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S.C. Supreme Court

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Honorable Shirley C. Robinson, Administrative Law Judge

Unpublished Opinion No. 2015-UP-269 (Ct.App. filed May 27, 2015)

Appellate Case No. 2015-001782

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

v.

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

Defendants

Of which, County of Charleston is.....Petitioner.

RESPONDENT'S RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

On September 1, 2011, the South Carolina Department of Environmental Control (“DHEC”) approved an application by Charleston County (the “County”) to modify DHEC Permit Number 101001-1201, expanding the construction, demolition, and land clearing debris or “Class II” component (the “Mound”) of the County-owned Bees Ferry Landfill (the “Second Permit Modification”). (R.p. 0006).

Respondent, Grand Bees Development, LLC (“Grand Bees”), the owner of property adjacent to the landfill, timely filed a request for a Final Review Conference with the DHEC Board on September 12, 2011. (R.p. 0001). The DHEC Board denied the request on October 13, 2011. (R.p. 0001).

Grand Bees subsequently filed a timely Request for Contested Case Hearing on November 2, 2011. (R.p. 0001). The Honorable Shirley C. Robinson, Administrative Law Judge, conducted the contested case hearing on March 20, 2012. (R.p. 0002).

By Order entered March 19, 2013, Judge Robinson reversed and vacated the Second Permit Modification, finding that DHEC violated state statutes and regulations and that the Second Permit Modification itself violated state statutes and regulations (the “Order”). (R.pp. 0011-0018). Specifically, the Order found: (1) DHEC failed to perform a complete and correct consistency determination pursuant to S.C. Code Ann. §44-96-290(F) because it failed to identify and review Section 10-22 of the Charleston County Code of Ordinances; (2) the Second Permit Modification was inconsistent with the County’s vegetative buffer and landscaping regulations found in Article 9.5 of its Zoning and Land Development Regulations (“ZLDR”); and (3) the Second Permit Modification violated S.C. Code Ann. Regs. 61-107.19, Part IV(B)(1)(a) because approximately 130

approved and planned residential lots on the Grand Bees property are located within 1,000 feet of the Landfill's fill area boundary. (R.pp. 0011-0018).

On March 29, 2013, both the County and DHEC filed their respective motions for reconsideration. (R.p. 0022). The ALC denied both by order dated May 8, 2013. (R.pp. 0020-0021). The County and DHEC both filed their Notices of Appeal with the Court of Appeals on May 29, 2013. (R.p. 0033). The Court of Appeals consolidated the appeals of the ALC's Order.

On May 27, 2015, the Court of Appeals entered Unpublished Opinion No. 2015-UP-269 ("Opinion") affirming the decision of the ALC. (App.p. 0765). The Court of Appeals upheld the ALC's decision that DHEC failed to make a proper consistency determination in not considering County Code of Ordinances Section 10-22 ("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. (App.pp. 0765-0768). Section 10-22 is not part of the County's ZLDR. Instead, it is part of an entirely separate ordinance titled "Disposal Sites and Facilities," ("Section 10-22"). (R.p. 0443).

The Court of Appeals held the ALC's reversal of the permitting decision was warranted based on her determination that DHEC failed to consider Section 10-22 in satisfying its obligation to decide whether the application conformed to all local laws as required under S.C. Code Ann. § 44-96-290(F).¹ Although there were two additional grounds for the ALC's reversal of DHEC's decision on the Second Permit Modification,

¹ Section 44-96-290(F) provides, in pertinent part, that "[n]o 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" (Double emphasis added.)

the Court of Appeals ruled it was unnecessary to reach these additional sustaining grounds.

On June 9, 2015, the County filed its Petition for Rehearing in the Court of Appeals; DHEC did not file a petition for rehearing. (App.pp. 0769-0784). On June 29, 2015, Grand Bees filed its Return to the County's Petition for Rehearing. (App.pp. 0785-0794). Finding no material fact or principle of law was overlooked or disregarded, the Court of Appeals denied the County's Petition for Rehearing on July 17, 2015. (App.pp. 0795-0796). The County filed its Petition for Writ of Certiorari on August 17, 2015.

ARGUMENT

- I. THE FIRST ISSUE ASSERTED IN THE PETITION FOR CERTIORARI WAS NOT RAISED BEFORE THE COURT OF APPEALS AND CANNOT BE THE BASIS FOR SEEKING A WRIT OF CERTIORARI UNDER RULE 242(D)(2), SCACR.

The County did not raise the first Question Presented to the Court of Appeals. As a result, this question cannot be the basis for a writ of certiorari under Rule 242(d)(2), SCACR. Rule 242(d)(2) provides, in pertinent part, as follows: "Only those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court"

Question Presented No. 1 in the County's Petition asks this Court to consider:

Did the Court of Appeals err when it affirmed the Administrative Law Court's decision to deny a DHEC permit based on the Administrative Law Court's review of the record before DHEC, instead of as an independent de novo fact-finder reviewing the evidence?

In its briefs to the Court of Appeals, the County did not present as an issue that the ALC failed to conduct a de novo review of the proof before it and, instead, decided the issues as an appellate court without making its own findings. Putting aside that the County's

contention is completely refuted by a review of the ALC's order (R.pp. 0001-0019), this alleged basis for reversing the ALC was not presented to the Court of Appeals.

The County's brief to the Court of Appeals presented the following issues:

STATEMENT OF ISSUES ON APPEAL

I. DID THE ADMINISTRATIVE LAW COURT ERR WHEN IT REVERSED DHEC'S DECISION TO GRANT A SOLID WASTE PERMIT TO THE COUNTY BASED ON DHEC'S FAILURE TO REVIEW A LOCAL SOLID WASTE DISPOSAL ORDINANCE?

II. DID THE ADMINISTRATIVE LAW COURT ERR WHEN IT CONCLUDED THAT THE SECOND PERMIT MODIFICATION DID NOT COMPLY WITH THE REGULATION BECAUSE THE COURT EXPANDED THE APPLICATION OF THE COUNTY'S VEGETATIVE BUFFER REGULATION AND IGNORED THE COUNTY'S LEGISLATIVE ACT AND INTENT?

III. DID THE ADMINISTRATIVE LAW COURT ERR WHEN IT EXPANDED THE APPLICATION OF THE 1,000-FOOT RESIDENCE SETBACK RESTRICTION FOR SOLID WASTE DISPOSAL FACILITIES TO INCLUDE PLANNED RESIDENCES AND RESIDENCES SHOWN ON AN APPROVED SITE PLAN?

(App.pp. 0583-0609). None of these "Issues on Appeal" asserts the ALC invoked the wrong standard in the contested case hearing by failing to determine the facts de novo. Instead, the County asserted in Issue No. I that the ALC should not have reversed based on DHEC's failure to consider Section 10-22, a local ordinance governing solid waste landfills. In fact, the words "de novo" do not appear anywhere in the County's initial brief or reply brief. (App.pp. 0583-0609).

Therefore, the County cannot now raise for the first time in its Petition an issue that it did not raise in its briefs to the Court of Appeals and that was never ruled on by the Court of Appeals. For this fundamental reason alone this Court should deny certiorari as to the County's first issue presented in the Petition.

II. EVEN IF ALL THE ISSUES ASSERTED IN THIS PETITION FOR CERTIORARI WERE RAISED BEFORE AND RULED UPON BY THE COURT OF APPEALS, CERTIORARI IS NOT APPROPRIATE UNDER THE STANDARDS OF SOUTH CAROLINA APPELLATE COURT RULE 242.

Rule 242 of the South Carolina Appellate Court Rules clearly states that a writ of certiorari “will be granted only where there are special and important reasons.” See Rule 242, SCACR. This case presents neither special nor important circumstances justifying the requested review by the Supreme Court. In fact, none of the reasons set forth in Appellate Rule 242 is present in this case:

1. There is no are novel questions of law;
2. There was no dissent in the decision of the Court of Appeals;
3. The decision of the Court of Appeals is not in conflict with a prior decision of the Supreme Court;
4. No constitutional issues are involved – directly or otherwise; and
5. No federal question was addressed by the Court of Appeals.

