

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

AUG 24 2015

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Shirley C. Robinson, Administrative Law Judge

S.C. Supreme Court

Unpublished Opinion No. 2015-UP-269 (S.C. Ct.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.

**APPENDIX TO THE
PETITION FOR WRIT OF CERTIORARI
Volume III of III**

Joseph Dawson, III, County Attorney
Bernard E. Ferrara, Jr., Deputy County Attorney
Austin A. Bruner, Assistant County Attorney
Bradley A. Mitchell, Assistant County Attorney
Johanna S. Gardner, Assistant County Attorney
CHARLESTON COUNTY ATTORNEY'S OFFICE
Lonnie Hamilton, III Public Services Building
4045 Bridge View Drive
North Charleston, South Carolina 29405
(843)958-4010
Attorneys for Petitioner County of Charleston

Etta R. Williams Linen, Esquire
SOUTH CAROLINA DEPARTMENT OF HEALTH AND
ENVIRONMENTAL CONTROL
2600 Bull Street
Columbia, South Carolina 29201

Attorney for
South Carolina Department of Health and
Environmental Control

G. Trenholm Walker, Esquire
PRATT-THOMAS WALKER, PA
Post Office Drawer 22247
Charleston, South Carolina 29413
(843) 727-2208

Jamie A. Khan, Esquire
Ross A. Appel, Esquire
McCULLOUGH KHAN, LLC
359 King Street, Suite 200
Charleston, South Carolina 29401
(843) 937-0400

Attorneys for Respondent

INDEX

1. Record on Appeal.	0001 – 0544
2. Appendix to the Record on Appeal.	0545 – 0582
3. Final Brief of Appellant County of Charleston.	0583 – 0610
4. Final Brief of Appellant South Carolina Department of Health and Environmental Control	0611 – 0638
5. Brief of Respondent (In Response to Appellant County of Charleston’s Brief).	0639 – 0682
6. Brief of Respondent (In Response to Appellant South Carolina Department of Health and Environmental Control.	0683 – 0726
7. Final Reply Brief of Appellant County of Charleston.	0727 – 0744
8. Final Reply Brief of Appellant South Carolina Department of Health and Environmental Control.	0745 – 0764
9. Unpublished Opinion No. 2015-UP-269.	0765 – 0768
10. Appellant’s Petition for Rehearing.	0769 – 0778
11. Appellant South Carolina Department of Health and Environmental Control’s Return to Appellant County of Charleston’s Petition for Rehearing.	0779 – 0784
12. Return of Respondent to Appellant County of Charleston’s Petition for Rehearing.	0785 – 0794
13. Order of the South Carolina Court of Appeals Filed July 17, 2015.	0795 – 0796

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Shirley C. Robinson, Administrative Law Judge

Docket No. 2011-ALJ-07-0556-CC

Grand Bees Development, LLC, ... Respondent,

v.

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

**APPENDIX TO THE
RECORD ON APPEAL**

Joseph Dawson, III, County Attorney
Bernard E. Ferrara, Jr., Deputy County Attorney
CHARLESTON COUNTY ATTORNEY'S OFFICE
Lonnie Hamilton, III Public Services Building
4045 Bridge View Drive
North Charleston, South Carolina 29405
(843) 958-4010

Attorneys for Appellant
County of Charleston

Etta R. Williams Linen, Esquire
SOUTH CAROLINA DEPARTMENT OF HEALTH AND
ENVIRONMENTAL CONTROL
2600 Bull Street
Columbia, South Carolina 29201

Attorney for Appellant
South Carolina Department of Health and
Environmental Control

G. Trenholm Walker, Esquire
PRATT-THOMAS WALKER, PA
Post Office Drawer 22247
Charleston, South Carolina 29413
(843) 727-2208

Jamie A. Khan, Esquire
Ross A. Appel, Esquire
McCULLOUGH KHAN, LLC
66 ½ Queen Street
Charleston, South Carolina 29401
(843) 937-0400

Attorneys for Respondent

INDEX

1. Notice of Motion and Motion for Reconsideration of Respondent
SCDHEC dated March 29, 2013. 0545 – 0559
2. Notice of Appeal of Respondent SCDHEC filed May 31, 2013. 0560 – 0581
3. Certificate of Counsel. 0582

BOARD:
Allen Amsler
Chairman
Mark S. Lutz
Vice Chairman



Catherine B. Templeton, Director

Promoting and protecting the health of the public and the environment

BOARD:
R. Kenyon Wells
L. Clarence Batts, Jr.
Ann B. Kiroi, DDS
John O. Hutto, Sr., MD

March 29, 2013

RECEIVED

APR 8 2013

VIA USPS & ELECTRONIC MAIL

Honorable Shirley Robinson
Administrative Law Court
Edgar A. Brown Building, Suite 224
1205 Pendleton Street
Columbia, South Carolina 29201

DHEC
OFFICE OF GENERAL COUNSEL

Re: *Grand Bees Development, LLC vs. South Carolina Department
of Health and Environmental Control and County of Charleston*
Docket No. 11-ALJ-07-0556-CC; OGC #21294.1

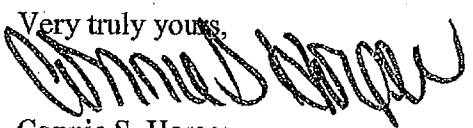
Dear Judge Robinson:

Enclosed for filing please find the original and one copy of Respondent DHEC's *Notice and Motion for Reconsideration* in the above-referenced matter. Kindly return the clocked copy in the self-addressed, postage-paid envelope provided.

By copy of this letter, and as evidenced by the Certificate of Service, we are serving counsel of record with a copy of the same.

With kind regards,

Very truly yours,


Connie S. Horger
Paralegal

/csh

Enclosures as stated.

cc: (w/Enclosure)
Jamie A. Khan, Esquire
G. Trenholm Walker, Esquire
Joseph Dawson, III, Esquire
Bernard E. Ferrara, Jr., Esquire
Kent Coleman, SC DHEC (via email)
Joan Litton, SC DHEC (via email)

FILED

MAR 29 2013

SC ADMIN. LAW COURT

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Grand Bees Development, LLC	)	Docket No. 11-ALJ-07-0556-CC
	)	
Petitioner,	)	
	)	
vs.	)	RESPONDENT DHEC'S NOTICE AND MOTION FOR RECONSIDERATION
	)	
South Carolina Department of Health and Environmental Control and County of Charleston,	)	
	)	
Respondents.	)	
	)	

PLEASE TAKE NOTICE that Respondent South Carolina Department of Health and Environmental Control ("DHEC" or "the Department"), pursuant to South Carolina Administrative Law Court ("SCALC") Rule 29.D., shall and hereby moves this Court to reconsider the *Final Order and Decision* ("Decision") issued by Administrative Law Court ("ALC") Judge Shirley Robinson, on March 19, 2013, in the above-captioned matter.

The grounds for this Motion for Reconsideration ("Motion") are as follows: the substantive rights of Respondent DHEC have been prejudiced because the administrative conclusions and decision are: **a)** in violation of statutory provisions; **b)** in excess of statutory authority or the agency; **c)** affected by other error or law; and/or **d)** clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or **e)** arbitrary and capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

FILED

MAR 29 2013

I. ARGUMENT

CONSISTENCY WITH LOCAL LAND USE ORDINANCES

A. Section 10-22 of Ordinance 180 is not a proper ground for denial of the permit for modification of the Landfill.

The Department maintains that Section 10-22 of Charleston County Ordinance 180 ("Ordinance"), referenced in Conclusion 9 on page 12 of the *Decision*, is not an *applicable* local land use ordinance that required a consistency determination pursuant to S.C. Code Ann. § 44-96-290(F). (*Emphasis added*). The fact that the Zoning Land Development Regulations ("ZLDR") is a more specific ordinance regarding local zoning and land use requirements makes Section 10-22 inapplicable as an Ordinance for determining whether the proposed modification of the Landfill is consistent with local zoning and land use requirements. Therefore, *Conclusion of Law # 9* on page 12 of the *Decision* is affected by error of law because the Department was not given deference regarding its decision to rely on the more specific ordinance, ZLDR, as opposed to the vague and non-specific language in Section 10-22 of Ordinance 180.

Section 10-22(b) is a local land use ordinance; however, the Department contends that there is no specific criteria included in the Ordinance that would allow the Department to evaluate the proposed modification to the Bees Ferry Landfill ("Landfill") against the Ordinance without doing so in conjunction with the more specific ZLDR. Specifically, the Ordinance states that "the disposal site shall: d. conform with the surrounding environment; and e. conform with future development of the area." Mr. Kent Coleman, Director of Solid Waste and Mining for DHEC, testified on March 20, 2012, at the hearing in the above-captioned matter, that the wording in the Ordinance was very general, not specific. (*Tr., P. 196, lines 9-10*). This is further illuminated by the fact that there is no definition of the word "conform" in the Ordinance.

Moreover, Mr. Coleman testified that in determining conformity with future uses, DHEC

reviewed the Charleston County ("County") ZLDR to ensure that the Landfill was properly zoned. (Tr., P. 214, lines 10-12). Furthermore, the Ordinance was passed in 1974, and since that time the ZLDR was developed (in 2001) and encompassed the updates to Charleston County's zoning and land development regulations.

The Department contends that the ZLDR "preempts, for the purposes of DHEC's consistency analysis, an otherwise applicable valid land use ordinance simply due to the latter's being more specific" (*Decision*, page 13, # 14); however, this is the Department's position because the Ordinance and the ZLDR (also an ordinance) involve the same issue – whether the proposed modification to the Landfill is consistent with "local zoning, land use, and other applicable local ordinances, if any." S.C. Code Ann. § 44-96-290(F) (2002). However, even if the Ordinance is applicable, Respondent DHEC's review of the ZLDR would satisfy the consideration of both ordinances.

The Department further contends that since the ZLDR specifies that the site where the Landfill is located is zoned "Industrial" and specifically outlines the standards to which a Landfill should adhere during its existence or in the event it is modified, and since there is no definition of the word conform in Section 10-22, it was reasonable and rational for the Department use the more specific ordinance, the ZLDR, to determine whether the proposed modification to the Landfill conformed with the surrounding environment or conformed with future development of the area. Therefore, the ZLDR is the more specific and applicable ordinance upon which the Department gauged the Landfill's consistency pertaining to the conformity issue. It is settled law that where two ordinance provisions deal with the same issue, one in a general and the other in a more specific and definite manner, the more specific prevails." (*Mikell v. County of Charleston*, 386 S.C. 153, 687 S.E.2d 326, 330 (2009), *quoting* *Capco of*

Summerville v. J.H. Gayle Constr. Co., Inc., 368 S.C. 137, 628 S.E.2d 38 (2006).

Pursuant to the foregoing, because there is no definition of conform in the Ordinance, and due to the vague and non-specific language stated in Section 10-22 of the Ordinance, Respondent DHEC was correct to apply the ZLDR. Section 10-22 was not applicable and should not have been considered in addition to the ZLDR; however, if the proposed Landfill modification is consistent with the ZLDR, it would also be consistent with Section 10-22. Therefore, the ALC's *Conclusion of Law # 9*, stating that Section 10-22 is an applicable local land use ordinance that requires the Landfill permit be denied, is an error of law, is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, and is arbitrary and capricious.

B. Respondent DHEC should be afforded deference by the ALC.

Respondent DHEC contends that its decision, determinations and its method of making such decisions and determinations must be afforded deference pursuant to Kim Murphy v. South Carolina Department of Health and Environmental Control and District 5 of Lexington and Richland Counties, 396 SC 633, 723 S.E.2d 191, 195 (2012). The Supreme Court gave deference to Jennifer Haynes, a DHEC project manager, when she interpreted the "vicinity of the project," when there was no definition for "vicinity" in the applicable DHEC regulation. The Court stated that Ms. Haynes "considered the vicinity [to include] more than just the 727 feet of stream and noted that although she did not have an exact area, it included many miles." (Murphy, page 4). Furthermore, the Court stated that "because this interpretation is both reasonable and consistent with the plain language of the regulation, we see no reason to deviate from DHEC's construction and application." 396 SC at 640-1, 723 S.E.2d at 195. Here, analogous to the foregoing, the Department made an interpretation of the language in Section 10-22 that was both reasonable and consistent. The Department determined that Section 10-22 of

the Ordinance is encompassed within the requirements outlined in the ZLDR.

Since the Murphy case, another Supreme Court decision has been issued that further validates the fact that Respondent DHEC is entitled to deference. Kiawah Development Partners, II v. South Carolina Department of Health and Environmental Control, 2013 WL 696729 at *2, states that “courts defer to the relevant administrative agency’s decisions with respect to its own regulations unless there is a compelling reason to differ.” The Court further stated that:

DHEC’s decision to refuse to conduct a Final Review Conference, pursuant to section 44-1-60(F) of the South Carolina Code, is analogous to the Panel decision in Coastal to affirm the ALC’s decision without analysis. In both situations, regardless of the mechanism, the staff decision became the agency decision and was entitled to deference. Thus, the appropriate question is not whether DHEC’s decision was entitled to deference, but instead whether there was a compelling reason for the ALJ not to defer to this decision.” (Kiawah Development Partners at *3).

Here, analogous to the opinion in Kiawah, the *Request for Review* by Petitioner Grand Bees was denied by the Board on October 13, 2011. Thus, once Petitioner Grand Bees’ RFR was denied, the DHEC Staff decision became the Agency’s final decision and was entitled to deference. Further, there are no significant or compelling reasons why DHEC’s interpretation of the ZLDR and the Ordinance’s language should not be afforded deference.

VEGETATIVE BUFFER REQUIREMENTS (CHARLESTON COUNTY’S ZLDR)

- **Respondent DHEC acted appropriately in regards to the vegetative buffer requirements.**

The *Decision’s* Conclusion of Law # 25 on page 15, which states that “the Second Permit Modification is not compliant with local zoning and land use regulations, as it relates to the county’s vegetative buffering regulations . . .,” is affected by error of law, is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, and is arbitrary and

capricious, because determination of compliance with Article 9.5 of the ZLDR does not rest with Respondent DHEC.

Rather, Article 9.5 of the ZLDR places the decision of whether Respondent Charleston County was required to adhere to “the standards of this Article . . .,” squarely upon the County’s Planning Director, not DHEC. This is supported by Petitioner Grand Bees’ own witness and in the Decision’s Finding of Facts # 44 when it states that “the Petitioner’s witness, Mr. Lester, testified that in practice, landscaping plans are submitted and required by **local government** to prove compliance with buffer regulations as a precondition to land development.” (*Emphasis added*). (*Decision*, Page 9, # 44). No testimony was given stating that landscaping plans are required by Respondent DHEC, and in fact, DHEC is not required by statute or regulation to request landscaping plans from applicants, nor is it the Department’s practice to request such plans from applicants, especially when this function, in Charleston County’s case, rests with the County’s Planning Director.

Section § 9.5.1 of the ZLDR states that: “When modifications or additions are being made to an existing non-residential building or site, the standards of this Article shall apply to those portions of the subject parcel that are directly affected by the proposed improvements, as determined by the Planning Director, . . .” (ZLDR, P. 9-23). First, it is clear from this passage that it is within the purview and authority of the County’s Planning Director to determine whether Respondent County’s proposed modification to the Landfill affects those portions of the “subject parcel,” which will require the implementation of landscaping, screenings, or buffers. Respondent DHEC’s consistency review involves: 1) review of the application including maps, etc., to make sure there is nothing impeding the implementation of the referenced landscaping, screenings, and buffers, if required by the Planning Director or a person to whom this authority is

given; and 2) only issue a consistency determination of "not consistent" if it is determined from the Department's review that the implementation of the landscaping, screenings, and buffers would be impeded. During DHEC's review of Respondent's Second Permit Modification application, there was nothing from DHEC's review that suggested that landscaping, screenings, or buffers could not be implemented if and when the County's Planning Director made the determination that such implementation was required. (Tr., P. 224, lines 1-8 and lines 18-24).

Pursuant to the foregoing, *Conclusion of Law # 25* in the ALC's *Decision* is affected by error of law, is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, and is arbitrary and capricious.

SETBACK REQUIREMENT (SOLID WASTE POLICY AND MANAGEMENT ACT)

A. Respondent DHEC performed a proper consistency determination regarding the setback regulation, 8 S.C. Code Ann. Regs. 61-107.19, Part IV, (B)(1)(a).

The *Decision's Conclusions of Law* #'s 29 (on page 16), 36 (on page 17), 37, and 38 (both on page 18), are affected by error of law, are clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, and are arbitrary and capricious.

Conclusion of Law # 29 states that "there is no evidence in the record that DHEC ever performed a regulatory compliance determination with respect to its own 1,000 foot setback requirement at that time . . . the permit file of DHEC the parties stipulated into evidence does not disclose a written determination of compliance with this regulation." (*Decision*, P. 16, # 29). Respondent DHEC's own setback requirement states that "the waste disposal boundary of the landfill shall not be located within one thousand (1000) feet of any residence, school, day-care center, hospital or publicly owned recreational park area." 8 S.C. Code Ann. Regs. 61-107.19, Part IV, (B)(1)(a). The ALC's holding regarding this matter is incorrect, as the mere issuance of the permit modification is evidence that DHEC determined that the proposed modification to the

Landfill was consistent with the 1,000 foot setback requirement contained in R.61-107.19, Part IV(B)(1)(a). Moreover, Kent Coleman testified during the hearing that DHEC staff did site visits to make sure the Agency had the most up-to-date information to use in its consistency determination and that those visits did not reveal anything “new or different” from previous visits to the site as it related to the permit application or the permit decision. (Tr., Page 194, lines 2-23, and Page 219, lines 2-10). There was no testimony on the record that any “residences” existed adjacent to the Landfill at the time the Second Permit Modification was issued on September 1, 2011. Therefore, if no “residences” existed, the only determination that could be rendered is that Respondent County’s proposed Landfill modification was consistent with the referenced Regulation. Furthermore, there is no requirement that DHEC issue a written determination of compliance with each and every regulation that it uses to evaluate whether a proposed modification is consistent with the regulations. There are several reasons why the Court should have found that DHEC determined that the proposed Landfill modification was consistent with DHEC’s “setback” Regulation: 1) during the Hearing, Kent Coleman attested to the proposed modification’s consistency with the Regulation (Tr., P. 219, lines 8-10); 2) the evidence on the record showing that there were no “residences” within 1000 feet of the boundary of the landfill; 3) the fact that Petitioner Grand Bees stipulated to the fact that there were only “proposed” and “planned” residences to be built onto the Grand Bees property (Tr., P. 108, lines 14-16); and 4) the fact that Petitioner admitted that “residences do not exist at this time.” (Tr., P. 118, lines 7-8; Decision, P. 10, Findings of Fact # 51). The foregoing reasons, taken separately or together, are ample evidence to find that the proposed Landfill is consistent with the referenced Regulation and to conclude that DHEC did consider and determine that the proposed Landfill modification is consistent with the Regulation.

Additionally, there is no substantiation to the Court's assertion in *Conclusion # 36* that to ignore any planned "residence" is a result the regulations seeks to avoid. Thus, this Conclusion is affected by error or law, arbitrary or capricious, and characterized by a clearly unwarranted exercise of discretion since the words "planned" or "proposed" residences are not words that are included in the statute or regulation, thereby creating no requirement or authority for Respondent DHEC to evaluate a "planned" or "proposed" residence in the context of a consistency review.

The Court states that Respondents' position "conflicts with the legislative intent and produces an absurd result." (*Decision*, P. 18, # 37). However, applying the plain language of the statute, the legislative intent is that there be a 1000 foot setback established from a "residence," not from a "planned" or "proposed" residence. Construing the statute to include "planned" or "proposed" residences is an unauthorized reading of the statute and will lead to unreasonable result because one cannot institute a setback from a residence that is non-existent – a "planned" or "proposed" residence is not a residence at all, pursuant to the common meaning of the word "residence." Unless there is something in the statute requiring a different interpretation, the words used in a statute must be given their ordinary meaning. Mid-State Auto Auction of Lexington, Inc. v. Altman, 324 S.C. 65, 476 S.E.2d 690, 692 (1996). When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning. *Id.* "When statutory language is unambiguous, this Court may not impose a contrary meaning." Bayle v. South Carolina Dept. of Transp., 344 S.C. 115, 542 S.E.2d 736, 739 (Ct.App.2001). Words should be construed according to common usage. DNR v. Wis. Power & Light Co., 321 N.W. 2d 289 (Wis. 1982). . Therefore, since there is no ambiguity, and because the word "residence" is not defined in Regulation 61-107, the words within the regulation must be read according to their

common meaning. If the term has a common, ordinary meaning (which can often be found in the dictionary), then that definition should be used. Edward F. O'Conner, American Bar Association Intell. Prop. L. & Litig. Patents § 2.18 (2009). Here, the common meaning of *residence*, as found in Webster's Third New International Dictionary 1931 (1966) is "the act or fact of abiding or dwelling in a place for some time; an act of making one's home in a place; the place where one actually lives or has his home as distinguished from his technical domicile; the place where something is permanently established; a building used as a home." It is illogical that the Legislature intended for Respondent DHEC to take into consideration proposed, planned, or designated residential lots, because the intent of the regulation is to make sure that there is ample distance between the waste disposal boundary of the landfill and where people actually reside or gather, for their protection from adverse effects from a landfill or landfill activity.

If Petitioner Grand Bees' and the Court's expanded definition were to be accepted, then the landfill could be prohibited from expanding indefinitely because as long as the Grand Bees property is zoned "residential," it can continuously claim that there are "planned" or "proposed" residences to be built onto the site and such a designation would enjoin the Landfill from encroaching upon a non-existent setback, even if the "planned" or "proposed" residences were never actually built. This would be an unreasonable outcome from a forced and misconstrued construction of the referenced landfill regulation.

There is no testimony or evidence on the record that the Legislature intended Respondent DHEC to consider "planned" or "proposed" residences. Therefore, because the term "residence" is not defined in the regulation, and because the words "planned approved residential use" cannot be considered as part of the regulation due to the absence of those words from the regulation, the common meaning of the word "residence" must be applied in this situation. Therefore, the

ALC's holding that DHEC is not entitled to deference regarding its interpretation of the meaning of the word "residence" is error of law, clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, and is arbitrary and capricious.

B. Respondent DHEC is entitled to deference.

Regarding *Conclusion of Law # 38*, Respondent DHEC reiterates its earlier contention that the Court must afford deference to the DHEC's staff interpretation of the word "residence." Pursuant to the holding in Kiawah Development Partners, 2013 WL 696729 at *3, and contrary to *Finding of Fact # 49* on page 10 of the *Decision*, it is not necessary for the DHEC Board to interpret how the Department defines residence before the Court can afford deference to the Department. It is well settled case law that if a statute, or in this matter a regulation, is unambiguous, we must give effect to the words within "according to their literal meaning." Carolina Power & Light Co. v. City of Bennettsville, 314 S.C. 137, 139, 442 S.E.2d 177, 179 (1994). Here, the regulation is not ambiguous. S.C. Code Ann. Regs. 61-107.19, Part IV(B)(1)(a), clearly sets out a 1000 foot buffer requirement from a "residence" for the waste disposal boundary of the landfill.

There is no compelling reason for the Court to ignore the literal meaning and common usage of the word "residence," or to construe the regulation to mean something other than a structure that is occupied or occupiable.

II. CONCLUSION

Pursuant to the foregoing, Respondent DHEC respectfully requests that the ALC's *Final Order and Decision* be reconsidered to alter or amend the *Decision* in the above-captioned matter to hold that:

- 1) Section 10-22 of Ordinance 180 is not an applicable local land use ordinance in light of the more specific standards stated in the ZLDR, and that it was not necessary for Respondent DHEC to review Section 10-22 to render a consistency determination for the proposed Landfill modification, or if applicable the record shows the permit Landfill modification met both requirements;
- 2) In its consistency review of the proposed Landfill modification, Respondent DHEC should be afforded deference in regards to the Agency's administrative decisions made in this matter with respect to its own regulations;
- 3) A Landscaping Plan from a landfill permit applicant is not required pursuant to statute or regulation in DHEC's review of a landfill application, and DHEC's determination that there was nothing to impede the implementation of vegetative buffers was proper;
- 4) The County's Planning Director is responsible for deciding whether a vegetative buffer is needed in regards to a non-residential building or site, not Respondent DHEC;
- 5) The literal meaning and common usage of the word "residence" must be used when there is no definition of the word in statute or regulation, and as such, a residence is a dwelling place that is occupied or occupiable;
- 6) Respondent DHEC's decision to issue the Second Modified Permit (DHEC # 101001-1201) is upheld; and

7) County is not required to submit a new and updated permit application.

Respectfully submitted,

Etta R. Williams Linen

Etta R. Williams Linen
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
Attorney for SCDHEC
Tel.: (803) 898-3349
Fax: (803) 898-3367 (Not for service)
williaer@dhec.sc.gov (Not for service)

March 29, 2013
Columbia, South Carolina

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Grand Bees Development, LLC

Petitioner,

vs.

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

Respondents.

Docket No. 11-ALJ-07-0556-CC

CERTIFICATE OF SERVICE

I, Connie S. Horger, Paralegal for the South Carolina Department of Health and Environmental Control, hereby certify that I have on this **29th day of March, 2013**, served a copy of *Respondent DHEC's Notice and Motion for Reconsideration* upon all parties and counsel of record in the above-captioned case, via United States Mail, First Class, postage prepaid, addressed as follows:

Jamie Khan, Esquire
McCullough Kahn, LLC
68½ Queen Street
Charleston, South Carolina 29401

G. Trenholm Walker, Esquire
Pratt-Thomas Walker, PA
16 Charlotte Street
Charleston, South Carolina 29403

Joseph Dawson, III, Esquire
Bernard E. Ferrara, Jr., Esquire
Charleston County Attorney's Office
4045 Bridge View Drive
North Charleston, South Carolina 29405


Connie S. Horger

March 29, 2013
Columbia, South Carolina

FILED
MAR 29 2013
SC ADMIN. LAW COURT



Catherine B. Templeton, Director

Promoting and protecting the health of the public and the environment

May 29, 2013

RECEIVED

JUN 6 2013

Honorable Tanya Gee
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

DHEC
OFFICE OF GENERAL COUNSEL

Re: *South Carolina Department of Health and Environmental Control vs. Grand Bees Development, LLC*
ALC Case No.: 11-ALJ-07-0556-C; OGC #21294.1

Dear Ms. Gee:

Enclosed for filing is a notice of appeal in the above case. Also enclosed are the following:

- (1) Proof of service of the notice of appeal on the respondent; and
- (2) A copy of the Order which is to be challenged on appeal.

Thank you for your assistance with this matter and should you have any questions or need additional information, please do not hesitate to contact our office.

Sincerely,

Etta R. Williams Linen

Etta R. Williams Linen
Assistant General Counsel

Enclosures

cc: Jamie Khan, Esquire
G. Trenholm Walker, Esquire
Joseph Dawson, III, Esquire
Honorable Jana E. Shealy, Clerk, Administrative Law Court

RECEIVED

MAY 31 2013

SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Shirley C. Robinson, Administrative Law Judge

Case No. 11-ALJ-07-0556-CC

Grand Bees Development, LLC,

Respondent,

v.

South Carolina Department of Health
and Environmental Control,

Appellant.

NOTICE OF APPEAL

South Carolina Department of Health and Environmental Control appeals the decision of the Honorable Shirley C. Robinson, dated March 19, 2013. Appellant received a copy of this decision on March 19, 2013.

May 29, 2013

Etta R. Williams Linen

Etta R. Williams Linen (SC Bar No. 16663)
Assistant General Counsel

Jacquelyn S Dickman (SC Bar No. 1681)
Deputy General Counsel

W. Marshall Taylor (SC Bar No. 16646)
General Counsel

2600 Bull Street
Columbia, South Carolina 29201-1708
(803)898-3350
Attorneys for Appellant

RECEIVED
MAY 31 2013
SOUTH CAROLINA COURT OF APPEALS

FILED

MAR 19 2013

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

SC ADMIN. LAW COURT

Grand Bees Development, LLC,

Docket No. 11-AIJ-07-0556-CC

Petitioner,

vs.

FINAL ORDER AND DECISION

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

Respondents.

RECEIVED

MAY 31 2013

SC Court of Appeals

APPEARANCES:

For the Petitioner:

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

For the Respondent SC DHEC:

Etta R. Williams, Esquire

For the Respondent County of Charleston: Bernard E. Ferrara, Jr., Esquire
Joseph Dawson, III, Esquire

This matter comes before the South Carolina Administrative Law Court ("ALC" or "Court") pursuant to S.C. Code Ann. §1-23-600(A) and S.C. Code Ann. §44-1-60(F)(2) upon the Request for a Contested Case Hearing filed by Grand Bees Development, LLC ("Petitioner"). Petitioner contests the September 1, 2011 final agency decision of Respondent South Carolina Department of Health and Environmental Control ("DHEC"), to issue a modified permit to Respondent Charleston County ("County") for the expansion of the Class II Landfill that is part of the County's Bees Ferry Landfill. On September 12, 2011, Petitioner filed a timely request for a Final Review Conference, and on October 13, 2011, the DHEC Board decided not to grant discretionary review. Thereafter, on November 2, 2011, Petitioner filed a Request for Contested Case Hearing with this Court.

In its Request for Contested Case Hearing, Petitioner asserts that the County's proposed expansion of the Class II Landfill violates applicable regulations and statutes and that this Court should vacate the modified permit.

The Court conducted a hearing on the merits on March 20, 2012, at the Administrative Law Court in Columbia, South Carolina.

FINDINGS OF FACT

Having observed the witnesses and exhibits presented, weighed their credibility, and taking into consideration the burden of persuasion of the parties, I make the following findings of fact by a preponderance of the evidence:

1. Notice of the time, date and nature of the hearing was timely given to all parties.
2. Petitioner is the owner of a tract of land comprised of approximately 311 acres, located off Bees Ferry Road in the City of Charleston, South Carolina (Charleston County TMS# 301-00-00-035) (the "Grand Bees Property"). Petitioner purchased the Grand Bees Property on November 15, 2004.
3. The Grand Bees Property is zoned Planned Unit Development ("PUD") by the City of Charleston ("City") and is designated for residential land use. The Grand Bees Property is part of a larger PUD in the City called Bees Landing, which was first approved by City Council in March of 1993. Also known to the public as Grand Oaks Plantation ("Grand Oaks"), the Bees Landing PUD has been amended numerous times by City Council – most recently on February 14, 2012. At the time of the hearing, there were nine distinct and completed neighborhoods in Grand Oaks totaling approximately 1,500 homes, along with various city parks and other amenities.
4. The Grand Bees Property represents approximately twenty-five percent (25%) of the total land area in Grand Oaks. Under the Bees Landing PUD, the Grand Bees Property is designated for residential development. It is one of the last remaining components of Grand Oaks that is not yet fully built-out.
5. Petitioner has paid its share of dues and assessments of the Master Grand Oaks Association since acquiring the Property in 2004.
6. Various other residential developments are located in the vicinity of Grand Oaks including, but not limited to, The Hunt Club and Long Savannah (residential) PUD's in the City of Charleston) located to the west and north of the Grand Bees Property.
7. The County operates the Bees Ferry Landfill (Charleston County TMS# 301-00-00-026) (the "Landfill"), located on Bees Ferry Road in the unincorporated part of the County. Bees Ferry Road abuts Grand Oaks and the Grand Bees Property. The Landfill and the Grand

Bees Property share a common boundary along the Grand Bees Property's southwest property line.

8. Charleston County disposes of various types of waste at the Landfill, and the portion of the Landfill adjacent to the Grand Bees Property is a DHEC Class II Landfill. This landfill had been classified under former DHEC regulations (prior to May 23, 2008) as a construction, demolition, and land clearing debris landfill ("C&D Landfill").

9. The Petitioner is in the business of residential development, and as such, purchases land, plans the residential project, obtains land plan approval, engineers the improvements to the land, obtains other necessary approvals and permits, builds the infrastructure, installs the utilities, subdivides the land into lots, and then sells the residential lots to home builders.

10. Prior to purchasing the Grand Bees Property, Petitioner conducted due diligence that included reviewing the Grand Bees Property's zoning, the C&D Landfill's DHEC Permit ("C&D Permit"), and the County regulations applicable to the Landfill. Petitioner's representatives also met with Charleston County solid waste officials prior to purchasing the Grand Bees Property. At the conclusion of its due diligence, the Petitioner determined that according to the County's zoning ordinances, the County would need to obtain a special exception from the Charleston County Board of Zoning Appeals as a prerequisite to expansion of the C&D mound adjacent to the Grand Bees Property.

11. Under the County's zoning ordinances a special exception requires a public hearing that allows comments from the public. A special exception would also require the County to directly notify adjacent property owners, such as Petitioner.

12. On November 15, 2004, Petitioner closed on the Grand Bees Property for \$4,141,518.00.

13. Consistent with its zoning for residential use under the Bees Landing PUD, Petitioner obtained site plan approval from the City for 507 residential units in February 2006. After obtaining site plan approval, Petitioner proceeded to incur extensive engineering costs for the necessary infrastructure improvements to the Grand Bees Property to accomplish the residential development.

14. Taylor Bush, one of Petitioner's principals, testified that his company has so far invested approximately \$8,000,000 in the acquisition and development of the Grand Bees

Property.

15. The County has operated the Landfill at its current location since approximately 1977. Pursuant to the S.C. Solid Waste Policy and Management Act of 1991 (the "Act"), the County has operated the C&D/Class II Landfill under DHEC Permit Number 101001-1201 since October 17, 1997.

16. In July 2007, the County applied to DHEC to amend its C&D Permit at the Bees Ferry Landfill, and in November 2007, the County revised its application. The County's application sought to enlarge the vertical height limitation from 74' above mean sea level ("MSL") to 168' MSL and to expand the footprint of the C&D by 5.5 acres. As stated in its application, the increases would expand the C&D Landfill's maximum disposal capacity from approximately 2.5 to 5.4 million cubic yards, more than doubling its size.

17. The vicinity map, included in the County's 2007 permit application as required by regulation, found at Page G-04 of the application, identifies the adjoining Grand Bees Property as zoned PUD with the land use specified as residential. The vicinity map (dated 2004) used in the 2007 application is based on a 2001 aerial photograph.

18. Although at the time of its application the County knew Petitioner was in the process of developing the Grand Bees Property for residential units, the County did not directly notify Petitioner of the County's application to DHEC to expand the size of the C&D Landfill.

19. DHEC granted the modification of DHEC Permit Number 101001-1201 (the "First Permit Modification") on January 17, 2008. The Petitioner learned of the County's application a few days after the First Permit Modification's issuance.

20. Thereafter, Petitioner requested a contested case hearing to challenge the issuance of the First Permit Modification. The Honorable Ralph King Anderson, III conducted a hearing on January 13th and 14th, 2009 (Docket No. 08-A1J-07-0198-CC). Judge Anderson ultimately ruled that DHEC erred in granting the permit because the County failed to obtain a special exception in accordance with its own zoning ordinances and the Zoning and Land Development Regulations ("ZLDR"). As a result, 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). By Order dated June 2, 2009, Judge Anderson vacated the First Permit Modification and remanded it to DHEC.

21. After Judge Anderson issued his order vacating the First Permit Modification, the

County amended its ZLDR to eliminate the requirement of a special exception for the expansion of the Bees Ferry Landfill.

22. The County's zoning amendment, eliminating the need for a special exception, was approved in 2010. DHEC considered the previously filed permit application from 2007 to re-issue the permit modification for expansion of the Class II landfill. The County did not submit a new permit application nor did DHEC require one. The County merely provided some additional information, primarily dealing with zoning, to supplement its 2007 application.

23. Since the County's initial 2007 application, the General Assembly substantially revised DHEC's regulations governing solid waste landfills. Specifically, DHEC reviewed the First Permit Modification in 2007 and 2008 under then applicable S.C. Code Regs. 61-107.11. S.C. Code Regs. 61-107.19 repealed and replaced S.C. Code Regs. 61-107.11 on May 23, 2008.

24. Kent Coleman, Director of DHEC's Division of Mining and Solid Waste Management testified that, on remand from this Court, it evaluated the 2007 permit application under the new regulations. Since the new regulations contained new groundwater monitoring regulations, DHEC required the County to supplement its application in this regard. However, DHEC did not otherwise require the County to update its application.

25. Mr. Coleman further testified that in addition to the vicinity map based on the 2001 aerial photograph, DHEC subsequently consulted "numerous aerial photographs throughout the process ... that were more updated through time." However, none of these other aerial photographs are in the record.

26. As for DHEC's consistency determination after the First Permit Modification was vacated, on April 12, 2011, Mary Varga with DHEC sent an internal memorandum with the subject line "Review of Charleston County ZLDR" to Tim Eleazer with DHEC (the "Consistency Memorandum") stating that "[s]taff initiated a review that included the Charleston County's Zoning Ordinance, last amended on December 16, 2010, the Charleston County zoning map, and a letter dated February 3, 2005, from the Charleston County's Planning Department to determine if [the Bees Ferry Class II Landfill Expansion] is consistent with local zoning."

27. The Consistency Memorandum concluded that DHEC "has determined that the proposed expansion is consistent with the Charleston County land-use planning and zoning." However, the Consistency Memorandum does not state that any other local ordinances, including any contained in other chapters of the Charleston County Code of Ordinances, were consulted in

addition to the ZLDR during DHEC's consistency review process. The Consistency Memorandum represents the only written documentation of DHEC's official consistency determination in the record.

28. DHEC approved a draft permit modification on April 18, 2011; and on April 18, 2011, DHEC published public notice of the draft permit modification in *The Post & Courier*, the Charleston daily newspaper. A public hearing on the draft permit modification was held on July 13, 2011. Petitioner's representative along with other individuals from Grand Oaks and the community attended and offered comments.

29. On September 1, 2011, DHEC rendered its final decision on remand and issued a new permit modification of DHEC Permit Number 101001-1201 (the "Second Permit Modification"). The Second Permit Modification authorizes the County to make the same modifications to the Class II Landfill as the First Permit Modification, i.e. increasing the height of the Class II Landfill from 74 feet MSL to 168 feet MSL, increasing the annual disposal limit from 182,000 tons per year to 200,000 tons per year, more than doubling its overall capacity, and expanding the footprint by 5.5 acres. Mr. Coleman approved and signed both the First and Second Permit Modifications.

30. During the hearing, Mr. Coleman testified that DHEC's permitting authority is subject to the requirements of the Act and its implementing regulations, namely S.C. Code Regs. 61-107.19. He further testified that under S.C. Code Ann. § 44-96-290(F) and S.C. Code Regs. 61-107.19, a permit cannot be issued by DHEC unless the expansion allowed by the permit is also consistent with local zoning and land use ordinances.

31. S.C. Code Regs. 61-107.19, Part 1 (D)(1)(a) requires that prior to the submittal of a permit application for a new or expanded landfill, the applicant must demonstrate, among other things, that the activity is consistent with local zoning, land use, and other applicable ordinances under S.C. Code Ann. § 44-96-290(F). Additionally, S.C. Code Regs. 61-107.19, Part 1 (D)(1)(b) provides that consistency determinations made pursuant to Part 1 (D)(1)(a) "prior to the effective date of this regulation . . . shall remain applicable and become the agency's final determination . . . subject to the appeal provision in Part 1 (D)(1)(c)"

32. In his testimony, Mr. Coleman stated that DHEC deemed the consistency requirement of S.C. Code Ann. § 44-96-290(F) satisfied once DHEC learned that the County had amended the ZLDR to eliminate the need for a special exception for expansion of the landfill.

Therefore, DHEC did not consider other applicable County ordinances.

33. Also, during the hearing before this Court, the Petitioner offered into evidence a certified copy of County Ordinance #180, adopted by County Council on March 5, 1974, which is presently codified (with minor typographical modifications) at Section 10-22 of the Charleston County Code of Ordinances (hereinafter, "Section 10-22"). Counsel for both the County and DHEC stipulated that Section 10-22 (titled "Disposal Sites and Facilities") was in effect when the original permit application was filed in 2007 and when the Second Permit Modification was issued. Moreover, wording in this Section shows that it applies to "[a]ll owners or operators of solid waste disposal facilities including governmental units or agencies." The Section also provides that certain site design regulations are triggered "[w]hen a new sanitary landfill is constructed or an existing site is extensively re-designed." (Emphasis added.)

34. The site design regulations include Section 10-22(2)(d), which provides that all disposal sites shall "conform with the surrounding environment." Section 10-22(2)(e) provides that solid waste disposal sites must also "conform with future development of the area." The County never brought Section 10-22 to DHEC's attention. Furthermore, Mr. Coleman testified that DHEC did not consider Section 10-22 when deciding whether to grant the Second Permit Modification and he did not become aware of it until his deposition in preparation for this hearing. There is also no mention of Section 10-22 in the Consistency Memorandum.

35. The Consistency Memorandum does not reference the Charleston County Code of Ordinances – it only references the ZLDR. There is no evidence in the record that Section 10-22 or the County's Code of Ordinances, more generally, was ever reviewed by DHEC to determine whether the requested permit modification was consistent with all applicable local ordinances.

36. According to Mr. Coleman, Section 10-22 was irrelevant to DHEC's consistency determination because its "generalized language is not applicable . . . in the sense that it doesn't change anything and doesn't specify anything about . . . the requirements that the local zoning does not already cover."

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 many of the tallest structures in Charleston County, including the driving surface of the Arthur Ravenel, Jr. 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 neighborhoods, 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.

40. After Judge Anderson vacated the First Permit Modification in 2009, DHEC never required and the County never provided a vicinity map with aerial photography updated from 2001. The vicinity map DHEC relied on in making its permitting decision does not reflect the substantial growth in residential development the area has experienced over the last ten years and will experience in the coming years. In contrast, the updated aerials depict the state of existing and future residential development as of 2008 and 2012.

41. Aside from Section 10-22 of the Charleston County Code of Ordinances, Chapter 9 of the ZLDR contains Development Standards which are generally applicable to new and expanding development. These Standards are intended "to protect the public health, safety, and general welfare;" "to promote harmonious and orderly development;" and "to foster civic beauty

by improving the appearance, character and economic value of civic, commercial and industrial development within the unincorporated areas." Article 9.1, ZLDR. These Development Standards are also designed to: "Implement the use of vegetated buffers in order to mitigate the effects of incompatible adjacent uses, to provide transition between neighboring properties and streets, to moderate climatic effects, and to minimize noise and glare." Article 9.1, ZLDR.

42. The landscaping, screening, and buffering regulations provide that "[w]hen modifications or additions are being made to an existing non-residential building or site, the standards of this Article shall apply to those portions of the subject parcel that are directly affected by the proposed improvements, as determined by the Planning Director" Article 9.5, ZLDR. In essence, the landscaping, screening, and buffering requirements are applicable to modifications of non-residential sites in Charleston County, including "waste-related uses." Article 9.5.1 and Article 9.5.4(A)(4), ZLDR.

43. In this instance, the County's regulations require a one hundred (100) foot vegetative buffer between the Class II Landfill and Petitioner's property, specifically nine (9) canopy trees, eleven (11) understory trees and fifty (50) shrubs per one hundred (100) feet of linear buffer along the property line. However, the approved Second Permit Modification drawings contain no reference to the County's landscaping regulations, no description or requirement of the vegetation that would be required to be planted, and no planting or landscaping plan.

44. The Petitioner's witness, Mr. Lester, testified that in practice, landscaping plans are submitted and required by local government to prove compliance with buffer and landscaping regulations as a precondition to land development. However, no landscaping plan or similar documentation was included either in the County's 2007 application, as supplemented, or the Second Permit Modification itself.

45. Mr. Lester further testified that in 2009 and 2012, his firm physically inspected the one hundred (100) foot space between the Class II Landfill and Petitioner's Property, and observed that it does not meet the specific requirements of the ZLDR, by not containing the vegetative buffering requirements. Additionally, the 100 foot space is utilized as an access road by the County around the Landfill.

46. Beyond consistency with the ZLDR and the County's Code of Ordinances, under S.C. Code Regs. 61-107.19 Part IV (B)(1)(a) a landfill's fill area boundary may not be located

within one thousand (1,000) feet of any "residence." As previously mentioned, the City approved the Grand Oaks PUD and the Petitioner's site plan for residential development several years before the County applied to DHEC for the expansion permit for its Class II landfill.

47. According to testimony provided by Mr. Bush, the planned development for the Grand Bees Property consists of various engineering phases, including Phase 7 adjacent to the Class II Landfill's common boundary. Mr. Bush further testified that Phase 7 has been both permitted for residential development by the City and engineered for water, sewer, storm system, and roadway infrastructure improvements.

48. Mr. Lester surveyed the common boundary between the Grand Bees Property and the Class II Landfill. He testified to the measurements performed, computer aided design ("CAD") plats produced, and the location of approximately 130 approved and planned residential lots on the Grand Bees Property located within 1,000 feet of the fill area boundary of the Class II Landfill Permit. Mr. Lester's analysis was based on the residential development approvals as well as Phase 7's engineering.

49. As set forth below, S.C. Code Regs. 61-107.19 neither defines "residence" nor provides a test for determining when a "residence" will be considered to be within 1,000 feet of a Class II Landfill. Additionally, the DHEC Board has no reported decision that interprets how the Department defines "residence" for purposes of its Solid Waste Act and the regulations propounded thereunder.

50. The Department's permitting decision in this case was based on the dictionary definition of "residence" that personnel interprets to mean a structure where someone lives or could live, as evidenced by a certificate of occupancy ("CO") granted by local government authorities. According to the Department's witness, Mr. Coleman, if a CO was granted within 1,000 feet of a residence "like a day prior to [a permit being issued], we would have to consider that in our decision"

51. The parties do not dispute that "there are proposed and planned residences . . . at this property."

CONCLUSIONS OF LAW

Based on the foregoing, I make the following legal conclusions:

1. The Administrative Law Court has jurisdiction over this contested case matter pursuant to S.C. Code Ann. §§ 1-23-600(A) and 44-1-60(F)(2) (Supp. 2012).

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).

3. The Petitioner, as the party challenging the issuance of the Permit to the County, bears the burden of proving, by a preponderance of the evidence, that the Permit issued by DHEC to the County did not meet the requirements of S.C. Code Ann. § 44-96-10 *et seq.* and S.C. Code Regs. 61-107. See Leventis v. S.C. Dep't. of Health and Envtl. Control, 340 S.C. 118, 132, 530 S.E.2d 643, 651 (Cl. App. 2000).

CONSISTENCY WITH LOCAL LAND USE ORDINANCES

4. S.C. Code Ann. § 44-96-290(F), contained in the Act, provides 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."

5. Compliance with local zoning, land use, and other applicable local ordinances is a condition precedent to DHEC issuing a permit for an expansion of an existing solid waste facility. Southeast Resource Recovery, Inc. v. S.C. Dep't. of Health and Envtl. Control, 358 S.C. 402, 407-08, 595 S.E.2d 468, 471 (2004).

6. Our courts have held that "consistent with" means "comply with" in this context, and the two terms are regularly used interchangeably when discussing the requirements of S.C. Code Ann. § 44-96-290(F). See Southeast Resource Recovery, Inc., 358 S.C. at 408, 595 S.E.2d at 471.

7. A consistency determination by a county applicant does not control; the law requires that the permitting agency determine consistency for purposes of a state statute that requires consistency as a condition of permitting. Southeast Resource Recovery, Inc., 358 S.C. at 407-08, 595 S.E.2d at 471 ("[a]lthough Section 44-96-290(F) requires a proposed facility comply with local standards, it does not designate the county as the final arbiter on whether the proposed facility complies with its local zoning, land use, and other ordinances."). Clearly, DHEC is prohibited from delegating the consistency determination to local governments through letters of consistency or other means. *Id.* DHEC has the ultimate responsibility to ensure that it surveys and considers all local zoning, land use, and other applicable ordinances. *Id.*

8. The ALC, as *de novo* fact finder in contested case hearings, similarly must determine whether DHEC made a proper consistency determination. To decide whether DHEC made a proper consistency determination, this Court must determine whether DHEC reviewed all applicable local ordinances and whether the permit, as granted, is consistent with these ordinances. S.C. Code Ann. § 44-96-290(F); See Southeast Resource Recovery, Inc. v. South Carolina Dept. of Health and Environmental Control, 358 S.C. 402, 595 S.E.2d 468 (2004).

9. As a matter of law, Section 10-22 is an applicable local land use ordinance under S.C. Code Ann. § 44-96-290(F). It specifically governs solid waste disposal facilities (both new and expanded), including those owned and operated by governmental entities, including the County.

10. Section 10-22(1) applies various rules and regulations to “[a]ll owners or operators of solid waste disposal facilities including governmental units or agencies” (emphasis added). Additionally, Section 10-22(1)(c) provides that these site design regulations are triggered “[w]hen a new sanitary landfill is constructed or an existing site is extensively re-designed” (emphasis added). Among other things, Section 10-22(b) provides that the disposal site shall “conform with the surrounding environment” and “conform with future development of the area.”

11. According to the South Carolina Supreme Court, zoning ordinances are not the only means by which local governments can regulate land use. Greenville County v. Kenwood Enterprises, 353 S.C. 157, 165, 577 S.E.2d 428, 432 (2003), overruled on other grounds by Byrd v. City of Hartsville, 365 S.C. 650, 620 S.E.2d 76 (2005) (“[W]hile the Comprehensive Planning Act governs zoning, it simply does not evince a legislative intent to completely prohibit any other local enactments from touching upon zoning or land use.”). The terms of S.C. Code Ann. § 44-96-290(F) acknowledge this distinction as well by expressly differentiating between zoning and general land use ordinances: “No permit . . . may be issued by the department unless the proposed facility or expansion is consistent with local zoning, land use, and other applicable local ordinances . . .” (emphasis added).

12. In 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.

13. 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. S.C. Code Ann. § 44-96-290(F); Southeast Resource Recovery, Inc., 358 S.C. at 407-08, 595 S.E.2d at 471.

14. The Court rejects Respondents' argument that Section 10-22 is less specific and more vague than the ZLDR and therefore superseded by the ZLDR, making Section 10-22 irrelevant for the purposes of consistency review. It is the conclusion of this Court that Section 10-22 is a valid land use ordinance that exists in addition to the ZLDR. Respondents have presented no authority to support the view that the ZLDR preempts, for the purposes of DHEC's consistency analysis, an otherwise applicable valid land use ordinance simply due to the latter's being more specific. See e.g., Mikell v. County of Charleston, 386 S.C. 153, 687 S.E.2d 326 (2009) ("Where two ordinance provisions deal with the same issue, one in a general and the other in a more specific and definite manner, the more specific prevails.").

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 future development of the area," are not the sort of "broad, general statements of goals" that worried the Supreme Court in Southeast Resource Recovery, Inc. Rather, the requirements of Section 10-22 are not broad and 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.

17. Respondents also argued that Section 10-22 was irrelevant to the consistency determination because DHEC's only charge was to review the permit application to ensure consistency with the ZLDR. Respondents base this argument on the provision in Judge Anderson's Order that "this case is remanded for review in accordance with the ZLDR" and S.C. Code Regs. 61-107.19, Part I (D)(1)(b), which provides that consistency determinations made prior to the effective date of the new regulations shall remain applicable upon adoption of the new regulations.

18. I conclude that, pursuant to the Act and its implementing regulations, DHEC may only issue permits that are consistent with local law (zoning or otherwise) and that all other applicable substantive and procedural requirements of the Act and the regulations must be complied with anytime DHEC issues a permit. S.C. Code Ann. § 44-96-290(A), (B) and (F). Therefore, when considering issuance of a permit, on remand or otherwise, DHEC must make sure that the proposed permit complies with the law in all respects.

19. Neither DHEC's permit review nor the scope of review of this Court is confined to an analysis of whether DHEC properly reviewed the ZLDR. 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. *E.g. Brown*, 348 S.C. at 520, 560 S.E.2d at 417. This determination includes compliance with both S.C. Code Ann. § 44-96-290(F) and S.C. Code Regs. 61-107.19.

20. Respondents are correct that S.C. Code Regs. 61-107.19, Part I (D)(1)(b) provides that consistency determinations, pursuant to S.C. Code Ann. § 44-96-290(F), previously made under the old regulations "remain applicable" for permits issued under the new regulations. However, there is no evidence in the record that DHEC ever performed the consistency determination with respect to Section 10-22 and the ZLDR (specifically, the vegetative buffering regulations) at that time. The permit file of DHEC the parties stipulated into evidence does not disclose a written determination of compliance with this regulation.

21. Additionally, when the First Permit Modification was vacated by Order of this Court in 2009 after the new regulations had taken effect, DHEC's prior consistency

determination no longer remained applicable because it had been vacated. This required DHEC to again perform a consistency determination, and in so doing, ensure that upon reissuance of the permit, the permitted activity was consistent in all respects with the applicable local zoning and land use ordinances and other applicable law.

VEGETATIVE BUFFER REQUIREMENTS (CHARLESTON COUNTY ZLDRs)

22. As mentioned above, S.C. Code Ann. § 44-96-290(F) requires permits issued by DHEC to be consistent with local zoning and land use ordinances. In this case, the Second Permit Modification constitutes a modification to a non-residential site, thereby triggering the County's landscaping, screening, and buffering regulations contained in Article 9.5 of the ZLDRs. These regulations, as applied, require a one hundred (100) foot vegetative buffer between the Class II Landfill and Petitioner's property. Based upon this finding, the Second Permit Modification is not consistent with the County's vegetative and landscaping standards because no landscaping plan or other documentation demonstrating compliance was made part of the permit application or the Second Permit Modification. Rather, only a one hundred (100) foot setback from the Landfill property line is indicated on the plans submitted with the application; however, this setback alone is insufficient to establish consistency because it neither shows nor requires the vegetative screen required by local zoning regulations.

23. The one hundred (100) foot setback depicted in the County's application reflects a DHEC regulatory requirement separate and apart from the County's landscaping and buffer regulations. S.C. Code Regs. 61-107.19, Part IV(B)(1)(e). The 100 foot setback is a DHEC siting requirement for any landfill of this type, no matter what the local ordinances require.

24. Respondent argues that the language "as determined by the Planning Director" in Article 9.5.1 of the ZLDR means the requirement of vegetative buffering can be waived by the Planning Director. However, neither the application nor DHEC's file include any demonstration of authority or proof that the buffer requirements had been or would be waived by the Planning Director.

25. Because the Second Permit Modification is not compliant with local zoning and land use regulations, as it relates to the County's vegetative buffering regulations, DHEC erred in granting the Second Permit Modification. S.C. Code Ann. § 44-96-290(F); Southeastern Resource Recovery, Inc. v. S.C. Dep't. of Health and Envtl. Control, 358 S.C. at 407-08, 595 S.E.2d at 471.

**SETBACK REQUIREMENT (SOLID WASTE POLICY AND MANAGEMENT
ACT)**

26. No person may initiate the construction or expansion of a solid waste management facility except in accordance with the requirements established by DHEC pursuant to the Act. S.C. Code Ann. § 44-96-290(B).

27. S.C. Code Regs. 61-107.19, Part IV(A) requires that the siting, design, construction, operation, and closure activities of Class II Landfills shall conform to the standards set forth in Part IV.

28. S.C. Code Regs. 61-107.19, Part IV(B)(1)(a) imposes the following mandatory setback from adjoining properties: "The boundary of the fill area shall not be located within 1,000 feet of any residence, school, day-care center, church, hospital, or publically owned recreational park area." (Emphasis added).

29. Respondents are correct that S.C. Code Regs. 61-107.19, Part I (D)(1)(b) provides that certain DHEC regulatory compliance determinations, specifically pursuant to S.C. Code Regs. 61-107.19, Part IV(B)(1)(a), previously made under the old regulations "remain applicable" for permits issued under the new regulations. However, there is no evidence in the record that DHEC ever performed a regulatory compliance determination with respect to its own 1,000 foot setback requirement at that time. The permit file of DHEC the parties stipulated into evidence does not disclose a written determination of compliance with this regulation.

30. What is meant by "residence" for purposes of measuring the minimum regulatory buffer is neither defined by S.C. Code Regs. 61-107.19, Part IV, nor elsewhere in the regulations.

31. Petitioner argues that the 1,000 foot setback applies to residences that are planned and shown on an approved site plan. The Respondents argue that the setback applies only to fully constructed and occupied residential dwellings.

32. The rules of statutory construction apply to regulations. Converse Power Corp. v. S.C. Dep't. of Health and Envtl. Control, 350 S.C. 39, 564 S.E.2d 341 (Ct. App. 2002). In construing statutory language, the statute must be read as a whole and sections which are part of the same general statutory law must be construed together and each one given effect. Jackson v. Charleston County School Dist., 316 S.C. 177, 181, 447 S.E.2d 859, 861 (1994). Moreover, the true guide to statutory construction is not the phraseology of an isolated section or provision, but the language of the statute as a whole considered in light of its manifest purpose. Id., citing

Browning v. Hartvigsen, 307 S.C. 122, 125, 414 S.E.2d 115, 117 (1992) (“[A] statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers. The real purpose and intent of the lawmakers will prevail over the literal import of particular words.”).

33. The statute must be read in a sense that harmonizes with its subject matter and accords with its general purpose. Mun. Ass’n of S.C. v. AT&T Commc’ns of S. States, Inc., 361 S.C. 576, 580, 606 S.E.2d 468, 470 (2004). An ambiguity in a statute should be resolved in favor of a just, beneficial, and equitable operation of the law. State v. Hudson, 336 S.C. 237, 247, 519 S.E.2d 577, 582 (Ct. App. 1999). The goal of statutory construction is to harmonize statutes whenever possible and to prevent an interpretation that would lead to a result that is plainly absurd. Clemson Univ. v. Speth, 344 S.C. 310, 313, 543 S.E.2d 572, 573 (Ct. App. 2001). Courts will reject statutory interpretations that lead to absurd results clearly unintended. S.C. Coastal Conservation League v. S.C. Dep’t. of Health and Envtl. Control, 380 S.C. 349, 369, 669 S.E.2d 899, 909 (Ct. App. 2008).

34. Regulations are construed using the same canons of construction as statutes. S.C. Dep’t of Rev. v. Blue Moon of Newberry, Inc., 397 S.C. 256, 261, 725 S.E.2d 480, 483 (2012); Murphy v. S.C. Dep’t of Health and Envtl. Control, 396 S.C. 633, 639, 723 S.E.2d 191, 195 (2012).

35. The purpose of the regulations relevant to this case is to establish a setback distance to protect residences, schools, hospitals, and publicly owned parks from the obvious, adverse effects of landfills on surrounding property. Moreover, the purposes and findings of the Act express the importance of, among other things, preserving and protecting public health and coordinating landfill planning between state and local government. These purposes would be considerably undermined if “residence” was interpreted in a way that effectively eliminates this basic protection for property located next to landfills.

36. Under the Respondents’ interpretation, if the permit applicant to DHEC can “win the race” – that is, succeed in obtaining a permit before a planned house, school, hospital, or park is finished with construction – these neighbors will be ignored for the purposes of S.C. Code Regs. 61-107.19, Part IV(B)(1)(a). The logical extension of the Respondents’ argument is that any planned “residence” – no matter how far along the development or construction process – must be ignored. And since many of these ignored, planned developments are likely to

ultimately be constructed and occupied after the permit has been granted, under Respondents' interpretation, they will end up being located within 1,000 feet of the Class II Landfill a result the regulations seeks to avoid.

37. Respondents' position that no unconstructed or incomplete residences (lacking a certificate of occupancy) should ever be considered regardless of the circumstances, including the circumstances in this case, conflicts with the legislative intent and produces an absurd result. Under this interpretation, the necessity of having a CO for there to be a "residence" under the regulation would mean that DHEC must continuously monitor (up to the minute before making its consistency determination) the activities of local building departments to determine when and if a CO has been issued. Additionally, should a CO be granted for a residence adjacent to the proposed landfill during the permitting process, this sort of "springing" residence could essentially stop a permit in its tracks. This narrow interpretation could not have been intended by the legislature because it creates extreme administrative difficulty for DHEC and the potential for unforeseen, yet easily avoidable, expenses and problems for all parties.

38. The Court rejects the Respondents' argument that this Court must afford its staff's interpretation of "residence" deference. DHEC staff's interpretation of the regulation is not entitled to deference because only the interpretation of DHEC's Board is entitled to deference by this Court. S.C. Coastal Conservation League, 363 S.C. at 75, 610 S.E.2d at 486; Waste Management of the Carolinas, Inc., 2008 WL 4659522 at 11 (holding that deference is only due to the construction or determination of a statute or regulation when the DHEC Board formally adopts such construction).

39. Respondents point to a case recently decided by the South Carolina Supreme Court to suggest that DHEC Staff's regulatory interpretations of undefined terms and phrases are entitled deference. In Murphy v. South Carolina Department of Health and Environmental Control, 396 S.C. 633, 723 S.E.2d 191 (2012), the Court relied on staff's interpretation of "vicinity of the project," finding the interpretation to be "both reasonable and consistent with the plain language of the regulation." Murphy, 396 S.C. at 640-41, 723 S.E.2d at 195.

40. However, Murphy is distinguishable from this case. Unlike the staff member's interpretation of the regulation applicable in Murphy, DHEC staff's interpretation of "residence" in this case is neither reasonable nor consistent with S.C. Code Regs. 61-107.19.

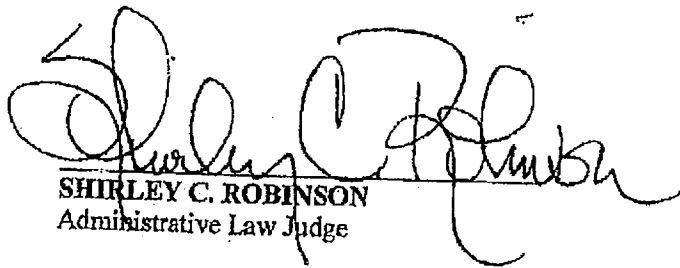
ORDER

Accordingly, based on the foregoing, **IT IS HEREBY ORDERED** that DHEC'S decision on the Second Modified Permit (DHEC #101001-1201) is **REVERSED** and the Second Modified Permit is hereby **VACATED**.

IT IS FURTHER ORDERED that should the County wish to continue pursuing a Class II Landfill expansion permit, an entirely new and updated permit application must be filed, given the long period of time between this Order and the County's initial application in 2007, the rapid changes in residential development in the surrounding area since that time, the repeal and replacement of the governing regulation, and the outdated materials on which the permit relies including, but not limited to, the vicinity map from 2001.

IT IS FURTHER ORDERED that any arguments of the parties not specifically addressed herein are hereby deemed to be denied.

AND IT IS SO ORDERED.


SHIRLEY C. ROBINSON
Administrative Law Judge

March 19th, 2013
Columbia, South Carolina

CERTIFICATE OF SERVICE
This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid or in the emergency Mail Service addressed to the party(ies) or their attorney(s).
True 19 day of March 2013
By: Jacobi J. Henderson
JUDGE, LAW CLERK

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Shirley C. Robinson, Administrative Law Judge

Case No. 11-ALJ-07-0556-CC

Grand Bees Development, LLC,

Respondent,

v.

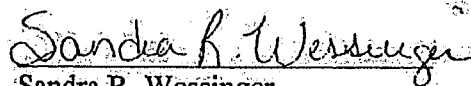
South Carolina Department of Health
and Environmental Control,

Appellant.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Grand Bees Development, LLC, by depositing a copy of it in the United States Mail, postage prepaid, on May 29, 2013, addressed to the attorneys of record: Jamie Khan, Esquire, McCullough Kahn, LLC, 68½ Queen Street, Charleston, South Carolina 29401; G. Trenholm Walker, Esquire, Pratt-Thomas Walker, PA, 16 Charlotte Street, Charleston, South Carolina 29403; and to counsel for Co-Appellant Charleston County: Joseph Dawson, III, Esquire, Bernard E. Ferrara, Jr., Esquire, Charleston County Attorney's Office, 4045 Bridge View Drive, North Charleston, South Carolina 29405.

May 29, 2013
Columbia, South Carolina


Sandra R. Wessinger

RECEIVED

MAY 31 2013

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Shirley C. Robinson, Administrative Law Judge

Docket No. 2011-ALJ-07-0556-CC

Grand Bees Development, LLC, ... Respondent,

v.

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

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Appendix to the Record on Appeal, together with the Record on Appeal, contains all material proposed to be included by any of the parties and not any other material.


Joseph Dawson, III, County Attorney
Bernard E. Ferrara, Jr., Deputy County Attorney
Austin A. Bruner, Assistant County Attorney
Bradley A. Mitchell, Assistant County Attorney
Johanna S. Gardner, Assistant County Attorney
CHARLESTON COUNTY ATTORNEY'S OFFICE
Lonnie Hamilton, III Public Services Building
4045 Bridge View Drive
North Charleston, South Carolina 29405
(843) 958-4010
Attorneys for Appellant

Charleston, South Carolina
October 21, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Shirley C. Robinson, Administrative Law Judge

Docket No. 2011-ALJ-07-0556-CC

Grand Bees Development, LLC, ... Respondent,

v.

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

**FINAL BRIEF OF
APPELLANT COUNTY OF CHARLESTON**

Joseph Dawson, III, County Attorney
Bernard E. Ferrara, Jr., Deputy County Attorney
Austin A. Bruner, Assistant County Attorney
Bradley A. Mitchell, Assistant County Attorney
Johanna S. Gardner, Assistant County Attorney
Charleston County Attorney's Office
Lonnie Hamilton, III Public Services Building
4045 Bridge View Drive
North Charleston, South Carolina 29405
(843) 958-4010

Attorneys for Appellant County of Charleston

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF ISSUES ON APPEAL	1
STATEMENT OF THE CASE	2
STATEMENT OF THE FACTS	5
ARGUMENT	8
I. THE COURT ERRED 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	9
A. No Finding of Inconsistency	9
B. Charleston County Solid Waste Disposal Ordinance Section 10-22 is a Subjective Standard and Does Not Create an Objective Standard for DHEC to Review and Apply	10
C. There Are No Objective Standards To Measure	12
II. THE COURT ERRED 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	14
A. Directly Affected by the Proposed Improvement	14
B. As Determined by the Planning Director	16
III. THE COURT ERRED 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	18
A. Residence Means Structure for Human Habitation	18
B. The Court Erred When it Failed to Give Deference to DHEC's Application of the Term Residence	20
CONCLUSION	22, 23

TABLE OF AUTHORITIES

CASES	PAGE
<u>Buist v. Huggins</u> , 367 S.C. 268, 625 S.E.2d 636 (2006)	21
<u>Eagle Container Co., LLC v. County of Newberry</u> , 366 S.C. 611, 622 S.E.2d 733 (2005)	15
<u>Greeneagle, Inc. v. S.C. Dep't of Health & Envtl. Control</u> , 399 S.C. 91, 730 S.E.2d 869 (Ct.App.2012)	8, 13
<u>Nucor Steel v. S.C. Public Serv. Comm'n</u> , 310 S.C. 539, 426 S.E.2d 319 (1992)	21
<u>Southeast Resource Recovery, Inc. v. S.C. Dep't of Health and Envtl. Control</u> , 358 S.C. 402, 595 S.E.2d 468 (2004)	10, 11, 17
STATUTES	
S.C. Code Ann. § 1-23-610	8
S.C. Solid Waste Policy and Management Act	3, 12
S.C. Code Ann. § 44-96-290(F)	3, 6, 7, 10, 11, 17
REGULATIONS	
Solid Waste Management Regulations	20
S.C. Regulation § 61-107	19
S.C. Regulation § 61-107.18(B)(29)	20, 21
S.C. Regulation § 61-107.19	3, 20
S.C. Regulation § 61-107.19, Part IV	20
S.C. Regulation § 61-107.19, Part IV(B)(1)(a)	19, 22
S.C. Regulation § 61-107.19, Part IV(B)(1)(e)	17

ORDINANCES

Charleston County Code of Ordinances § 10-22 7, 9, 10, 11, 12, 13, 14

Charleston County Zoning and Land Development Regulations . 2, 3, 4, 6, 7, 15, 16, 17, 18

 Article 9.5 15, 16, 17

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?

STATEMENT OF THE CASE

On November 8, 2007, the County of Charleston ("Charleston County" or the "County") 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.

On January 17, 2008, the Division of Mining and Solid Waste Management, Bureau of Land and Waste Management of the DHEC issued its Permit No. 1010001-1201 for the requested modification of the construction, demolition and land-clearing debris ("C&D") cell.

On April 18, 2008, Grand Bees Development, LLC ("Grand Bees") appealed the permit modification to the South Carolina Administrative Law Court ("ALC") filing a request for a contested case hearing. On January 13-14, 2009, the ALC held a contested case hearing. On June 2, 2009, the ALC issued its final order and decision that the modification did not comply with the Charleston County Zoning and Land Development Regulations Ordinance (the "ZLDR") because Charleston County had not obtained a special exception for the expansion. The ALC vacated DHEC's decision granting the modification of the permit and remanded the matter to DHEC for its review in accordance with the County's ZLDR. On July 2, 2009, the County appealed the decision of the ALC to the South Carolina Court of Appeals (the "Court of Appeals").

At the time the County appealed the decision to the Court of Appeals, the Charleston County Planning Department introduced an amendment to the ZLDR to change the provisions interpreted by the ALC requiring the County to obtain a special exception before modifying the Landfill. The Charleston County Planning Commission approved the text changes and forwarded its recommendation to Charleston County Council ("County Council") to remove the provisions at issue in the ZLDR and accept the text amendment. County Council adopted the amendment to the ZLDR on August 11, 2009.

On October 8, 2009, the Court of Appeals issued its order dismissing the County's appeal and finding that until DHEC reviewed the permit modification as required by the ALC's order, there was no decision of DHEC on the merits of the case.

Thereafter, DHEC reviewed the permit in accordance with the 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. DHEC subsequently issued Permit No. 101001-1201 to the County of Charleston on September 1, 2011, for modification of the C&D cell ("Second Permit Modification").

Grand Bees appealed DHEC's issuance of the Second Permit Modification. Grand Bees claims that the permit was issued contrary to the S.C. Regulations 61.107.19 and the statutes contained in the S.C. Solid Waste Policy and Management Act and that it was inconsistent with the County of Charleston's zoning, land use and other applicable ordinances as required by S.C. Code Ann. § 44-96-290(F) and its implementing

regulations. That petition was the subject matter of a contested case hearing on March 20-21, 2012.

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. On March 29, 2013, the County and SCDHEC filed respective motions for reconsideration. On May 8, 2013, the ALC issued its order denying the County's motion for reconsideration. The County filed its notice of appeal with this Court on May 29, 2013.

STATEMENT OF FACTS

Since 1977, Charleston County has operated the Bees Ferry Landfill, which is located along Bees Ferry Road in an unincorporated portion of the County. As part of its operations, the County operates and maintains a DHEC Class II Landfill that includes a C&D cell.

On November 15, 2004 - 27 years after the County began operating the landfill - Grand Bees purchased a tract of land of approximately 311 acres located adjacent to the County's landfill off Bees Ferry Road. The Grand Bees property is zoned planned unit development ("PUD") by the City of Charleston and is designated for residential land use. The property is part of a larger PUD that was first approved by the City Council in March 1993 -16 years after the County began operating its landfill.

The County has operated the C&D cell under DHEC Permit Number 101001-1201 since October 17, 1997. In July 2007, the County applied to DHEC to amend its construction and demolition permit and revised its application in November 2007. The County's application sought to increase the vertical height limitation of the C&D cell from 74 feet above mean sea level ("MSL") to 168 feet MSL. In addition, the application sought to expand the footprint of the cell by 5.5 acres in order to allow for the effective and efficient disposal of construction, demolition, and land clearing debris by expanding the cell's maximum disposal capacity from approximately 2.5 to 5.4 million cubic yards. This action would enable the County to continue to protect the public health, safety and general welfare of the citizens of the County by providing a central location for disposal of this type of waste and thereby minimizing unlawful dumping and littering throughout the County and

surrounding municipalities. DHEC granted the First Permit Modification on January 17, 2008.

Grand Bees subsequently requested a contested case hearing challenging DHEC's issuance of the First Permit Modification. By order dated June 2, 2009, the ALC vacated the First Permit Modification and remanded the matter back to DHEC. The order was based 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) because the County did not first obtain a special exception in accordance with the County's ZLDR.

In 2010, the County amended the ZLDR and eliminated the requirement of a special exception for the expansion of the Bees Ferry Landfill. The County supplemented its 2007 application so that it could comply with revised state regulations. DHEC approved a draft permit modification on April 18, 2011, and on the same day published the notice in *The Post & Courier*, the Charleston daily newspaper. DHEC held a public hearing on the draft permit modification on July 13, 2011. Representatives of Grand Bees attended the public hearing.

On September 1, 2011, DHEC rendered its final decision on remand and issued the Second Permit Modification, which allowed for the same increases in height and size sought under the First Permit Modification.

Again, Grand Bees subsequently requested a contested case hearing challenging DHEC's issuance of the Second Permit Modification. The ALC reversed DHEC's decision and vacated the Second Permit Modification. The ALC further ordered that should the County wish to continue pursuing an expansion permit, an entirely new application must be

filed given the long period of time since the initial application in 2007 and the rapid changes in residential development in the surrounding area since that time. (R. at 0019).

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 Section 10-22 of the Charleston County Code of Ordinances "was ever reviewed by DHEC to determine whether the requested permit modification was consistent with all applicable local ordinances" (R. at 0007). The ALC also found that the County did not meet the County's own ZLDR landscaping regulations requiring a 100 foot vegetative buffer between the landfill and Grand Bees property, "specifically nine (9) canopy trees, eleven (11) understory trees and fifty (50) shrubs per one hundred (100) feet of linear buffer along the property line" (R. at 0009). As a further ground, the ALC found that there were "130 approved and planned residential lots on the Grand Bees Property located within 1,000 feet of the fill area boundary of the Class II Landfill Permit" and therefore the Second Permit Modification must be nullified (R. at 0010).

STANDARD OF REVIEW

"The Administrative Procedures Act (APA) establishes the standard of review for appeals from the ALC. The APA provides this court may reverse or modify the ALC's decision only if the substantive rights of a party have been prejudiced due to: constitutional or statutory violations; an agency exceeding its authority; unlawful procedure; an error of law; a clearly erroneous view of evidence in the record; or an abuse of discretion. S.C. Code Ann. § 1-23-610(B) (Supp.2011). "As to factual issues, judicial review of administrative agency orders is limited to a determination [of] whether the order is supported by substantial evidence.' 'Substantial evidence' sufficient to support a finding of the ALC is 'evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached.' 'The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.'" Greeneagle, Inc. v. S.C. Dep't of Health & Envtl. Control, 399 S.C. 91, 95, 730 S.E.2d 869, 871 (Ct.App.2012), reh'g denied (July 23, 2012) (citations omitted).

ARGUMENT

I. THE ALC ERRED 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.

A. No Finding of Inconsistency.

The ALC erred when it reversed DHEC's decision granting the County's permit modification for lack of consistency with the Charleston County Solid Waste Disposal Ordinance, Chapter 10, Article II, Section 10-22, based on DHEC's failure to review it, without a finding that the permit modification was in fact inconsistent with the Ordinance.

The Charleston County Solid Waste Disposal 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.**

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).

The ALC found that "DHEC never considered Section 10-22 in its consistency review." (R.

at 0012). The ALC's findings on "Consistency with Local Land Use Ordinances" misapplies 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 it does not find that the Second Permit Modification is inconsistent with the County's Solid Waste Disposal Ordinance, Section 10-22, which is a prerequisite for denying the County's permit modification. Rather, the ALC found that "DHEC's failure to review Section 10-22 is significant. . . . 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's "failure to review standard" has not been established in the Act or in case law. The South Carolina Solid Waste Policy and Management Act and the Southeast Resource Recovery, Inc. decision do not require DHEC to "consult **all** applicable land use ordinances . . . to fulfill the consistency requirement of S.C. Code Ann. § 44-96-290(F)." (R. at 0012) (emphasis added). Instead, South Carolina law simply prohibits landfill expansions that are inconsistent with local ordinances. Therefore, the failure to review or consider a local ordinance on its face does not *necessarily* defeat the consistency requirement found in South Carolina law.

B. Charleston County Solid Waste Disposal Ordinance, Section 10-22 is a Subjective Standard and Does Not Create an Objective Standard For DHEC To Review And Apply.

The County's Solid Waste Disposal Ordinance, Section 10-22 requires landfill's to conform with the environment and future development. DHEC is charged with determining

if a proposed expansion is consistent with local zoning and other applicable local ordinances. S.C. 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.

South Carolina Code Ann. Section 44-96-290(F)(2002).

Under Section 44-96-290(F), consistency with local zoning, land use, and other applicable local ordinances is a condition precedent to DHEC issuing a permit for an expansion of an existing solid waste facility. See, Southeast Resource Recovery, Inc. v. S.C. Dep't of Health and Env'tl. Control, 358 S.C. 402, 407-08, 595 S.E.2d 468, 471 (2004) ("DHEC cannot issue a permit unless the proposed facility is consistent with local zoning, land use, and other applicable local ordinances.").

DHEC found that the Second Permit Modification was consistent with local zoning, land use, and other applicable local ordinances, if any. Its failure to review the County's Solid Waste Disposal Ordinance Section 10-22 before or after its consistency decision does not alter whether or not the Second Permit Modification is consistent with the County's ordinances. The standards in the County's archaic 1974 Solid Waste Disposal Ordinance Section 10-22 are not unique. In fact, they are embodied in the S.C. Solid Waste Policy and Management Act, the S.C. Code of Regulations, and the Charleston County's Zoning and Land Use Regulations; and therefore, DHEC was mandated by law to

consider the same concepts.¹

The County's Solid Waste Disposal Ordinance 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. Similarly 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). The ALC's application of the Solid Waste Policy and Management Act and the DHEC Solid Waste Regulations did not lead to a finding of inconsistency.

C. There Are No Objective Standards To Measure.

_____ The County's Solid Waste Disposal Ordinance Section 10-22 contains outdated, subjective industry standards, which cannot be objectively measured, whereas the ALC found that the language is specific.² (R. at 0013). In Southeast Resource Recovery, