

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Shirley C. Robinson, Administrative Law Judge

Unpublished Opinion No. 2015-UP-269

RECEIVED

JUL 01 2015

SC Court of Appeals

Grand Bees Development, LLC, Respondent,

vs.

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

**RETURN OF RESPONDENT
TO APPELLANT COUNTY
OF CHARLESTON'S PETITION FOR REHEARING**

G. Trenholm Walker
PRATT-THOMAS WALKER, P.A.
P.O. Drawer 22247
Charleston, SC 29413-2247
Phone: (843) 727-2200

Jamie A. Khan
Ross A. Appel
MCCULLOUGH KHAN, LLC
359 King Street, Suite 200
Charleston, SC 29401
Phone: (843) 937-0705

ATTORNEYS FOR RESPONDENT
GRAND BEES DEVELOPMENT, LLC

INTRODUCTION

On May 27, 2015, this Court entered Unpublished Opinion No. 2015-UP-269 (“Opinion”) affirming the decision of the ALC. This Court held that the ALC did not err in finding DHEC failed to make a proper consistency determination by neglecting to consider county ordinance section 10-22 that requires the expansion of a solid waste landfill to be compatible with the surrounding environment and future development in the area .

On June 9, 2015, Appellant County of Charleston (the “County”) filed its Petition for Rehearing. The County admits in its Petition for Rehearing that the consistency determination of Appellant South Carolina Department of Health & Environmental Control (“DHEC”) under S.C. Code Ann. §44-96-290(F) was fundamentally flawed for failure to consider county ordinance section 10-22 that directly addresses expansions of solid waste facilities. Even so, the County asserts that the decision of the Administrative Law Court (“ALC”) should be reversed because the ALC did not make a separate determination that the requested enormous increase in the size and elevation of the C&D mound was inconsistent with the overlooked ordinance.

The Court should deny the County’s Petition. This Court previously rejected this argument, and the County’s contention does not meet the standard for reversal even if the Court were to once again consider the County’s position.

DHEC did not file a Petition for Rehearing. In its Return to the County’s Petition for Rehearing, DHEC asks this Court to vacate the Opinion and remand the matter to DHEC for further consideration. Neither of these actions is an authorized or appropriate relief to be obtained by return to the County’s Petition for Rehearing currently before this

Court. First, DHEC has never requested this matter be remanded for further consideration and it did not do so in its Motion to the ALC for reconsideration. (R.pp. 0545-0559). Second, even if DHEC had preserved that position by properly moving before the ALC, the motion currently before the Court is the County's Petition for Rehearing which does not seek, and therefore cannot result in, a remand of this matter to DHEC.

STANDARD OR REVIEW

"[T]he purpose of a petition for rehearing is not just to have the case tried in this court a second time." Kennedy v. S.C. Ret. Sys., 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001). "It is a rare thing when the court grants such a petition. Usually, they are dismissed with a simple order to that effect, for the reason that they contain nothing but a 'rehash' of what the losing party has said before, matters which the court has already considered well and disposed of." Arnold v. Carolina Power & Light Co., 168 S.C. 163, 167 S.E. 234, 238 (1933).

ANALYSIS OF COUNTY'S PETITION FOR REHEARING

Respondent submits that nothing has been overlooked or misapprehended by the Court. The County's Petition for Rehearing is no more than a rehash of its overarching argument that neither the ALC nor this Court need concern itself with section 10-22. In addition, the County raises for the first time a new argument the County did not preserve before the ALC nor argue in its briefs before this Court.

In affirming the decision of the ALC and finding in favor of Respondent Grand Bees, this Court held:

- (1) The ALC did not err in finding DHEC failed to make a proper consistency determination;
- (2) Because the ALC made no error, this Court was required to and did therefore affirm the ALC's order vacating the permit modification;
- (3) Having affirmed the ALC, it was unnecessary for this Court to consider any other issues raised by the County and DHEC; and
- (4) This Court disagreed with DHEC and the County as to all other arguments raised before the ALC, adopted the reasoning of the ALC, and ruled any additional issues not addressed by the ALC are not preserved.

