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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Carolyn C. Matthews, Administrative Law Judge

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

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

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

vs.

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

REPLY BRIEF OF PETITIONER ON WRIT OF CERTIORARI

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February 28, 2014

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ARGUMENT

Respondents do not dispute that the Solid Waste Management and Policy Act ("the Act") authorizes counties to enact ordinances necessary to carry out their responsibilities under the Act. S.C. Code Ann. § 44-96-80(K). Respondents do not dispute that York County's Emergency Ordinance sought to carry out those responsibilities. Instead, Respondents simply argue that the Act does not authorize this particular ordinance because 1) it is an "emergency" ordinance and 2) the County does not have authority to enact this Emergency Ordinance. (Resp. Brief p. 16). Respondents point to no authority for either of these contentions, both being contrary to the plain language of Section 4-9-130 and Section 44-96-80(K).

As to the conclusion that the proposed landfill is consistent with local zoning, the Respondents do not dispute that the PUD Ordinance is devoid of the word "landfill" and that the facility is never described as a "landfill" anywhere in the PUD or its supporting documents. Instead the landfill company asks the Court to assume that the words "recycling center" and a reference to regulations that are equally applicable to landfill and recycling facilities necessarily include a landfill component.

Finally, Respondents do not dispute that the plain language of the Act requires a "demonstration of need," instead steadfastly arguing that the Demonstration of Need ("DON") Regulation is DHEC's interpretation of the Act's mandate, despite the DON's failure to actually measure need at all. Respondents fail to address whether the DON Regulations exceed DHEC's authority by materially altering and adding to the Act's requirement that an applicant actually demonstrate that a proposed landfill is needed.

I. The Emergency Ordinance is a Valid Exercise of the County's Authority and Represents the County's Efforts to Comply With the Requirements of the Act

The Act mandates that DHEC determine whether a proposed facility is "consistent with local zoning, land use, and other applicable local ordinances, if any," S.C. Code § 44-96-290(F). The Act authorizes the "governing body of a county [] to **enact such ordinances as may be necessary to carry out its responsibilities** under this chapter." S.C. Code § 44-96-80(K). The County's responsibilities under the Act include the development of a Solid Waste Management Plan ("Plan") which contains an estimate of current disposal rates, an estimate of existing capacity, and "an analysis of existing and new facilities which will be needed to manage the solid waste generated in that county or region" for the next twenty years. S.C. Code Ann. § 44-96-80(A)(3). The County was on the precipice of carrying out those responsibilities, having gone through the process of gathering information and passing two readings of the Plan, when it learned that it might be imminently thwarted by a DHEC decision prior to third and final reading of its Plan. To protect its responsibilities under the Act, the County enacted the Emergency Ordinance. Importantly, the Emergency Ordinance gave express reasons why it was declaring a moratorium – so that it could continue to gather the information necessary to adopt a new Plan that fit the County's needs.

The Emergency Ordinance was an "applicable local ordinance," which was "necessary to carry out [the county's] responsibilities," and DHEC was thus required to determine whether the proposed landfill was consistent with the Emergency Ordinance.

Respondents assign intent and purpose to the County as "attempting to usurp DHEC's

permitting authority" based on language broadly declaring ***all*** landfills "inconsistent"[1] (Resp. Brief, p. 9). Regardless of the word "inconsistent" being used in the Emergency Ordinance, it is clear the County imposed a moratorium to maintain the *status quo* to allow it time to finalize its 2007 Plan. York County was on the verge of passing a responsible new plan, and DHEC was aware of the County's efforts. DHEC's failure to review the Emergency Ordinance and determine whether the landfill was consistent with that ordinance violates Section 44-96-290(F). Initially DHEC recognized the County's moratorium on new landfills and concluded that the landfill was inconsistent. But DHEC abruptly reversed itself for no apparent reason on the basis that the County only "attempted to adopt and Emergency Ordinance" which only "purported to place a moratorium on the construction of new landfills." (App. 1072, DHEC Staff Decision Summary).

Respondents question whether York County validly enacted the emergency ordinance pursuant to S.C. Code Ann. § 4-9-130. The question of whether the Emergency Ordinance was validly enacted was not raised to and ruled upon by the ALC or the Court of Appeals and is thus not preserved for review by this Court. Absent a ruling on whether York County's enactment of the emergency ordinance met the requirements of Section 4-9-130, this Court must presume that it is validly enacted.

Setting aside that the validity of the enactment is not preserved, there is nothing to support a conclusion that the ordinance was not validly promulgated. Section 4-9-130 requires the following in passing an emergency ordinance:

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[1] Respondent overlooks that fact that the Emergency Ordinance did not place a moratorium on any particular landfill, but was applicable to all landfills, including York County's own landfill. (Resp. Brief pp. 8-9).