A review of the County’s Petition for Writ of Certiorari confirms certiorari is not appropriate. Only two of Rule 242’s enumerated reasons for certiorari are argued by the County – an alleged novel legal question and an alleged contradiction of Supreme Court precedent. However, the Petition only hints at the remote involvement of Supreme Court precedent and then mildly attempts to fashion reviewable questions of law without ever satisfying the requirements of the Rule.

Should this Court nonetheless decide to review the three issues presented by the Petition, there is no showing the Court of Appeals’ unanimous decision was in error, that it decided a novel issue of law, or that it was contrary to controlling precedent of this

Court. Further, the ALC had two separate and additional grounds for her decision to reverse the Second Permit Amendment; both of these grounds were affirmed by the Court of Appeals in not reaching them and those grounds still stand. For these additional reasons certiorari should be denied.

III. THE COURT OF APPEALS DID NOT ERR WHEN IT AFFIRMED THE ADMINISTRATIVE LAW COURT'S DECISION TO DENY THE DHEC PERMIT.

A. THE ADMINISTRATIVE LAW COURT MADE SUFFICIENT INDEPENDENT DE NOVO FACTUAL DETERMINATIONS AND ALL OTHER REQUIRED DETERMINATIONS.

A reading of the ALC's decision plainly shows that she reviewed the evidence de novo and made her own findings. She did not apply an appellate scope of review as argued by the County. The ALC's decision contains eight pages of Findings of Facts. (R.pp.0002-0010). The ALC's second Conclusion of Law, alone, entirely undermines the County's assertion she did not make de novo factual determinations:

2. 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 Envtl. Control, 348 S.C. 507, 520, 560 S.E.2d 410, 417 (2002).

(R.p. 0011). See also, Order of the ALC at p. 14 ("Rather, as *de novo* fact finder, this Court's role is to determine whether DHEC granted the Second Permit Modification in compliance with all applicable laws."). (R.p. 014).

At the very heart of the Court of Appeals' Opinion is its determination that there was no proof to contradict the ALC's factual finding that DHEC did not consider Section 10-22 in its consistency determination:

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. [...] 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. [...] 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**.

Unpublished Opinion No. 2015-UP-269 at 4 (App.p. 0768) (double emphasis added).

In support of its Petition for Certiorari on its first question presented regarding de novo review, the County 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). However, Engaging & Guarding Laurens County's Env't does not further the County's position, but rather refutes it.

Engaging & Guarding Laurens County's Env't was an appeal from the ALC's decision after 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 when the ALC conducted its de novo review) 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. Here the ALC did just as the ALC did in Engaging & Guarding Laurens County's Env't. Judge Robinson found after her de novo review that DHEC did not

consider Section 10-22 and, as a result, its consistency determination was flawed because it never addressed the standards in that ordinance.

The Petition asserts in Question Presented No. 2 that the Court of Appeals erred in failing to reverse based on the County's view that the ALC did not make a new consistency determination. The County further asserts the ALC determined that DHEC's consistency determination was fundamentally deficient for its failure to consider Section 10-22. The County argues that "the ALC's decision is insufficient for meaningful appellate consideration of the issue of consistency review and should have been reversed and remanded." Petition at 6. As is clearly evident from the Opinion, the Court of Appeals was easily able to conduct a meaningful review. The Court of Appeals in fact reviewed the entire record and determined that the entire record supported, and the County and DHEC conceded, that Section 10-22 was an applicable local ordinance and it was not considered by DHEC in its consistency determination.

