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THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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JUN 10 2015

SC Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Shirley C. Robinson, Administrative Law Judge

Unpublished Opinion No. 2015-UP-269

Grand Bees Development, LLC, ..... Respondent,

v.

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

**APPELLANT'S PETITION FOR REHEARING**

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Attorneys for Appellant County of Charleston

## SUMMARY OF THE PETITION FOR REHEARING

The Court of Appeals Unpublished Opinion No. 2015-UP-269 (the “Opinion”), a copy of which is attached hereto, misapprehended the Administrative Law Court’s (“ALC”) authority and responsibility to conduct a *de novo* review of the Department of Health and Environmental Control’s (“DHEC”) decision to grant the modification of its Solid Waste Permit (“permit modification”) to the County of Charleston (“County”). The Court improperly reviewed the ALC’s decision to deny the permit modification to the County as if the ALC were acting in an appellate capacity to determine if DHEC made a proper consistency determination. In a *de novo* contested case hearing, the correctness of DHEC’s consistency determination is not controlling. Rather, the ALC must review, consider, and apply the evidence presented at the contested case hearing, which included consideration of the Charleston County Solid Waste Disposal Ordinance, Chapter 10, Article II, Section 10-22 (the “Ordinance” or “Section 10-22”)<sup>1</sup> in making its own consistency determination.

Given the ALC’s authority and responsibility to conduct a *de novo* contested case hearing rather than an appellate review of DHEC’s consistency determination, this Court overlooked the ALC’s failure to make a specific finding of whether or not the permit modification sought by the County from DHEC is inconsistent with the Ordinance. Therefore, in failing to make this finding, the ALC failed to meet the legal standard necessary to rule on whether or not the permit modification should be granted.

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<sup>1</sup> The County has since repealed this Ordinance.

Alternatively, assuming *arguendo*, that the proper legal standard for the ALC to review the permit modification was to determine if DHEC made a proper consistency determination, without a hearing *de novo* (where the Ordinance was introduced into evidence for the ALC's consideration), this Court misapprehends the County's argument that the permit modification is consistent with local ordinances when the County's ordinances are, in fact, embodied in the Solid Waste Policy and Management Act, codified at S.C. Code Ann. § 44-96-10, et seq. (the "Act") and in the DHEC Solid Waste Regulations ("Regulations").

The Court of Appeals reviewed only the County of Charleston Zoning and Land Development Regulations ("ZLDR") in isolation and determined that the ZLDR did not contain provisions similar to the requirements in the Ordinance that a landfill shall conform to the surrounding environment and future development in the area. The mistake is that the County did not claim DHEC's consideration of the ZLDR **alone** constituted a consistency determination regarding the Ordinance. Instead, the County believes DHEC's determination that the permit modification is consistent with the County's ordinances fully incorporates review, consideration and application of the Act and the S.C. Code of Regulations, and therefore, DHEC's lack of knowledge of the Ordinance does not automatically invalidate DHEC's determination that the permit modification is consistent with it. This Court should have reviewed the Act and Regulations because together, State law and the County's ordinances—not just the County's ZLDR—embody the requirements of the County's local ordinances.

## ARGUMENT

The Appellant County of Charleston respectfully submits that this Court overlooked or misapprehended the legal grounds and reasoning of the lower court's order and that either a rehearing should be granted, or the Opinion vacated, on the following grounds.

**I. THE SOUTH CAROLINA COURT OF APPEALS MISAPPREHENDED THE ADMINISTRATIVE LAW COURT'S AUTHORITY AND RESPONSIBILITY TO CONDUCT A *DE NOVO* REVIEW OF DHEC'S DECISION TO GRANT THE SOLID WASTE PERMIT MODIFICATION TO THE COUNTY, RATHER THAN THE ALC ACTING IN AN APPELLATE CAPACITY TO DETERMINE IF DHEC MADE A PROPER CONSISTENCY DETERMINATION.**

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 Env'tl. Control, 348 S.C. 507, 520, 560 S.E.2d 410, 417 (2002). In the *de novo* contested case hearing, the ALC receives a presentation of evidence and testimony. Engaging & Guarding Laurens County's Env't v. S.C. Dep't of Health & Env'tl. Control, 407 S.C. 334, 344, 755 S.E.2d 444, 449 (2014). In contested permitting cases, the ALC presides as the fact-finder. Id. (citing Brown v. S.C. Dept. of Health & Env'tl. Control, 348, S.C. 512-16, 560 S.E.2d 410, 413-15 (2002)). It is undisputed in the record that the Ordinance was admitted into evidence for review and consideration by the ALC, notwithstanding DHEC's failure to consider it before it issued the permit modification.