Appellant's Petition for Rehearing asserts this Court misapprehended the ALC's authority in that the ALC "should have reviewed the evidence presented and made its own findings on consistency" and that because "the ALC failed to make a consistency determination itself" the matter should be opened for rehearing.¹ Petition for Rehearing at 5 and 6.

Contrary to the assertions of the Petition for Rehearing, the ALC stated the appropriate standard and then applied the correct standard in making its decision "as factfinder" by conducting a "*de novo* determination regarding the matters at issue." Final Order and Decision (R.p. 0011) (emphasis in original); see also Final Order and Decision (R.p. 0014) (stating the ALC was acting as a "*de novo* fact finder" to determine "whether DHEC granted the Second Permit Modification in compliance with *all*

¹ The County's Petition for Rehearing is organized in three sections. Because the first and second sections are essentially a restatement of the same matter, both are addressed together in this Response.

applicable laws” citing Brown v. S.C. Dep't of Health & Env'tl. Control, 348 S.C. 507, 520, 560 S.E.2d 410, 417 (emphasis in original).

In conjunction with its *de novo* factual review, the ALC did analyze South Carolina Code Ann. Section 44-96-290(F)(2002), which does not allow DHEC to issue a permit for expansion of a landfill “unless the proposed facility or expansion is consistent with local zoning, land use, and other applicable local ordinances, if any.” See Final Order and Decision. (R.p. 0011). In applying S.C. Code Section 44-96-290(F), the ALC found “evidence of substantial existing residential development in the area, and future development in the area, including, but not limited to, ... development on the Grand Bees Property” and concluded that expansion of the landfill is inconsistent with Section 10-22 of Ordinance 180 of the Charleston County Code of Ordinances. Final Order and Decision. (R.p. 0011).

The Final Order and Decision of the ALC clearly demonstrates sufficient findings and a conclusion that the expansion of the landfill is not consistent with applicable laws. Upon reviewing the decision of the ALC, this Court affirmed, correctly noting in its Opinion that Section 10-22 requires landfills “[c]onform with the surrounding environment” and “[c]onform with future development of the area.” Opinion at 4, quoting Section 10-22 of Ordinance 180, Charleston County Code of Ordinances. This Court properly affirmed the ALC decision and rehearing is not warranted.

In support of its Petition for Rehearing, the County also cites Engaging & Guarding Laurens County's Env't v. S.C. Dep't of Health & Env'tl. Control, 755 S.E.2d 444, 407 S.C. 334 (S.C. 2014). In that case the ALC conducted a contested case hearing. “The sole issue for determination at the hearing was whether ‘additional

factors' beyond those listed in the DON [Demonstration of Need] Regulation required DHEC to deny the DON request" Engaging & Guarding Laurens County's Env't v. S.C. Dep't of Health & Env'tl. Control, 755 S.E.2d 444, 447, 407 S.C. 334, 339 (2014). Affirming the decision of the ALC, the Supreme Court held that it is proper (as was the case below here) for the ALC to consider issues beyond those that DHEC included in its permit review and that the appellate courts should not disturb the ALC findings upon completion of said consideration. See also Risher v. S.C. Dep't of Health & Env'tl. Control, 393 S.C. 198, 204, 712 S.E.2d 428, 431 (2011) (Decisions of the ALC should be upheld when supported by substantial evidence in the record.)

The County's Petition for Rehearing ignores the substantial evidence before the ALC, the ALC's litany of findings regarding DHEC's failure to consider all required and applicable laws, and the ALC's conclusion regarding consistency per S.C. Code Section 44-96-290(F). The ALC explicitly found that the "long period of time" since "the County's application in 2007, the rapid changes in residential development in the surrounding area since that time, the repeal ... of the governing regulation, and the outdated materials on which the permit relies including ... the vicinity map from 2001" all invalidate DHEC's decision on the permit. Final Order and Decision. (R.p. 0019). Furthermore, the ALC repeatedly states it was sitting *de novo*. See Final Order and Decision. (R.pp. 0012, 0014, 0019).

