision?

A: Yes, it did.

(Hearing Tr., p. 299, l. 23 – p. 302, l. 7, R. pp. 418-421). Accordingly, DHEC had the guidance of the circuit court with respect to the effect of the Ordinance on DHEC's permitting decision prior to making that decision. Consistent with the Court of Appeals' ruling, the circuit court found that pursuant to Section 44-96-290 of the Solid Waste Act, "DHEC and DHEC alone has the duty for determining the granting or denial of a landfill permit." Based on that ruling, DHEC proceeded with the issuance of the permit to C&D Management.

York County further contends that "[t]he decision of DHEC, the ALC and the Court of Appeals to strike down the emergency ordinance violates the letter, as well as the spirit of the law." (Brief, p. 16). Contrary to this and similar contentions, the ALC did not rule on the validity of the Emergency Ordinance. The ALC unequivocally stated that its findings and conclusions were not a determination of the validity of the Ordinance *per se*:

58. The Petitioners further argue that DHEC has no authority to determine the validity of a county ordinance. However, DHEC's decision to disregard the Emergency Ordinance in making its permitting decision on the Proposed Landfill does not require a determination of the validity of the Ordinance *per se*. Pursuant to the *Southeast Resource Recovery* holding, the Department is precluded from deferring to the County with respect to its consistency determination for the Proposed Landfill, regardless of the mechanism by which the County seeks to affect the Department's permitting decision.

59. In this case, the County attempted to affect such decision through an emergency ordinance. However, any attempt by the County to interfere with the Department's consistency determination by any means would be impermissible under the *Southeast Resource Recovery* holding. Moreover, under the holding in *Simpkins v. City of Gaffney*, the County lacks authority to enact an ordinance imposing a moratorium on DHEC's permitting authority. As such, even if the Ordinance were valid in all other respects, DHEC would be prohibited from giving effect to the Ordinance in making its permitting decision for the Proposed Landfill.

Accordingly, DHEC properly disregarded the Emergency Ordinance in issuing the permit for the Proposed Landfill.

(Final Order and Decision, pp. 27-28, R. pp. 27-28). Any claim that DHEC, the ALC, or the Court of Appeals struck down the Emergency Ordinance is without merit.

Finally, York County's assertion that the Emergency Ordinance is within its statutory authority under the Solid Waste Act is fundamentally flawed. The Solid Waste Act does not grant the counties authority to enact "emergency ordinances" to amend a local solid waste management plan. *See* S.C. CODE ANN. § 44-96-80 (2002). Moreover, to the extent that the Emergency Ordinance is a valid exercise of the County's legislative authority, as York County claims, such authority could only be derived from S.C. CODE ANN. § 4-9-130. While the ALC did not rule on the validity of the enactment of the Emergency Ordinance, the ALC's order included the following findings of fact:

30. Consideration of an emergency ordinance was not on the County Council agenda, the agenda was never amended to include consideration of an emergency ordinance, and County Council did not discuss or identify an emergency in open Council session after returning from executive session.

(Final Order and Decision, pp. 7-8, R. pp. 7-8). As such, not only is the Emergency Ordinance not within any statutory authority granted to the County under the Solid Waste Act, there is considerable question as to whether the Emergency Ordinance was within the County's statutory authority to enact emergency ordinances generally.

**II. THE COURT OF APPEALS PROPERLY HELD THAT THE REMAINING ISSUES WERE FACUTAL DETERMINATIONS FOR WHICH THERE WAS SUBSTANTIAL EVIDENCE IN THE RECORD BEFORE THE ALC.**

Pursuant to Rule 220(b)(1), SCACR, the Court of Appeals properly affirmed the remaining issues raised to and ruled on by the ALC. In an appeal from the decision of the ALC, the decision "should be affirmed if supported by substantial evidence in the

record.” *Original Blue Ribbon Taxi Corp. v. South Carolina Dep’t of Motor Vehicles*, 380 S.C. 600, 604, 670 S.E.2d 674, 676 (Ct. App. 2008) (citations omitted). “Substantial evidence is relevant evidence that, considering the record as a whole, a reasonable mind would accept to support an administrative agency’s action.” *Porter v. S.C. Pub. Serv. Comm’n*, 333 S.C. 12, 20, 507 S.E.2d 328, 332 (1998). “Furthermore, the possibility of drawing two inconsistent conclusions from the evidence does not prevent a court from concluding that substantial evidence supports an administrative agency’s finding.” *Id.* at 21, 507 S.E.2d at 332. As such, if the substantial evidence on the record supports the ALC’s findings of fact necessary for a decision under the applicable law, the Court should affirm the ALC’s decision. There is no question that the ALC made the requisite findings in the matter, and the Court of Appeals properly ruled that such findings were supported by the substantial evidence on the record. There is substantial evidence in the record to support the ALC’s finding that DHEC properly concluded that the Proposed Landfill is consistent with the applicable City of Rock Hill zoning ordinance and the solid waste management plan in effect for York County at the time of the permitting decision. Likewise, there is substantial evidence in the record to support the ALC’s finding that DHEC’s demonstration of need approval for the Proposed Landfill conformed to the requirements of the DON Regulation and Section 44-96-290(E) of the Solid Waste Act.

A. **The evidence in the record supports the ALC’s finding that the Proposed Landfill is consistent with the applicable City of Rock Hill zoning ordinance.**

The ALC found that DHEC properly determined that the Proposed Landfill was allowed under the applicable City of Rock Hill zoning ordinance, and the substantial evidence on the record supports that finding. York County argues that the City’s PUD Ordinance identified the facility as the “Vernsdale Compost & Building Material

Recycling Center,” but did not use the term “landfill.” (Brief, p. 25). Contrary to this contention, the evidence on the record demonstrates that the description of the facility to be located in the PUD is a compost and building material recycling center, which includes a C&D landfill as a component of the facility.

At the time that C&D Management selected the site for its proposed recycling and reclamation center, including a C&D landfill, the property was zoned heavy manufacturing (“M-H”). (DHEC Ex. 62, R. pp. 1567-68; Tr. p. 617, ll. 3-6, R. p. 765). The M-H zoning allowed for the siting of a landfill, but the City requested that C&D Management apply for rezoning PUD so the City could impose additional conditions on the use of the property. (DHEC Ex. 62, R. p. 1567-68). On May 23, 2005, the Rock Hill City Council adopted an ordinance changing the zoning for the property from M-H to planned unit development (“PUD Ordinance”). (Pet. Ex. 33, R. pp. 1179-87). The PUD Ordinance unquestionably provides for the siting of a C&D landfill at the recycling and reclamation center. The Conditions of PUD Rezoning, attached to the PUD Ordinance, clearly recognized that the facility would include a C&D landfill. The Conditions include the following provision:

Griffin Brothers will obtain a permit from South Carolina’s Department of Health and Environmental Control (SCDHEC) Bureau of Land and Waste Management Division of Mining and Solid Waste Management, under regulations 61-107.11 Part II and Part IV for C&D and LCD Facilities and 61-107.4 for Yard Debris, Land Clearing, and Compost Facilities.

(Pet. Ex. 33, R. p. 1184). The reference to the “regulations 61-107.11 Part II and Part IV for C&D and LCD Facilities” leaves no doubt that the facility requires a DHEC permit for a landfill. Section 61-107.11 is the DHEC regulation for permitting of “Construction, Demolition and Land-Clearing Debris Landfills.” 25A S.C. CODE ANN. REGS. § 61-107.11 (Supp. 2007). Section 61-107.11 Part II of the Landfill Regulation is entitled

“General Permitting for the Disposal of Land-Clearing Debris and Yard Trash” and provides the permitting and design criteria for land-clearing debris and yard trash landfills. 25A S.C. CODE ANN. REGS. § 61-107.11 Part II (Supp. 2007). Section 61-107.11 Part IV of the Landfill Regulation is entitled “Long-Term Construction, Demolition, and Land-Clearing Debris Landfills, i.e., All Other Construction, Demolition and Land-Clearing Debris Landfills Not Addressed in Parts I, II or III” and provides the permitting and design criteria for long-term C&D landfills. 25A S.C. CODE ANN. REGS. § 61-107.11 Part IV (Supp. 2007). As such, the Conditions of PUD Zoning indisputably provide for the siting of a C&D landfill in the PUD.

