

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM THE ADMINISTRATIVE LAW COURT

JUN 22 2015

Shirley C. Robinson, Administrative Law Judge

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SC Court of Appeals

Unpublished Opinion No. 2015-UP-269

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

v.

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

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**APPELLANT SOUTH CAROLINA DEPARTMENT OF HEALTH AND  
ENVIRONMENTAL CONTROL'S RETURN TO APPELLANT CHARLESTON  
COUNTY'S PETITION FOR REHEARING**

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## SUMMARY

Appellant, South Carolina Department of Health and Environmental Control ("DHEC" or "the Department") submits this Return to the Petition for Rehearing of Appellant Charleston County ("Petitioner"). DHEC concurs with Petitioner's position that the Department's permit determination should not have been reversed on grounds of the agency's failure to know about and consider the 1974 ordinance. DHEC agrees with the Petitioner's assertion that the Department made a proper consistency determination when the South Carolina Solid Waste Policy and Management Act ("SWPMA"), the DHEC Solid Waste Regulations, the County Zoning and Land Development Regulations ("ZLDR") and the 1974 local ordinance are applied as a whole. Pursuant to the consistency requirement of 344-96-260(F), the agency decision when viewed as a whole is correct as a matter of law.

DHEC also concurs that if the Department decision was incomplete because the Department did not specifically and separately apply the 1974 ordinance, the proper remedy was not to reverse and invalidate the permit modification. However, DHEC submits that, under the circumstance in this case, remanding the matter to DHEC for further review and consideration would be the proper remedy as further set forth below.

## AGRUMENT

### THE PERMIT MODIFICATION SHOULD NOT BE INVALIDATED BUT SHOULD BE REMANDED TO DHEC

Petitioners rely on Engaging & Guarding Laurens Cnty.'s Env't v. S.C. Dep't of Health & Env'tl. Control, 407 S.C. 334, 344, 755 S.E.2d 444 (2014), for the proposition that the ALC should make "its own consistency determination." In that case the Supreme Court stated, "the ALC is authorized to make a final determination – after a final agency decision and subject to judicial review – as to whether an administrative agency should have granted or denied a particular permit." Id. at 344, 755 S.E.2d at 449. However, the Supreme Court went on to specifically state, "We emphasize that in this case, the ALC did not conceive a new factor, nor did it consider evidence outside of the existing record. Instead, in determining the Landfill was not needed, the ALC considered and utilized in its decision a factor that was discussed during the public comment period and tried at the ALC hearing." Id. at 345, 755 S.E.2d at 450. Here, the 1974 ordinance, which was put into evidence at the 2012 ALC hearing, was "a new factor."<sup>1</sup> The ordinance was not submitted, introduced or discussed at the agency level at any time, although this landfill permit modification has been in litigation since 2008. Thus, this case is the opposite of Engaging & Guarding Laurens Cnty.'s Env't and should have a different remedy.

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<sup>1</sup> Local ordinance Section 10-22 has been repealed.

As the Petitioner contends, the ALC never found that the proposed expansion of the Landfill was not “consistent with local zoning, land use, and other applicable local ordinances, if any....” Since the ALC did not find that DHEC’s determination of consistency was actually wrong, but rather found that it was incomplete, it should have remanded the case to DHEC for further consideration and review. The ALC should have remanded this matter to the Department to allow it the opportunity to make an initial determination regarding whether the proposed landfill expansion is consistent with Section 10-22. Judge Anderson did just that in his 2009 contested case order on this same landfill permit modification litigation. Then Judge Anderson found that a special exception was needed for the landfill expansion and remanded the case to the Department for further review under the County’s ZLDR.

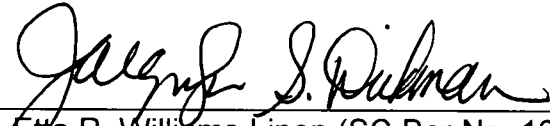
DHEC’s permitting function under the SWMPA, which includes making consistency determinations, is at the core of the Department’s delegated responsibility and authority. DHEC is charged with ensuring that solid waste facilities meet the requirements for permitting. See Southeast Res. Recovery Inc. v. S.C. Dep’t of Health & Env’tl. Control, 358 S.C. 402, 408, 595 S.E.2d 468, 471 (2004).

### **CONCLUSION**

For the foregoing reasons, Appellant DHEC respectfully concurs that this Court should vacate its Opinion No. 2015-UP-269, and submits that this matter should be remanded to DHEC for further consideration of the 1974 Ordinance.

***(Signature Page to Follow)***

SOUTH CAROLINA DEPARTMENT  
OF HEALTH AND ENVIRONMENTAL  
CONTROL



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Columbia, South Carolina  
June 19, 2015

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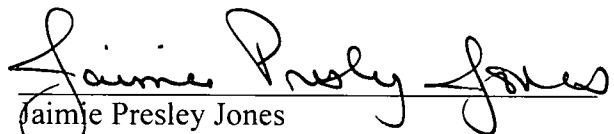
**CERTIFICATE OF SERVICE**

I, Jaimie Presley Jones, with the South Carolina Department of Health and Environmental Control, hereby certify that I have this 19<sup>th</sup> day of June, 2015 served the **Appellant South Carolina Department of Health and Environmental Control's Return to Appellant County of Charleston's Petition for Rehearing** upon all parties and counsel of record via U.S. Mail, first-class, with sufficient postage paid, at the address indicated below:

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Jaimie Presley Jones  
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Catherine E. Heigel, Director

*Promoting and protecting the health of the public and the environment*

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June 19, 2015

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JUN 22 2015  
SC Court of Appeals

VIA ~~US MAIL~~ DELIVERY  
Honorable Jenny Abbott Kitchings  
Clerk, South Carolina Court of Appeals  
1220 Senate Street  
Columbia, South Carolina 29211

Re: Grand Bees Development, LLC vs. South Carolina Department of Health and Environmental Control and County of Charleston  
Appellant Case No.: 2013-001141  
OGC File No.: 21294.1

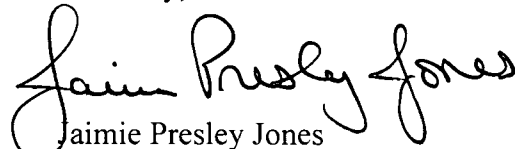
Dear Ms. Kitchings:

Enclosed for filing, please find the original and six (6) copies of the **Appellant South Carolina Department of Health and Environmental Control's Return to Appellant Charleston County's Petition for Rehearing** with a Certificate of Service in the above referenced matter. I would appreciate your filing the originals and returning a copy for our records to our office in the enclosed self-addressed stamped envelope.

By copy of this letter, I am serving a copy of the same on opposing counsel.

If you have any questions or need additional information, please do not hesitate to contact our office.

Sincerely,

  
Jaimie Presley Jones  
Office of General Counsel

/dkh

Enclosures

cc: Jamie A. Khan, Esquire  
G. Trenholm Walker, Esquire  
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