Neither the Record nor Engaging & Guarding Laurens County's Env't v. S.C. Dep't of Health & Env'tl. Control, 755 S.E.2d 444, 407 S.C. 334 (2014), supports DHEC's assertions that this Court "misapprehended" the ALC's "authority and responsibility" or that this Court acted "improperly" in its review of "the ALC's decision to

deny the permit.” That is the standard for a motion for rehearing and it is not met here. See South Carolina Appellate Court Rule 221(a).

Furthermore, to the extent that the County raised any of the grounds of its Petition for Rehearing in its briefs, this Court addressed all those in the Opinion when it ruled, “Any additional arguments not addressed by the ALC are not preserved.” Opinion at FN.#1 citing *Travelscape, LLC v. S.C. Dep’t of Revenue*, 319 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). In particular, the County did not present to the ALC the ground in its Petition that the ALC failed to make a detailed finding of the inconsistency of the requested expansion of the C&D mound with the requirement of compatibility imposed by section 10-22. Therefore, the issue is not preserved.

The grounds for the County’s Motion for Reconsideration filed with the ALC did not raise the argument that the ALC was required to make a specific determination that the proposed permit modification was inconsistent with ordinance 10-22. Instead, in its Motion for Reconsideration before the ALC, the County made numerous other arguments -- that DHEC was not required to consult all applicable local land use ordinances, that ordinance 10-22 was in effect embodied in other County ordinances as well as the applicable regulations and statutes, that the wording of 10-22 was not sufficiently specific to set forth a standard, and that the City of Charleston’s approval of a planned unit development (“PUD”) that included the Grand Bees Property years before the request for permit modification established consistency of future residential development with a greatly expanded C&D mound. County’s Motion for Reconsideration. (R.pp. 0023 – 0026). Nowhere in its Motion for Reconsideration

before the ALC did the County raise the argument set forth in its Petition for Rehearing to this Court.

In a final attempt to justify its request for rehearing, the Petition pretends the Court misunderstood the County's positions. That is not grounds for rehearing. Nonetheless, the County attempts to clarify as follows: "the County contends DHEC's determination that the permit modification is consistent with the County's ordinances fully incorporates review, consideration, and application of ... the ZLDR." Petition at 10. This is just a restatement of the County's briefing in this matter. The County then goes on to confusingly assert that "Section 10-22 does not alter or add new criterion" to the consistency consideration. Petition at 9.

As this Court pointed out in affirming the ALC, "the County did not identify a provision in the ZLDR imposing the same requirements as section 10-22 [of the Charleston County Code of Ordinances]." Opinion at 4. Therefore, this Court held the requirements of Section 10-22 cannot be said to be embodied in or addressed by other provisions of the ZLDR. Id. It is clear, then, that this Court properly concluded "the ALC did not err in finding DHEC failed to make a proper consistency determination." Id.

There was no confusion as to the County's position before this Court. And nothing in the Petition for Rehearing articulates a reason for this Court to rehear or to reconsider its decision to affirm the ALC. Further, the additional grounds for the ALC's final decision constitute additional sustaining grounds for this Court's affirmance of the ALC. O'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000).

CONCLUSION

In order to warrant rehearing, a petitioner must present this Court with particularity the points allegedly overlooked or misapprehended by the Court in its analysis. See South Carolina Appellate Court Rule 221(a). The County has failed to present any legitimate issue, much less a misapprehension of law or fact, that would justify rehearing. Further, the County did not raise before the ALC the specific substantive issue argued by it and cannot raise it for the first time in its Petition for Rehearing.

Likewise, the relief requested by DHEC in its Return to the County's Petition for Rehearing should not be granted by this Court. DHEC has never requested this matter be remanded for further consideration and it cannot do so now for the first time in response to the County's Petition for Rehearing.

Therefore, for the foregoing reasons, the County's Petition for Rehearing should be denied.