> Every emergency ordinance shall be designated as such and shall contain a declaration that an emergency exists and describe the emergency. Every emergency ordinance shall be enacted by the affirmative vote of at least two-thirds of the members of council present. **An emergency ordinance is effective immediately upon its enactment without regard to any reading, public hearing, publication requirements, or public notice requirements.** Emergency ordinances shall expire automatically as of the sixty-first day following the date of enactment.

S.C. Code Ann. § 4-9-130.

The Respondents' argument regarding the ALC findings that the emergency ordinance was not on the agenda and was not discussed in open session (App. pp. 7-8), does nothing to diminish the validity of the ordinance in light of the requirements in Section 4-9-130.

II. The ALC Erroneously Held that the Emergency Ordinance is Invalid

The Respondents assert that any "claim that DHEC, the ALC or the Court of Appeals struck down the Emergency Ordinance is without merit." (Resp. Brief p. 16). The Respondents cite to Findings #58 and #59 in claiming that the ALC "did not rule on the validity of the Emergency Ordinance." (Resp. Brief p. 15). What Respondents skip over is Finding #57, which plainly states that "**the Emergency Ordinance is thus invalid** and does not preclude DHEC's issuance of the permit." (App. p. 27, FF #57 (emphasis added)).

The ALC first concludes that the Emergency Ordinance is invalid, then equivocates that in disregarding the ordinance DHEC was not required to determine the validity of the ordinance, justifying its decision by concluding that DHEC is "precluded from deferring to the County."[2] (App. p. 27, FF #58). Later the ALC affirms its finding that the Ordinance is invalid in Finding # 59 by stating "even if the Ordinance were valid . . . DHEC would be prohibited from giving

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[2] Despite Respondents argument to the contrary, the practical effect of "disregarding" an ordinance as DHEC has done and the ALC and Court of Appeals have sanctioned, is to strike it down. In other words, the ordinance might as well not exist if it is disregarded.

[it] effect." *Id.* The ALC's finding presumes the ordinance is invalid, just as the ALC concluded two paragraphs earlier in the Order. Finally, the ALC asserts that the Emergency Ordinance is "impermissible" under *Southeastern Resource Recovery* and that the "County lacks authority to enact [the] ordinance." (App. p. 28, FF #59).

The ALC's justification of DHEC's disregard of the Ordinance; its conclusion that the County lacks authority to enact the Ordinance; and its conclusion that the Ordinance is "impermissible" does nothing to negate its previous finding that the Emergency Ordinance is "invalid." Just the opposite, all of those findings bolster the ALC's ultimate holding that the Emergency Ordinance is "invalid."

III. DHEC's Disregard for the Emergency Ordinance Usurped the County's Authority

Despite Respondents' assertion to the contrary, York County does not suggest that DHEC should not have taken action on permitting after 2001 because the County was in the process of amending its plan. (Resp. Brief, p. 12). While it is true that York County recognized the need to update its plan as early as 2001, by the time DHEC approved this landfill York County: had gone through two readings of the 2007 Plan in late 2006; had received correspondence from its consultant, Rudy Curtis, in August 22, 2006 stating that there was no need for additional C & D landfills in the county (App. 1097-98); and had enacted an Emergency Ordinance to allow it to get through third and final reading of its Plan by the time DHEC made its decision. Tellingly, DHEC's consistency determination was made a mere **six days** before York County was able to conduct a third reading of its new Plan which reflected the analysis and recommendations of its engineers and consultants regarding future C & D disposal needs. The ALC's opinion that "any attempt by the County to interfere with the Department's consistency determination **by any means** would be impermissible under *Southeastern Resource*

Recovery," affirmed by the majority and cited by Respondents, would usurp York County's ability to exercise their authority under Section 44-96-80 and is erroneous. (Resp. Brief, p , citing ALC Order, App. 36, para. 59).

DHEC's use of a 13 year old plan when it knew a new one was nearly complete and its rejection of the Emergency Ordinance underscores that it was DHEC that was trying to usurp the County's authority under Section 44-96-80,[3] not the other way around.