Similarly, the Conditions of the PUD Zoning also place numerous conditions on the disposal of C&D waste. For example, the Conditions limit the disposal as follows: “A maximum tonnage of 58,300 C&D material will be adhered to based on the Demonstration of Need letter issued by SCDHEC.” (Pet. Ex. 33, R. p. 1185). This is an express reference to the March 22, 2004 Demonstration of Need Approval for the Proposed Landfill, which provided for a “maximum annual tonnage limit of 58,300.” (Pet. Ex. 2, R. p. 797). The Conditions of the PUD Zoning further provide that C&D Management would “accept City of Rock Hill C&D materials at a maximum of 500 tons per year at no charge.” (Pet. Ex. 33, R. p. 1186). Finally, the Conditions also define the “Acceptable Construction and Demolition Debris” which may be received at the facility. (Pet. Ex. 33, R. p. 1186). Accordingly, there is substantial evidence to support the ALC’s finding that the PUD Ordinance expressly provides for the siting of a C&D landfill on the property.

Additionally, contrary to York County’s assertions, the characterization of the

facility as a “Compost and Building Material Recycling Center” does not support its argument that the PUD Ordinance does not allow a landfill. The evidence on the record indisputably shows that the C&D landfill is one component of the larger facility to be located on the property. Ronald Gilkerson testified that the Proposed Landfill is part of a planned reclamation and recycling center, which will, in addition to landfilling, include wood chipping, composting of yard-clearing debris, concrete crushing, and segregation of other C&D waste, such as metal, wood, gypsum, shingles, and cardboard, for recycling. (Tr. p. 543, l. 19 – p. 558, l. 17, R. pp. 691-706). Mr. Gilkerson further testified that the residual of the reclamation and recycling operations at the facility will be disposed of in the Proposed Landfill. (Tr. p. 558, l. 18 – p. 559, l. 18, R. pp. 706-07). Accordingly, the identification of the facility as a “Compost and Building Material Recycling Center” is an accurate description of the activities to be conducted there. Indeed, the identification of the facility as a C&D landfill would have been an incomplete description of the operations at the facility. As such, the characterization of the facility as “Compost and Building Material Recycling Center” does not in any way contradict the finding that the PUD Ordinance expressly provides for the siting of a C&D landfill on the property, and the substantial evidence on the record supports that finding by the ALC.

Additionally, the reversal of *Mikell v. County of Charleston*, 375 S.C. 552, 561-62, 654 S.E.2d 92, 97 (Ct. App. 2007), after the ALC’s final order in this matter does not affect the Court of Appeals’ decision to affirm the ALC’s order based on the sufficiency of the factual determinations. The *Mikell* case was a challenge to the validity of a county zoning ordinance. The validity of the relevant zoning ordinances was not before the ALC in this matter. Indeed, in the Final Order and Decision, the ALC states:

19. Prior to the hearing on the merits, C&D Management filed a motion *in limine* to exclude evidence related to any purported procedural defects in the applicable zoning ordinance related to the Proposed Landfill. The basis for such motion was that this Court does not have jurisdiction to hear appeals related to a purported procedural defect in zoning ordinances pursuant to S.C. CODE ANN. § 6-29-760. Indeed, a challenge to the validity of the PUD Ordinance was brought in the Court of Common Pleas for York County, and an appeal of that Court's decision is currently pending before the South Carolina Court of Appeals. This Court granted C&D Management's motion and limited matters related to zoning to DHEC's review of the applicable ordinances in making its consistency determination pursuant to Section 44-96-290(F) of the Solid Waste Act.

