

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM THE ADMINISTRATIVE LAW COURT

S.C. Supreme Court

Shirley C. Robinson, Administrative Law Judge

Unpublished Opinion No. 2015-UP-269 (Ct.App.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

Grand Bees Development, LLC, Respondent,

v.

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

Of which, County of Charleston is Petitioner.

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on July 17, 2015.

QUESTIONS PRESENTED

1. 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?
2. Did the Court of Appeals err when it affirmed the Administrative Law Court's review of a DHEC permit when the ALC failed to make its own consistency determination?
3. Did the Court of Appeals err when it failed to address whether Section 10-22's requirement that a disposal site conform with the surrounding environment and future development are concepts identified in the Solid Waste Management Act and the ZLDR, not solely within the ZLDR?

STATEMENT OF THE CASE

On November 8, 2007, the County of Charleston submitted an application for a permit modification to the South Carolina Department of Health and Environmental Control ("DHEC"). The permit sought to modify the existing construction, demolition, and land-clearing debris cell by increasing the disposal limit from 182,000 tons per year to 200,000 tons per year, expanding the footprint by 5.5 acres, and increasing the elevation from 74 feet to 168 feet mean sea level of the Bees Ferry Landfill in Charleston County, South Carolina.

DHEC issued the permit, and Grand Bees Development, LLC appealed to the South Carolina Administrative Law Court ("ALC"). After the contested case hearing, the ALC issued a final order vacating DHEC's permit and remanded the matter back to DHEC.

Thereafter, DHEC reviewed the permit in accordance with the County's Zoning and Land Development Regulations Ordinance ("ZLDR") and subsequently determined that the permit application was consistent with the County's zoning, land use, and other applicable ordinances pursuant to S.C. Code Ann. § 44-96-290(F) and S.C. Regulations 61-107.19 and issued the permit modification. Grand Bees Development appealed.

On March 19, 2013, the ALC issued its final order and decision that the second permit modification (1) was inconsistent with local land use ordinances, (2) did not comply with the vegetative buffer requirements of the County's ZLDR, and (3) violated the set back requirement of the Solid Waste Policy and Management Act. The ALC based its decision on the grounds that the modified permit was inconsistent with local zoning, land use, and other applicable regulations in violation of S.C. Code Ann. § 44-96-290(F). The ALC found that there was no evidence that Charleston County Code of Ordinances Section 10-22 enacted in 1974 "was ever reviewed by DHEC to determine whether the requested permit modification was consistent with all applicable local ordinances" (R. at 0007).

The Court of Appeals affirmed the ALC's order vacating the permit modification. Grand Bees Development, LLC v. SCDHEC and County of Charleston, Unpublished Opinion No. 2015-UP-269 filed May 27, 2015. Petitioner seeks a writ of certiorari to review that decision because the ALC's decision raises a novel question of law: whether the ALC can satisfy its authority, role and responsibility in the administrative scheme of conducting a *de novo* review when it only reviews the decision of someone else and does not make a determination itself. Does the ALC satisfy the administrative scheme if it only determines DHEC's consistency review was inconsistent with requirements of the Solid Waste Policy

and Management Act, and does not make factual findings itself of consistency with the Act?

ARGUMENTS

1. THE COURT OF APPEALS ERRED 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 this permit challenge, the ALC improperly acted in a quasi-appellate capacity when it reviewed DHEC's decision to grant a solid waste permit, not as an independent, *de novo* fact-finder; therefore, this Court should grant Petitioner's writ of certiorari to determine if the ALC's Order complies with State law. Under South Carolina law, "[a]n administrative law judge shall preside over all hearings of contested cases . . . involving the departments of the executive branch of government . . . in which a single hearing officer, or an administrative law judge, is authorized or permitted by law or regulation to hear and decide these cases" S.C. Code Ann. § 1-23-600(A). 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). The ALC did not perform a *de novo* review of the evidence in this case. It is undisputed in the record that the County's Ordinance Section 10-22 was admitted into evidence for review and consideration by the ALC, notwithstanding DHEC's failure to consider it before it

issued the permit modification to the County. (R. at 0012). However, the ALC did not review this matter in the role of a trial court sitting *de novo* when it found that:

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)(Emphasis added).

Rather, the ALC improperly reviewed DHEC's decision as if sitting in an appellate judicial review capacity. The ALC admitted Ordinance Section 10-22 into the record, but it chose not to consider it *de novo*. Instead, the ALC opted to deny the permit because it found that DHEC's consistency determination was incomplete because if DHEC had reviewed the Ordinance it would have materially influenced its decision. However, Chief Justice Toal's dissent in Kiawah Dev. Partners, II, (decided on other grounds) articulates the proper role of the ALC in contested case stating that:

The ALC's *de novo* review hearing is best explained as 'one in which the decisionmaker does not review the decision of someone else, but *makes the determination himself*. Thus, the [ALC], while he may use the record compiled earlier as part of the evidence in the case, may receive additional evidence and decides the issue *without regard* to the decisions made by the agency.'

Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envl. Control, 411 S.C. 16, 58-60, 766 S.E.2d 707, 729-30 (2014)(citing Lowell, Practice and Procedure 152, see Blizzard v. Miller, 306 S.C. 373, 375, 412 S.E.2d 406, 407 (1991) ("A trial de novo is one in which 'the whole case is tried as if no trial whatsoever had been had in the first instance.'")).

By way of analogy, in Engaging & Guarding Laurens County's Env't, DHEC declined to consider the 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 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 Court of Appeals agreed with the ALC stating, "[t]he ALC found DHEC did not make a proper consistency determination because it failed to consider section 10-22 of the county ordinance." The Court of Appeals erred by making its decision based on what DHEC failed to do, rather than based on the evidence in the record *de novo*, before the ALC. Therefore, this Court should grant Petitioner's writ of certiorari to review the Court of Appeals' affirmation of the ALC's decision.

2. THE COURT OF APPEALS ERRED WHEN IT AFFIRMED THE ADMINISTRATIVE LAW COURT'S REVIEW OF A DHEC PERMIT WHEN THE ALC FAILED TO MAKE ITS OWN CONSISTENCY DETERMINATION.

Alternatively, assuming *arguendo*, that the ALC is not required to review DHEC's consistency determination *de novo*, the ALC failed to determine whether the permit modification was consistent with local zoning, land use, and other applicable local ordinances, if any, or not. Under the South Carolina Solid Waste Policy and Management

Act a consistency determination is a prerequisite for issuance of a permit. The Act 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).

The Court of Appeals affirmed the ALC's finding that "DHEC never considered Section 10-22 in its consistency review." (R. at 0012). However, upon review of the ALC's Final Order and Decision in the part titled "Consistency with Local Land Use Ordinances", Paragraphs 4-21, the ALC never made a **finding** of consistency – whether the permit was consistent with Section 10-22. The ALC failed to make any factual findings itself; thus, the ALC's decision is insufficient for meaningful appellate consideration of the issue of consistency review and should have been reversed and remanded. The ALC's analysis in "Consistency with Local Land Use Ordinances" misapprehends Section 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). In Southeast Resource Recovery, Inc., this Court analyzed similar language to Newberry County's ordinance when it rejected a comparable attempt to invalidate a permit modification. This Court 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.

This Court reversed the Richland County circuit court judge ruling that instead of relying on Newberry County's Solid Waste Management Plan, the circuit court relied on the above general statement of goals, which cannot serve as the basis for concluding Newberry's facility is inconsistent with its Plan.

The ALC clearly pronounces that DHEC's consideration of Ordinance Section 10-22 would have materially influenced DHEC's decision to grant the permit, but the ALC's decision fails to specifically make a factual finding that the permit modification is inconsistent with local ordinances. Not only did the Court of Appeals and the ALC do what the Richland County circuit court did — substitute general statements of goals as “minimum standards for the operation of landfills” — but the ALC went further and failed to make its own specific findings of consistency. Yet the Court of Appeals found the ALC did not err in finding DHEC failed to make a proper consistency determination.

The Ordinance Section 10-22 provides:

All collectors shall dispose of all solid waste collected at an approved facility in a sanitary manner. 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.** (Emphasis added).

State law requires that the expansion sought under the permit be consistent with local zoning, land use, and other applicable local ordinances. Similarly, Section 10-22 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 Section 10-22 invalidates its consistency determination on its face. However, in a contested case hearing, the ALC is required to make its own consistency determination in place of DHEC's determination. The ALC failed to do so; therefore, this Court should grant Petitioner's writ of certiorari to review whether the ALC complied with the Act when it denied the solid waste permit.

3. THE REQUIREMENTS OF ORDINANCE SECTION 10-22 ARE SIMILAR TO THE CONCEPTS IDENTIFIED IN THE SOLID WASTE MANAGEMENT ACT AND THE ZLDR.

Although the ALC did not make a consistency finding regarding Ordinance Section 10-22, Ordinance Section 10-22's provisions 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 to make its consistency determination. The Act provides "[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:

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;** (Emphasis added).

These requirements of the Act, Regulations and ZLDR exemplify and reinforce the very requirements imposed by the Section 10-22 that landfills conform with the environment and future development. Section 10-22 does not alter or add new criterion. Instead, it contains general statements of recognition that landfills must fit within the infrastructure of local communities. Here, the fallacy of the ALC’s decision that DHEC never considered Section 10-22 in its consistency review and the Court of Appeals’ affirmation that the ALC did not

err in finding DHEC failed to make a proper consistency determination, is that the County does not claim DHEC's consideration of the ZLDR **alone** constituted a complete consistency determination regarding Section 10-22.

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, Regulations and ZLDR. In addition to the ZLDR, the Court of Appeals should have reviewed the Act and 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 regulations, in addition to the ZLDR, in reviewing the ALC's decision and the Court of Appeals' misunderstanding of the County's argument applicable to the consistency determination.

CONCLUSION

For the reasons stated, Petitioner asks this Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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Of which, County of Charleston is Petitioner.

PROOF OF SERVICE

I certify that I have served the **Petition for Writ of Certiorari** on all counsel of record and the Clerk of the South Carolina Court of Appeals by depositing a copy of the same in the United States Mail, postage prepaid, on August 17, 2015, addressed as follows:

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