IV. The Emergency Ordinance has the Same Applicability as Any Other Ordinance Or Plan Adopted by a Governing Body to Carry Out Its Responsibilities Under the Act and the Court of Appeals Erred in Failing to Treat it as Such

Respondents misunderstand York County's arguments about what laws DHEC must apply in making consistency determinations. Respondents expend enormous energy exploring how DHEC must follow "local zoning" while ignoring the remainder of Section 44-96-80(K), which requires DHEC to follow "other applicable local ordinances." The Respondents fathom worlds of difference between a zoning ordinance and this Emergency Ordinance. Respondents appear to acknowledge that a County could pass a zoning ordinance that would prohibit a landfill and that DHEC would have to follow that ordinance (Resp. Brief p. 10), but when it comes to the Emergency Ordinance temporarily prohibiting landfills, DHEC is suddenly prohibited from following that ordinance. York County fails to see the distinction between the two ordinances and neither the Act nor any case law supports a distinction between the applicability of a zoning ordinance versus an emergency ordinance. (S.C. Code Ann. § 44-96-

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[3] "the governing body of each county . . . shall prepare a solid waste management plan for the area within that county; . . . The governing body of a county is authorized to enact such ordinances as may be necessary to carry out its responsibilities under this chapter."

290(F), requiring DHEC to determine whether the facility is "consistent with local zoning, land use, and other applicable local ordinances."). If DHEC did not need to consider the emergency ordinance in making its consistency determination, DHEC would have to conclude that the emergency ordinance was not "applicable" or "local." There is no basis for such conclusion as the emergency ordinance was passed by York County and expressly applies to landfills under the county's solid waste management responsibilities.

Respondents claim a distinction noted by the lower courts that the "purpose of the Emergency Ordinance was to 'control DHEC's permitting decision.'" (Resp. Brief p. 11, citing Opinion, App. p. 2390). Taking Respondents' argument to its logical conclusion, DHEC could disregard a County ordinance prohibiting landfills in a certain zoning district or a Solid Waste Management Plan prohibiting landfills because to "defer" to that ordinance or Plan would be allowing the County to "control" a DHEC consistency determination. This argument ignores the plain language and intent of the Act, which directs local governments to play an integral role in the management of their solid waste. Such a suggestion entirely reworks the balance of power under the Act.

Indeed, comparing "content" and "actual effect" of a zoning ordinance or a Plan prohibiting landfills in certain areas to the Emergency Ordinance at issue here, one arrives at the same result. The actual effect in both instances is that a landfill would be deemed inconsistent with the ordinance or plan. The majority's rationale would have to find these measures equally objectionable. Yet the Court of Appeals recently affirmed DHEC's denial of consistency with York County's 2007 Plan which prohibits new landfills in the County.*Greeneagle v. DHEC,* 399 S.C.91, 730 S.E.2d 869 (Ct. App. 2012). The "actual effect" of the 2007 Plan is a conclusion that the *Greeneagle* landfill is inconsistent with that Plan. The distinction between the 2007 Plan

and the Emergency Ordinance, both of which prohibit new landfills and both of which were promulgated by York County Council pursuant to authority granted by the SWPMA, is a distinction without a difference.

The relevant difference is between the Emergency Ordinance and the delegated Letters of Consistency that were struck down under *Southeastern Resources.* The Emergency Ordinance is not a "delegation" made by DHEC, as was done when DHEC required an applicant to obtain a Letter of Consistency from the local government. *See Pressley v. Lancaster County*, 343 S.C. 696, 542 S.E.2d 366 (Ct. App. 2001). The Emergency Ordinance is an enactment by a local governing body, which is authorized by both Sections 4-9-130 and 44-96-80(K).

V. There is No Judicial Opinion Addressing the Validity of the Emergency Ordinance

While C & D Management Company did bring an action seeking a restraining order and temporary injunction with respect to the Emergency Ordinance in Circuit Court, the Circuit Court never ruled on the validity of the Emergency Ordinance nor enjoined York County from enforcing that ordinance. *C&D Mgmt v. York County and DHEC*, Case No. 2007-CP-46-360 (Feb. 15, 2007). Judge John Hayes' Order, cited by Respondents, states that the "Court has determined that the issues before this Court, at this time, should be addressed as tersely as possible in order to minimize the possibility that statements, observations, or holdings herein will not be subject to use or debate by the parties during the further course of this litigation." Second, and more importantly, Judge Hayes declined to grant C & D Management's request to enjoin York County from enforcing its Emergency Ordinance. Despite Respondents' suggestion that Judge Hayes ruled on whether DHEC had to utilize the Emergency Ordinance in making its consistency determination, a review of the succinct opinion reveals that Judge Hayes, in fact, was unwilling to enjoin the application of York County's Emergency Ordinance, did not rule

on the validity of the Ordinance, and did not direct that DHEC should disregard that ordinance. Judge Hayes recognized that DHEC is responsible for granting or denying permits, but in declining to enjoin the County's ordinance, the Order actually affirms York County's argument that the Emergency Ordinance is valid and that York County is entitled to treat it as a binding ordinance. Respondents' assertion that DHEC somehow had "guidance" from this Opinion lacks merit.