(Final Order and Decision, p. 15, R. p. 15). The ALC correctly acknowledged that jurisdiction for a challenge to the validity of the relevant zoning ordinance was vested in the circuit court. Since the decision in *Mikell* addresses the validity of a zoning ordinance, the reversal of the *Mikell* decision could only have potential impact in the action brought in the circuit court. Therefore, the reversal of *Mikell* has no impact on the decision of the ALC in this matter. Similarly, this Court's ruling in *Sinkler v. County of Charleston*, 387 S.C. 67, 690 S.E.2d 777 (2010), involves the validity of a zoning ordinance under the Comprehensive Planning Act. Again, any challenge to the validity a zoning ordinance must be brought in an action pursuant to Section 6-29-760 of the Comprehensive Planning Act. S.C. CODE ANN. § 6-29-760 (2004). As stated in the ALC's findings, a challenge to the zoning ordinance at issue in this case had in fact been brought in circuit court and had been dismissed as untimely. (Respondent C&D Management, LLC's Motion in Limine, Ex. 1 of Ex. C, R. pp. 114-21).

**B. The evidence in the record supports the ALC's finding that the Proposed Landfill is consistent with the 1994 Catawba Regional Plan.**

The ALC found that the 1994 Catawba Regional Plan was the local solid waste management plan of record for York County at the time of the permitting decision and

affirmed DHEC's determination that the Proposed Landfill was consistent with that Plan. York County does not argue that the Court of Appeals improperly affirmed this factual determination. Instead, York County argues that the 2007 York County Plan should have been used for the consistency determination because DHEC's decision was not final until the Board declined to conduct a final review conference. As a preliminary matter, this argument is not preserved for appeal to this Court since York County did not raise argument in its motion for reconsideration. Rule 242(d)(2), SCACR; *Camp v. Springs Mortg. Corp.*, 310 S.C. 514, 426 S.E.2d 304 (1993) (declining to address an issue not addressed by the Court of Appeals and not raised in a petition for rehearing). However, even if this argument were properly before this Court, which it is not, such argument is without merit.

Pursuant to S.C. CODE ANN. § 44-1-60(F), if the Board elects not to hold a final review conference, "the department decision becomes the final agency decision." S.C. CODE ANN. § 44-1-60(F) (Supp. 2009). York County argues that because the Board's election not to conduct a final review conference occurred after the County had adopted a new solid waste management plan, the permit application should have been reviewed under the new plan. However, the law provides that the DHEC decision automatically becomes the final agency decision, and the applicant may request a contested case hearing before the ALC. There is no requirement that DHEC remake its original decision.

York County's interpretation of the statute would throw the administrative review of consistency determinations into disarray. C&D Management began the process to obtain a permit on March 19, 2004. C&D Management requested its preliminary

consistency determination that the Proposed Landfill was consistent with the applicable county solid waste management plan on May 25, 2004. Upon review of the plan and receipt of letters from York County officials affirming the project's consistency with the plan, DHEC determined that it was consistent. (Pet. Exs. 12, 14, R. pp. 1069, 1070). C&D Management's application was consistent with the county's solid waste management plan from that date through the date of the department permit decision and was consistent with all drafts of new plans considered by York County Council through the date of the DHEC decision. (C&D Exs. 3, 4, R. pp. 1925, 2010-11). To say that after years of moving through the review process, the application should be denied because after the DHEC decision, York County adopted a new plan omitting C&D Management's project would not only be unfair and unworkable, but also contrary to established requirements governing the issuance of permitting decisions by DHEC.

Additionally, York County contends that DHEC should have delayed the decision on the Proposed Landfill because the staff was aware that the County was in the process of adopting a new plan. Appellant cites no authority for such requirement. Moreover, at the time of the permitting decision by DHEC, the 1994 Catawba Regional Plan and all draft plans submitted to York County Council expressly provided for the siting of the Proposed Landfill. (C&D Exs. 3, 4, R. pp. 1925, 2010-11; Braswell Dep., p. 439, ll. 18-25, R. p. 587). As such, the ALC correctly held that the York County Solid Waste Management Plan adopted on February 28, 2007, had no bearing on its review of the February 22, 2007 permitting decision.