Respectfully Submitted,

BY: 

G. Trenholm Walker, Esquire
PRATT-THOMAS WALKER, P.A.
Post Office Drawer 22247
Charleston, SC 29413-2247
Phone: 843.727.2200
gtw@p-tw.com

Jamie A. Khan, Esquire
Ross A. Appel, Esquire
MCCULLOUGH KHAN, LLC

359 King Street, Suite 200
Charleston, SC 29401
Phone: (843) 937-0705
jamie@mklawsc.com

Charleston, South Carolina
June 29, 2015

ATTORNEYS FOR RESPONDENT,
GRAND BEES DEVELOPMENT, LLC

STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

APPEAL FROM THE ADMINISTRATIVE LAW COURT

JUL 01 2015

Shirley C. Robinson, Administrative Law Judge

SC Court of Appeals

Unpublished Opinion No. 2015-UP-269

Grand Bees Development, LLC, Respondent,

vs.

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

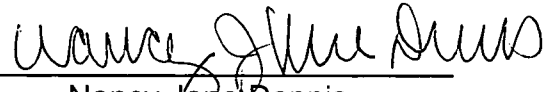
CERTIFICATE OF SERVICE

I, Nancy Jane Dennis, hereby certify that I have on this 29th day of June, 2015, served a copy of Respondent Grand Bees Development, LLC's Return to Appellant County of Charleston's Petition for Rehearing upon all parties and counsel of record in the above-captioned case, via United States Mail, First class, postage prepaid, addressed as follows:

Joseph Dawson, III, Esq.
Bernard E. Ferrara, Jr., Esq.
Austin A. Bruner, Esq.
Bradley A. Mitchell, Esq.
Johanna S. Gardner, Esq.
Charleston County Attorney's Office
4045 Bridge View Drive
North Charleston, South Carolina 29405
ATTORNEYS FOR THE COUNTY OF CHARLESTON

Etta R. Williams Linen, Esq.
Jacquelyn S. Dickman, Esq.
Assistant General Counsel for SC DHEC
Office of General Counsel
South Carolina Department of Health
and Environmental Control

2600 Bull Street
Columbia, South Carolina 29201-1708
ATTORNEYS FOR SCDHEC

A handwritten signature in cursive script, appearing to read "Nancy Jane Dennis", written in black ink.

Nancy Jane Dennis

Charleston, SC

PRATT-THOMAS | WALKER

ATTORNEYS AT LAW
PROFESSIONAL ASSOCIATION

16 CHARLOTTE STREET
CHARLESTON, SC 29403

PO DRAWER 22247
CHARLESTON, SC 29413-2247

PHONE: 843.727.2200
FAX: 843.727.2238

WWW.P-TW.COM

(843) 727-2208 (direct dial)
(843) 727-2231 (fax)
gtw@p-tw.com (e-mail)

June 29, 2015

RECEIVED
JUL 01 2015
SC Court of Appeals

U.S. MAIL FACSIMILE FEDERAL EXPRESS EMAIL

Hon. Jenny Abbott Kitchings
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: Grand Bees Development, LLC v. County of Charleston and SC-DHEC
Unpublished Opinion No. 2015-UP-269
Our File No.: 7087.002

Dear Ms. Kitchings:

Enclosed please find the original and six copies of Respondent Grand Bees Development, LLC's Return to Appellant County of Charleston's Petition for Rehearing with Certificate of Service.

Thank you for your courtesies in filing these with the Court. With kind regards, I am,

Sincerely,

PRATT-THOMAS WALKER, P.A.



G. Trenholm Walker

GTWnjd

Enclosures (As noted above)

c: Joseph Dawson, III, Esq.
Bernard E. Ferrara, Jr., Esq.
Austin A. Bruner, Esq.
Bradley A. Mitchell, Esq.
Johanna S. Gardner, Esq.
Etta R. Williams Linen, Esq.

Jacquelyn S. Dickman, Esq.
Jamie A. Kahn, Esq.
Ross A. Appel, Esq.