Respondent disagrees with the County's contention that the ALC did not make any determination whether the Second Permit Modification was consistent with Section 10-22's requirements. Among other things, Section 10-22(2)(d) requires that all solid waste disposal sites "conform with the surrounding environment," and Section 10-22(2)(e) requires that the sites "conform with future development of the area." The ALC made numerous findings in her Order that establish that the Second Permit Modification would not be in conformity with the surrounding environment and future development of the area. See specifically ALC Order, Findings Nos. 16, 17, 18, 33, 34, 37, 38, 39, and 40. (R. pp. 0014-0018). The following excerpted findings leave no doubt that the ALC determined the Second Permit Modification was inconsistent with the surrounding

environment and the future development of the area, thereby supporting her ruling and the affirmance by the Court of Appeals:

37. Petitioner's expert, John S. Lester, P.E. ("Lester") (the President of HLA, Inc., a civil engineering and landscape architecture firm in Charleston), Mr. Bush, and Wallace A. Jack ("Jack") (a board member of the Grand Oaks Boulevard Association), all testified to the rapidly expanding and residential character of the area surrounding the landfill since 2001. These witnesses testified that increasing the maximum height of the Class II Landfill from 74 feet to 168 feet (in addition to the other modifications allowed by the Second Permit Modification) would neither be compatible with nor conform to current and future development in the area. They expressed concerns about noise, dust, aesthetics, and increased traffic from operations associated with the requested expansion of the Class II Landfill, specifically. Mr. Bush testified that the Second Permit Modification would have a "significant impact" on his ability to develop and market the Grand Bees Property due to the expansion's incompatibility and nonconformance with adjacent residential development.

38. Mr. Lester testified that the 168-foot maximum height of the Class II Landfill, allowable by the Second Permit Modification, would match or exceed the tallest structures in Charleston County, including the driving surface of the Arthur Ravenel Bridge (the New Cooper River Bridge) as well as what is possibly Charleston's tallest building, the Holiday Inn along the Ashley River. In addition, he testified that based on the to-scale, engineering models his firm had produced, a 168-foot Class II landfill would be clearly visible over the tree lines and buffers of the surrounding neighborhood, including both the Grand Bees Property and other parts of the Grand Oaks community.

39. In addition to these models, Petitioner offered two updated aerial photographs of the landfill and its surrounding area, depicting the status of existing and planned residential development as of 2008 and 2012. These developments include, but are not limited to, the Grand Bees Property, the several other neighborhoods in Grand Oaks, and other residential developments adjacent to the Landfill. The updated aerials show vast changes in the surrounding areas since 2001.

(R. pp. 0007-0008).

As these findings demonstrate, the failure of the ALC to enter an additional or separate finding specifically stating that the Second Permit Modification was inconsistent

with Section 10-22 was unnecessary, entirely harmless, and does not provide a basis for reversing the Court of Appeals. See Snipes v. Augusta-Aiken Railway & Electric Corp., 151 S.C. 391, 149 S.E. 111 (1929) (The doctrine of harmless error applies to judicial decisions on appeal.).

The County's Petition also inserts a new argument in its Petition by asserting that the ALC somehow "misapprehends" SC Code Section 44-96-290. Petition at 6. Clearly the ALC did not misunderstand the requirement of consistency imposed by Section 44-96-290(F) and the County's assertion is without support.

The Petition next relies upon Southeast Res. Recovery, Inc. v. S.C. Dep't of Health & Env'tl. Control, 358 S.C. 402, 595 S.E.2d 468 (2004), even though that case has no pertinence to the matters decided by the Court of Appeals. In Southeast Resource Recovery, Inc. this Court addressed an entirely different scenario involving Newberry County's Solid Waste Management Act. In that case the ordinance at issue did not contain specific requirements like those in Charleston County Ordinance 10-22. The ALC's review of Charleston County Ordinance 10-22 and her findings related to it are not analogous to the circumstances in Southeast Resource Recovery, Inc.

This Court held in Southeast Resource Recovery, Inc. that an ordinance's sweeping generalizations that a project must protect and preserve the environmental quality of the community do not provide sufficient specificity for a consistency determination. The ALC in this case specifically distinguished Section 10-22 and the holding in Southeast Resource Recovery, Inc.:

15. Respondents also argue that "broad, general statement of goals" cannot be relied upon in a consistency determination. Southeast Resource Recovery, Inc., 358 S.C. at 409, 595 S.E.2d at 472 (holding goals "to preserve, protect and enhance the environmental quality of Newberry

County" is a broad, general statement of goals). The Court in Southeast Resource Recovery, Inc. noted that "[t]o 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." Id.

16. I conclude that the critical language of Section 10-22, namely "conform with the surrounding environment" and "conform with the future development of the area," are not the sort of "broad, general statement of goals" that worries the Supreme Court in Southeast Resource Recovery, Inc. Rather, the requirements of Section 10-22 are not broad, general "goals," but rather specific standards, requirements and criteria of the ordinance which simply do not lend themselves to more precise, quantitative measures. Moreover, said requirements and criteria are sufficiently specific and fact-based to guard against an arbitrary and capricious determination that *any* proposed landfill violates Section 10-22.

(R. pp. 0013-0014).

Question Presented No. 2 asserted by the Petition fails to meet the requirements of SCACR 242; it presents no novel questions, does not demonstrate the ruling of the Court of Appeals is in conflict with a prior decision of this Court, and fails even to demonstrate that the Court of Appeals committed legal error in affirming the ALC.

IV. EVEN THOUGH THE COURT OF APPEALS WAS NOT REQUIRED TO DETERMINE WHETHER SECTION 10-22'S REQUIREMENTS ARE SIMILAR TO THOSE IDENTIFIED IN THE SOLID WASTE MANAGEMENT ACT AND THE ZLDR, IT NONETHELESS DID SO AND FOUND THAT THEY WERE NOT.

In a final attempt to justify certiorari, the Petition pretends the Court of Appeals somehow misunderstood the County's positions. That is not grounds for certiorari. Nonetheless, in the very last paragraph of its Petition, the County attempts to resurrect its previous arguments by stating: "the County contends DHEC's determination that the permit modification is consistent with the County's ordinances [and] fully incorporates review, consideration, and application of ... the ZLDR." Petition at 10. This is just a restatement of the County's previous briefing before the Court of Appeals. Again,

however, this position fails to recognize that the ALC and the Court of Appeals both determined that Section 10-22 is not subsumed by either the Solid Waste Management Act or the ZLDR and that DHEC should have considered Section 10-22.

As the Court of Appeals 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].” Unpublished Opinion No. 2015-UP-269 at 4 (App.p.0768). Therefore, the Court of Appeals 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 there is no confusion -- “the ALC did not err in finding DHEC failed to make a proper consistency determination [by failing to take into account Section 10-22].”

Id.

The provisions that the County cites from the Solid Waste Act do not come close to imposing the particular requirements of Section 10-22. The County refers to the following sections of the Solid Waste Act and the regulations promulgated thereunder:

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)).

Petition at pp. 8-9.

These provisions nowhere state that DHEC needs to take into account the surrounding environment and future development of the area. The specific requirements


of Section 10-22 are simply not included. There is no basis for asserting that the Court of Appeals erred and should have found that the statutes either contain the same requirements as Section 10-22 or somehow usurp the requirements of Section 10-22. The Court of Appeals' failure to specifically address the County's contention that the statutes and regulations subsume Section 10-22 was not error, was harmless if it constituted error, and certainly does not meet any of the criteria for this Court's granting certiorari under Rule 242(b), SCACR.

CONCLUSION

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

Respectfully submitted.

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Of which, County of Charleston is.....Petitioner.

CERTIFICATE OF SERVICE

I, Nancy Jane Dennis, an employee of Pratt-Thomas Walker, P.A., hereby certify that I have served this 6th day of October 2015, a copy of the Respondent's Return to Petition for Writ of Certiorari on counsel of record by placing the same in the United States mail, first-class postage pre-paid, to:

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