In Engaging & Guarding Laurens County's Environment, DHEC declined to consider excess regional capacity as an "additional factor" in determining the need for a landfill in Laurens County. The ALC was not bound by DHEC's findings and, in fact, considered the excess regional capacity and made its own findings of fact, rather than reviewing DHEC's decision in an appellate capacity. See Engaging, 407 S.C. at 334, 755 S.E.2d at 449.

Here, the Court stated, “The ALC found DHEC did not make a proper consistency determination because it failed to consider section 10-22 of the county ordinance.” (Unpublished Opinion No. 2015-UP-26). The ALC issued its order concluding that “[i]n 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.” (R. at 0013). The ALC concluded:

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.

(R. at 0013).

The ALC improperly reviewed DHEC’s decision as if sitting in an appellate capacity, rather than as it properly should have in a *de novo* contested case hearing. The ALC had Ordinance Section 10-22 in the record before it but chose not to consider it *de novo*.

The Court of Appeals overlooked this point when it found “the ALC did not err in finding DHEC failed to make a proper consistency determination.” As the fact-finder, the ALC should not have solely reviewed DHEC’s administrative process, but it should have reviewed the evidence presented and made its own findings on consistency.

**II. THE SOUTH CAROLINA COURT OF APPEALS OVERLOOKED THE ADMINISTRATIVE LAW COURT'S FAILURE TO DETERMINE IN ITS *DE NOVO* CONTESTED CASE HEARING WHETHER CHARLESTON COUNTY ORDINANCE 10-22 WAS CONSISTENT WITH THE SOLID WASTE PERMIT ISSUED TO CHARLESTON COUNTY OR NOT.**

While the ALC determined DHEC did not make a proper consistency determination, the Court of Appeals overlooked the point that the ALC failed to make a consistency determination itself, which is the legal standard to grant or deny a solid waste permit in this State. South Carolina Code Section 44-96-290(F) prohibits DHEC from issuing a permit to expand a solid waste management facility unless the expansion is consistent with local zoning, land use, and other applicable ordinances. Specifically, it provides:

No permit to construct a new solid waste management facility or to expand an existing solid waste management facility within a county or municipality may be issued by the department unless the proposed facility or expansion is consistent with local zoning, land use, and other applicable local ordinances, if any.

S.C. Code Ann. § 44-96-290(F)(2002).

The Court of Appeals affirmed the ALC's finding that "DHEC never considered Section 10-22 in its consistency review." (R. at 0012). However, the ALC's findings on "Consistency with Local Land Use Ordinances" misapprehends S.C. Code Ann. § 44-96-290(F) and the South Carolina Supreme Court's decision in Southeast Resource Recovery, Inc. v. S.C. Dep't of Health & Env'tl. Control, 358 S.C. 402, 595 S.E.2d 468 (2004), because the ALC failed to make a finding of consistency. In Southeast Resource Recovery, Inc., the South Carolina Supreme Court analyzed similar language to the County's Ordinance when it rejected a similar attempt to invalidate a permit modification. The Southeast Resource

Recovery Inc. stated :

Section 10.2 discusses the goals associated with Newberry County's solid waste disposal. Section 10.2 states, in relevant part, that one of the goals is to "preserve, protect, and enhance the environmental quality of Newberry County." This broad, general statement of goals cannot serve as a basis for concluding the proposed facility is inconsistent with Newberry County's plan. To 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. Therefore, the circuit court erred in relying on Section 10.2 in holding the proposed facility inconsistent with the Plan.

The ALC did not find that the permit modification is, or is not, consistent with the Ordinance, which is a prerequisite for granting or denying the County's permit modification. The ALC's finding is not sufficient to constitute a consistency determination in accordance with state law.

The ALC clearly pronounces that DHEC's consideration of the Ordinance would have materially influenced DHEC's decision to grant the permit, but the ALC's Final Order and Decision fails to specifically make a finding that the permit modification is inconsistent with local ordinances. The Charleston County Solid Waste Disposal Ordinance, Section 10-22 provides:

A properly operated sanitary landfill shall be considered acceptable to meeting this requirement and shall meet the following minimum standards . .