C. **The evidence in the record supports the ALC's finding that DHEC issued a demonstration of need approval for the Proposed Landfill in accordance with the applicable DHEC regulation and Section 44-96-290(E) of the Solid Waste Act.**

Section 44-96-290(E) of the Solid Waste Act provides that no permit “may be issued until a demonstration of need is approved by the department.” S.C. CODE ANN. § 44-96-290(E) (2002). DHEC is required to “promulgate regulations to implement this section.” S.C. CODE ANN. § 44-96-290(E) (20 02). DHEC promulgated regulations governing the demonstration of need at S.C. CODE ANN. REGS. § 61-107.17 (“DON Regulation”). 25A S.C. CODE ANN. REGS. § 61-107.17 (Supp. 2008). York County contends that the express criteria for demonstrating need as set forth in the DON Regulation and as applied by the DHEC staff in approving C&D Management’s DON Request does not measure need as that term is defined in the dictionary and is therefore inconsistent with Section 44-96-290(E) of the Solid Waste Act. (Brief, p. 34). York County does not argue that DHEC did not have authority to promulgate the DON Regulation. Nor does York County argue that DHEC did not promulgate such Regulation in accordance with the requirements of the APA. Instead, York County argues that the application of the express terms of the DON Regulation allows for the authorization of disposal capacity in excess of its perception of actual need and therefore violates Section 44-96-290(E) of the Solid Waste Act.

While the Solid Waste Act requires DHEC to promulgate regulations for determining need for new facilities and expansion of existing facilities, it does not specify procedures for DHEC to follow in making need determinations. *Southeast Resource Recovery, Inc.*, 358 S.C. at 408, 595 S.E.2d at 471. When the General Assembly does not define a term in a statute, the administrative agency implementing that statute may be

authorized “to fill up the details’ by prescribing rules and regulations for the complete operation and enforcement of the law within its expressed general purpose.” *Young v. South Carolina Dep’t of Highways and Public Transp.*, 287 S.C. 108, 113, 336 S.E.2d 879, 882 (Ct. App. 1985) (citations omitted). Section 44-96-290(E) expressly requires DHEC to “promulgate regulations to implement this section.” S.C. CODE ANN. § 44-96-290(E) (2002). As such, there is no doubt that Section 44-96-290(E) of the Solid Waste Act authorizes DHEC to define need in the regulations promulgated under that section, and DHEC did so in promulgating the DON Regulation in accordance with the APA. 25A S.C. CODE ANN. REGS. § 61-107.17 (Supp. 2008).

The DON Regulation establishes specific and detailed criteria for the demonstration of need for the construction of a new Part IV C&D landfill. 25A S.C. CODE ANN. REGS. § 61-107.17(A)(1) (Supp. 2008). The Regulation employs a process which establishes a “planning area” around the proposed facility “for determining the need for new disposal facilities and expansions of existing disposal facilities.” 25A S.C. CODE ANN. REGS. § 61-107.17(B)(6)(a) (Supp. 2008). York County argues that criteria for demonstrating need under the DON Regulation is in conflict with the Solid Waste Act “[i]f DHEC has promulgated a regulation that turns the mandate of ‘need’ into a mandate for ‘excess capacity’ . . .” (Brief, p. 35). There is nothing in the Solid Waste Act which prohibits the permitting of disposal capacity beyond that generated within a county or region, or even within the State. Indeed, there is no dispute that the operation of the DON Regulation may result in permitted capacity in excess of the amount of waste generated in the host county. Specifically, subsection (D)(3)(b) provides as follows: “Each disposal facility in the planning area will be allowed up to a maximum yearly

disposal rate equal to the total amount of solid waste destined for disposal that is generated in the county or counties that fall, either all inclusive or a portion thereof, within the planning area. Disposal rates for existing facilities shall not be reduced pursuant to this provision.” 25A S.C. CODE ANN. REGS. § 61-107.17.D(3)(b) (Supp. 2008) (emphasis added). This provision of the DON Regulation clearly provides that the combined maximum yearly disposal rate for all facilities within a county may exceed the waste disposal needs of the host county.