Thus DHEC, when reviewing the landfill application for consistency with local ordinances, was required to review the landfill for consistency with the Emergency Ordinance. Completely disregarding the Ordinance amounted to a decision – whether express or not – that the Emergency Ordinance was invalid.[4] *Drummond v. Dep't of Revenue*, 378 S.C. 362, 662 S.E.2d 587 (2008).

VI. The Court of Appeals Ruling Leaves DHEC and the Counties with Confusing Guidance

The Court of Appeals opinion leaves DHEC with confusing guidance as to what ordinances it can or should or must consider, explaining only that "DHEC could not give effect" to this particular ordinance because it would be an improper delegation of authority under *Southeasterm Resources*. (Resp. Brief p. 9).

The majority of the Court of Appeals says it looks past the "label" of the Emergency Ordinance as a moratorium and instead focuses on "content" and "actual effect" of the Emergency Ordinance. Under the Court of Appeals ruling, the County has zero authority to

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[4] DHEC's Staff Summary Decision states that the County only "attempted to adopt and Emergency Ordinance," and that the Ordinance only "purported to place a moratorium on the construction of new landfills." (App. 1072).

create, by ordinance or solid waste management plan, any "content" whose "actual effect" leads to a conclusion that a landfill is inconsistent with that ordinance or plan. The ALC's opinion that "any attempt by the County to interfere with the Department's consistency determination **by any means** would be impermissible under *Southeastern Resource Recovery,*" affirmed by the majority and cited by Respondents, would usurp York County's ability to exercise their authority under Section 44-96-80 and is erroneous. (Resp. Brief, p. 13, citing ALC Order, App. 36, para. 59).

The underlying theme from the Court of Appeals is that DHEC must disregard anything "inconsistent with state law." In other words, the counties cannot pass an ordinance that would result in DHEC having to conclude that a landfill is inconsistent with that ordinance because it would be following a county ordinance or plan which prohibits landfills and it would allow the County to "usurp" DHEC's permitting authority. This never has been and cannot now be the law, and it opens up an array of unanswered questions as to the limits of county authority to carry out their responsibilities under the Act: Is it only emergency ordinances that DHEC should disregard? Is it ordinances or Plans that use the word "inconsistent" that DHEC should disregard? Is it any ordinance or Plan that will actually "effect" or "control" DHEC's permitting decision that DHEC should disregard? Is an ordinance or Plan that prohibits a new landfill effecting or controlling DHEC's decision? All of these questions are now unanswered as a result of the Court of Appeals' decision.

VII. There is No Legal Support for the Conclusion that the Underlying Zoning Ordinance or the PUD Ordinance Allow this C & D Landfill

Rock Hill's zoning ordinance in effect at the time of PUD approval prohibited "sanitary landfills" in PUD zones. (App. 2174, 2247; R. 2164, 2237). There is no definition of "sanitary

landfills" in that zoning ordinance, but the Act defines "sanitary landfills" to include C&D landfills and the City's zoning ordinance was amended to expressly exclude C&D landfills in PUD districts. The underlying zoning ordinance is controlling over what activities can occur in a PUD district. *See Mikell v. County of Charleston,* 386 S.C. 153, 687 S.E.2d 326 (2009).

The language used in this PUD Ordinance indicates that the facility will be a "Compost and Building Material Recycle Center." (App. 1193). Respondents do not dispute that the PUD Ordinance **never** uses the term "landfill," despite its contention that the PUD "expressly provides for the siting of a C&D landfill." (Resp. Brief p. 19). What Respondents are really doing is asking the Court to assume that the words "Compost and Building Materials Recycling Center" and a reference to regulations applicable to either recycling or landfill facilities mean that there will necessarily be a landfill component. (Resp. Brief p. 18-20). The PUD describes the site as having designated space for composting, reprocessing, and recycling. The PUD conditions referenced by Respondents relate to tonnage limits and materials accepted, but say nothing about the materials being disposed of in a landfill versus being recycled or composted, as indicated in the name of the facility. (App. 1190-1197). All of the conditions cited by the Respondents to support its argument that the facility is "expressly" intended to be a landfill could equally and easily also apply to recycling and composting activities. (Resp. Brief p. 19).

When interpreting an ordinance, the legislative intent must prevail if it can be reasonably discovered in the language used. *Charleston County Parks & Recreation Commn. v. Sommers*, 319 S. 65, 67, 459 S.E.2d 841, 843 (1995). As creative as Respondents' arguments are – that because the PUD references regulations that could apply to C & D landfills, this landfill is expressly authorized by the PUD ordinance – the arguments overlook the fundamental principle of interpretation and legislative intent.

Moreover, the underlying zoning ordinance explicitly prohibits landfills in PUD zones. Instead of looking at the plain language of the Act or the City's Zoning Ordinance, the Respondents point to testimony from Art Braswell to support its argument that "sanitary landfills" do not include C & D landfills. (Resp. Brief p. 4). Mr. Braswell's testimony about the history of the Act, along with a vague reference to "Subtitle D" landfills not only fails to support Respondents' argument, *see* App. Pp. 362-63, more importantly it does nothing to rescue the ALC from its obligation to apply the plain language of the City's Zoning Ordinance which expressly prohibits "sanitary landfills" in PUDs in determining whether the proposed landfill is consistent with that Ordinance. The failure to apply the plain language of the zoning ordinance's prohibition of landfills in PUDs is reversible error.

VIII. The ALC's De Novo Review Bears Upon the Law Applied by the ALC

As a branch of the executive, the ALC is the final agency arbiter exercising *de novo* review. Under that review, the ALC considers facts and evidence that may not have been before the agency at the time of its decision. Some of that evidence in this case includes the fact that the 2007 Plan is now in effect and the zoning ordinance now expressly prohibits C&D landfills in PUD districts. The ALC makes conclusions of law in light of these facts. Respondents assert that the law applicable at the point of finality of the DHEC decision is not preserved for review. (Resp. Brief p. 22-23). On the contrary, the issue of what law the ALC should have applied is preserved, and this includes both the time at which the staff decision became the "final agency decision," as well as the ALC's *de novo* review.

York County is not proposing that DHEC "remake its original decision," (Resp. Brief p. 22), but rather that at the time that the agency decision became final the 2007 Plan was in effect and the ALC should have applied the 2007 Plan and amended City zoning ordinance in

arriving at its own conclusions on consistency with the then-applicable solid waste management plan.

Respondents' assertion that the application of the 2007 Plan would be "unfair and unworkable" and causing "disarray" is remarkable in light of the history of this particular proposed landfill. (Resp. Brief p. 22-23). What is unfair and unworkable and has caused disarray is the DHEC's decision-making process. First DHEC determined that the proposed landfill was inconsistent with local zoning, which prohibits landfills in PUD districts. DHEC reversed its conclusion after notification to the applicant and a subsequent letter from a City employee. DHEC also initially determined that the proposed landfill was inconsistent with the emergency ordinance, but abruptly changed its conclusions with respect to that decision, as well.

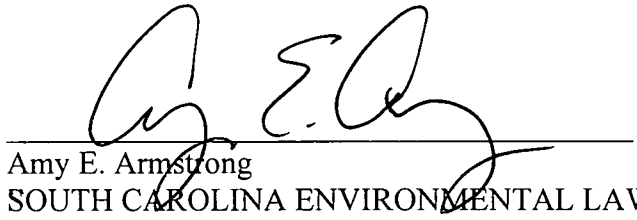
IX. The Respondents Fail to Refute York County's Argument Regarding the Act's Requirement for a Demonstration of Need

The Respondents argue that because the disputed landfill application complies with the Demonstration of Need ("DON") regulations, which they allege are DHEC's interpretation of the Act's requirement for a "demonstration of need," the landfill fulfills the statutory requirement. This argument overlooks the fundamental question of whether DHEC has exceeded its authority in promulgating regulations that materially alter and add to the statute. *Society of Prof. Journalists v. Sexton*, 283 S.C 563, 324 S.E.2d 313 (1984). Under Respondents' argument, the DON regulations effectively turn a requirement for a "demonstration of need" into a mandate for "excess permitted disposal capacity." Converting a "demonstration of need" into a mandate for excess capacity materially alters and adds to the statute, and should be struck down.

CONCLUSION

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

Respectfully submitted,



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CERTIFICATE OF SERVICE

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

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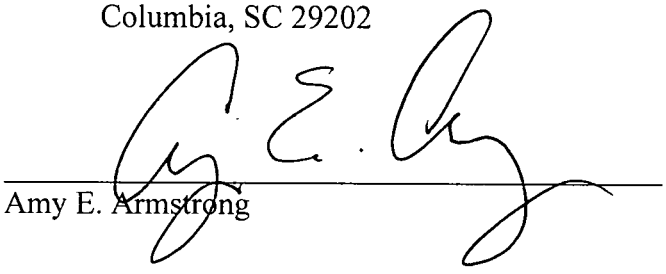

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