. (2) Site location. The disposal shall:

- (a) Be easily accessible to collection vehicles, and where applicable, transfer vehicles;
- (b) Safeguard against water pollution originating from the disposal of solid waste;
- (c) Have an adequate quantity of acceptable earth cover. The cover material should be easily workable and compactible, should be free of large objects that would hinder compaction, and should not contain large amounts of organic matter. It shall be of sufficient quantity and distributed in such a manner as to prevent the harborage and breeding of insects, rodents, and

other animal vectors;

(d) **Conform with the surrounding environment; and**

(e) **Conform with future development of the area.**

Charleston County Code of Ordinances No. 864, Chapter 10, Article II, Solid Waste Disposal Ordinance No. 180, Section 10-22, Adopted March 5, 1974 (Emphasis added).

State law requires that the expansion sought under the permit be consistent with local zoning, land use, and other local ordinances. Similarly, the Ordinance requires, in relevant part, that the expansion conform with the surrounding environment and with future development in the area. Nevertheless, the ALC found that DHEC's failure to review the Ordinance invalidates its consistency determination on its face, but the ALC failed to make its own *de novo* consistency determination in place of DHEC's determination. This finding is a legal requirement, without which this Court should vacate its Opinion affirming the ALC's order.

**III. THE SOUTH CAROLINA COURT OF APPEALS MISAPPREHENDED THE COUNTY'S ARGUMENT REGARDING CHARLESTON COUNTY ORDINANCE 10-22'S REQUIREMENT THAT A DISPOSAL SITE CONFORM WITH THE SURROUNDING ENVIRONMENT AND FUTURE DEVELOPMENT AS CONCEPTS IDENTIFIED SOLELY IN ITS ZLDR, RATHER THAN CONCEPTS IDENTIFIED IN THE SOLID WASTE MANAGEMENT ACT AND THE ZLDR.**

Even if the proper legal standard for the ALC to review the Solid Waste Permit to the County is a *de novo* review of the record before DHEC only, to determine if DHEC made a proper consistency determination, the Court of Appeals misapprehends the County's argument that the Ordinance's concepts are, in fact, embodied in the Solid Waste Policy and Management Act, DHEC's Regulations, and the ZLDR, which were all reviewed, considered, and applied by DHEC—and not solely within the ZLDR. The Act states “[i]t is the purpose of this article to . . . (3) require local governments to adequately plan for and

provide efficient, environmentally acceptable solid waste management services and programs; (4) promote the establishment of resource recovery systems that preserve and enhance the quality of air, water, and land resources; (5) ensure that solid waste is transported, stored, treated, processed, and disposed of in a manner adequate to protect human health, safety, and welfare and the environment; . . . .” S.C. Code Ann. § 44-96-20(B). Similarly, the Regulations provide, “Class Two landfills shall be consistent with the State and the Region/County Solid Waste Management Plans, local zoning, land use and other applicable ordinances.” (DHEC Solid Waste Regulation 61-107.19, Part IV(A)(5)). In addition, the ZLDR Article 1.5 Purpose and Intent, provides that:

**This Ordinance is intended to protect the health, safety, and general welfare of existing and future residents of Charleston County by:**

- A. Implementing the goals, objectives and policies of the Comprehensive Plan;
- B. Providing for adequate light, air, and open space;
- C. Preventing overcrowding of land, to avoid undue concentration of population, and to lessen congestion in the streets;
- D. Protecting and preserving scenic, historic, or ecologically sensitive areas;
- E. Regulating the density and distributions of populations and the uses of buildings, structures and land for trade, industry, residence, recreation, agriculture, forestry, conservation, airports and approaches thereto, water supply, sanitation, protection against floods, public activities, and other purposes; . . . .**

ZLDR Art. 1.5, Purpose and Intent (Emphasis added).

These requirements exemplify and reinforce the very requirements imposed by the Ordinance for landfills to conform with the environment and future development. Section 10-22 does not alter or add new criterion. Instead, it is simply a recognition that landfills must fit within the infrastructure of local communities. Here, the fallacy of the ALC and the Court’s contrary finding is that the County does not claim DHEC’s consideration of the

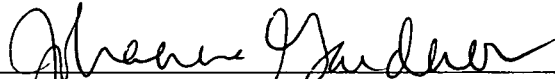
ZLDR **alone** constituted a complete consistency determination regarding the Ordinance. Instead, the County contends DHEC's determination that the permit modification is consistent with the County's ordinances fully incorporates review, consideration, and application of, and is consistent with, the Act, the Regulations and the ZLDR. In addition to the ZLDR, the Court of Appeals should have reviewed the Act and the Regulations because together, State law, State regulations, and the County's ordinances—not just the County's ZLDR—embody the requirements of the County's local ordinances. Therefore, this Court should also review, consider, and apply State law and applicable regulations, in addition to the ZLDR, in reviewing the ALC's consistency determination.