Contrary to York County’s contention, this potential excess capacity is consistent with and furthers the goals of the Solid Waste Act. For example, such permitted capacity promotes the goal of the Solid Waste Act to provide solid waste management services in “the most environmentally, safe, economically feasible and cost-effective manner.” S.C. CODE ANN. § 44-96-20(B)(1) (2002). The permitted disposal capacity for commercial facilities within a planning area and the surrounding region clearly promotes competition within the C&D waste disposal market. Mr. Braswell testified regarding the DON Regulation: “So, when we wrote the regulation, our intent was to ensure there was adequate capacity in a plan area and also that there was at least two facilities to ensure there was some competition to keep prices down at that time.” (Braswell Dep., p. 55, ll. 12-19, R. p. 854). Accordingly, any excess permitted disposal capacity which may result from the application of the DON Regulation is consistent with the stated purposes of the Solid Waste Act. Also, as noted before, York County was seeking an expansion of its own C&D landfill at this time. Moreover, this Court has recently recognized that “the DON Regulation serves as a planning tool to ensure the state is prepared to meet the waste disposal needs of the population by providing adequate landfill capacity and to

assist the counties in that endeavor.” *Sandlands C&D, LLC v. County of Horry*, 394 S.C. 451, 471, 716 S.E.2d 280, 290 (2011). Accordingly, there is no basis for the County’s assertion that DHEC’s interpretation of the DON Regulation is in direct conflict with the Solid Waste Act.

York County further contends that the 2009 amendment of the DON Regulation, effective June 26, 2009, should have been applied by the ALC in its decision. (Brief, pp. 31-32, fn. 13). York County cites to the 1943 U.S. Supreme Court in *Ziffrin v. United States*, 318 U.S. 73 (1943) as authority for this contention. Since York County has cited to no authority that the South Carolina courts have adopted this holding, and Respondents find no such authority, the *Ziffrin* holding is not binding authority in this matter. Moreover, even if this Court considers the 1943 holding in *Ziffrin* to be persuasive, such holding has no application in the instant case. As the ALC correctly held, the amendment of the DON Regulation includes the following provision which expressly provides that the amendment has no application to decisions made prior to the effective date of the amendment:

Where, prior to the effective date of this regulation, the Department made determinations required under Part I.D.1.a. of South Carolina Regulation 61-107.19, such determinations shall remain applicable and become the agency’s final determination subject to the appeal provision in Section F of this regulation and any applicable public notice and application requirements. All demonstration of need determinations are subject to termination criteria outlined in Sections C.4 and C.5 of this regulation regardless of when the determination was made.

(Pet. Ex. 31, Section C.6, R. p. 1113). Accordingly, the ALC correctly held that the amendment of the DON Regulation effective June 26, 2009, was not applicable in the ALC’s review of the DON approval for the Proposed Landfill.

## CONCLUSION

For the foregoing reasons, Respondents South Carolina Department of Health and Environmental Control and C&D Management, LLC respectfully request that this Court affirm the Court of Appeals and ALC decisions upholding DHEC's decision to issue the permit for the Proposed Landfill.

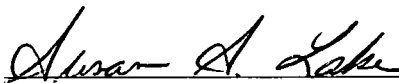
February 5, 2014



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THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Carolyn C. Matthews, Administrative Law Judge

**RECEIVED**

FEB - 5 2014

**S.C. Supreme Court**

Case No. 07-ALJ-07-0178-CC  
Appellate Case No. 2012-212041

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

of whom York County is . . . . . Petitioner,

v.

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

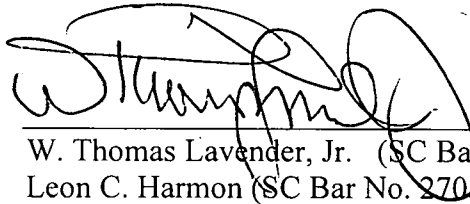
**PROOF OF SERVICE**

I certify that I have served Brief of Respondents South Carolina Department of Health and Environmental Control and C&D Management Company, LLC on all counsel of record by depositing a copy of it in the United States Mail, postage prepaid, on February 5, 2014, addressed to:

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