### CONCLUSION

For the foregoing reasons, the Appellant County of Charleston respectfully requests this Court vacate its Opinion No. 2015-UP-269 and grant this Petition for Rehearing.

Respectfully submitted,

### COUNTY OF CHARLESTON



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BERNARD E. FERRARA, JR., Deputy County Attorney  
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### ATTORNEYS FOR APPELLANT

Charleston, South Carolina  
June 8, 2015

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE  
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING  
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA  
In The Court of Appeals**

Grand Bees Development, LLC, Respondent,

v.

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

Appellate Case No. 2013-001141

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Appeal From The Administrative Law Court  
Shirley C. Robinson, Administrative Law Judge

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Unpublished Opinion No. 2015-UP-269  
Heard October 9, 2014 – Filed May 27, 2015

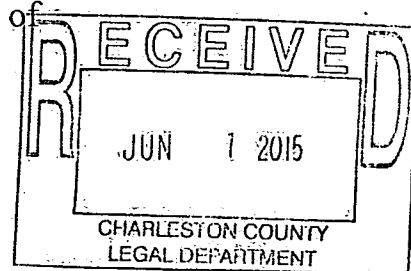
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**AFFIRMED**

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Joseph Dawson, III, Bernard E. Ferrara, Jr., Austin  
Adams Bruner, Bradley Allen Mitchell, and Johanna  
Serrano Gardner, all of North Charleston, for Appellant  
County of Charleston.

Etta R. Linen and Jacquelyn Sue Dickman, both of  
Columbia, for Appellant South Carolina Department of  
Health and Environmental Control.



George Trenholm Walker, of Pratt-Thomas Walker, PA,  
of Charleston, and Jamie A. Khan and Ross A. Appel,  
both of McCullough Khan, LLC, of Charleston, for  
Respondent.

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**PER CURIAM:** The County of Charleston and the South Carolina Department of Health and Environmental Control (DHEC) appeal the administrative law court's (ALC's) order vacating DHEC's granting of a permit modification for the expansion of the Bee's Ferry Landfill. The County and DHEC argue the ALC erred in finding DHEC failed to properly determine whether the permit modification is consistent with all applicable local ordinances. We affirm.

### **I. Facts and Procedural History**

Grand Bees Development, LLC has owned approximately 311 acres located off Bees Ferry Road in Charleston since November 15, 2004. The County owns and operates the Bees Ferry Landfill, which is also located on Bees Ferry Road. The Grand Bees property and the landfill share a common boundary.

The Grand Bees property is zoned Planned Unit Development by the City of Charleston and is designated for residential land use. The property is part of a larger development called Bees Landing—also known as Grand Oaks—which was first approved by City Council in 1993. At the time of the hearing before the ALC, Grand Oaks consisted of approximately 1,500 homes in addition to parks, pools, and other infrastructure. The Grand Bees property takes up approximately twenty-six percent of the total land area in Grand Oaks.

The County has operated the landfill at its current location since approximately 1977 and currently operates under a DHEC permit issued in 1997. The landfill includes several cells; one of the cells consists of construction, demolition, and land-clearing debris and is classified as a "Class II" mound. In November 2007, the County submitted a permit modification for vertical and lateral expansion of the mound. This expansion would increase the height of the mound from seventy-four feet above mean sea level to one hundred sixty-eight feet above mean sea level and expand the footprint of the mound by 5.5 acres. The expansion would increase the mound's maximum disposal capacity from 2.5 million to 5.4 million cubic yards. DHEC granted the permit modification on January 17, 2008, and Grand Bees learned of the modification during the following fifteen days.

Grand Bees requested a contested case hearing before the ALC to challenge DHEC's decision to grant the permit modification. The ALC held DHEC erred in granting the modification because the County failed to obtain a "special exception" in accordance with its own zoning ordinances and the County of Charleston Zoning and Land Development Regulations (ZLDR). Consequently, the ALC vacated the permit modification and reversed and remanded the matter to DHEC.

After the ALC vacated the permit modification, the County amended its zoning ordinances to eliminate the requirement of a "special exception" as a precondition to expanding the landfill. After the matter was remanded, DHEC reconsidered the 2007 permit application, and the County provided some additional zoning information to supplement the application. DHEC did not readdress any of its previous consistency determinations, but it did determine compliance with the ZLDR. Kent Coleman—director of DHEC's Division of Mining and Solid Waste Management—testified DHEC also consulted updated aerial photographs.

On April 12, 2011, a DHEC employee sent an internal memorandum stating department staff initiated a review to determine if the expansion is consistent with local zoning. This review included County zoning ordinances, a County zoning map, and a letter from the County's Planning Department. The memorandum explained DHEC determined the proposed expansion was consistent with the County's land-use planning and zoning; however, it did not make reference to any other local ordinances.

DHEC granted the second permit modification authorizing the same expansion as the first permit modification, and Grand Bees requested a contested case hearing before the ALC. The ALC reversed DHEC's decision and vacated the second permit modification.

## **II. Law and Analysis**

This court may reverse a decision of the ALC if it is affected by an error of law or is "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." S.C. Code Ann. § 1-23-610(B) (Supp. 2014). DHEC may not issue a permit to expand a landfill "unless the proposed facility or expansion is consistent with local zoning, land use, and other applicable local ordinances, if any." S.C. Code Ann. § 44-96-290(F) (2002). Section 10-22 of Ordinance 180 of the Charleston County Code of Ordinances—adopted in 1974—provides minimum

standards for the operation of landfills and requires landfills to "[c]onform with the surrounding environment" and "[c]onform with future development of the area."

The ALC found DHEC did not make a proper consistency determination because it failed to consider section 10-22 of the county ordinance. The parties do not dispute that the ordinance is still in force or that DHEC did not consider the ordinance when making its consistency determination. However, the County argues DHEC did not need to consider the ordinance to determine consistency. The County's position is based on the claim that the ZLDR addresses the same substantive requirements as section 10-22 and is more specific; therefore, DHEC's consideration of the ZLDR also constituted a consistency determination regarding section 10-22.

We examined the ZLDR in detail and cannot find provisions similar to the requirements in section 10-22 that a landfill conform to the surrounding environment and future development in the area. Moreover, in its brief and at oral argument, the County did not identify a provision in the ZLDR imposing the same requirements as section 10-22.<sup>1</sup> Consequently, we find the ALC did not err in finding DHEC failed to make a proper consistency determination. Because this finding requires that we affirm the ALC's order vacating the permit modification, it is unnecessary for us to consider the other issues raised by the County and DHEC, and the order of the ALC is **AFFIRMED**.

**FEW, C.J., and THOMAS and LOCKEMY, JJ., concur.**

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<sup>1</sup> The County and DHEC assert several other arguments that DHEC's failure to make a consistency determination as to section 10-22 should not invalidate the permit modification. We do not agree with any of the arguments, and adopt the reasoning of the ALC as to each argument it addressed. Any additional arguments not addressed by the ALC are not preserved. *See Travelscape, LLC v. S.C. Dep't of Revenue*, 391 S.C. 89, 109-110, 705 S.E.2d 28, 39 (2011) (holding arguments were unpreserved because the ALC did not address the arguments in its final order).

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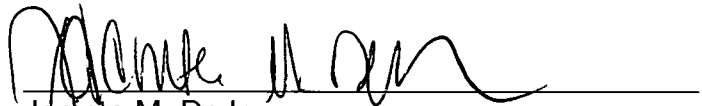
**CERTIFICATE OF SERVICE**

I certify that I have served Appellant County of Charleston's **Petition for Rehearing**  
on all counsel of record by depositing a copy of the same in the United States Mail,  
postage prepaid, on June 9, 2015, addressed as follows:

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ASSISTANT COUNTY ATTORNEY

June 9, 2015

Honorable Jenny Abbott Kitchings  
Clerk of Court  
The South Carolina Court of Appeals  
Post Office Box 11629  
Columbia, South Carolina 29211

**RECEIVED**  
JUN 10 2015  
SC Court of Appeals

Re: Grand Bees Development, LLC v. South Carolina Department of Health  
and Environmental Control and County of Charleston  
Appellate Case No. 2013-001141

Dear Ms. Kitchings:

Enclosed please find for filing the original and six (6) copies of Appellant's Petition for Rehearing along with the Certificate of Service and check in the amount of \$25.00 for the filing fee. I would appreciate your acknowledging receipt of these documents by date-stamping the extra copy of the enclosed and returning it to me in the enclosed envelope.

By copy of this letter, I am serving all parties with these documents. Should you have any questions or need additional information, please do not hesitate to contact me.

Sincerely,

CHARLESTON COUNTY ATTORNEY'S OFFICE

A handwritten signature in cursive script that reads "Johanna S. Gardner".

Johanna S. Gardner

JSG/

Enclosures

cc: Etta R. Williams Linnen, Esquire  
G. Trenholm Walker, Esquire  
Jamie A. Khan, Esquire  
Ross A. Appel, Esquire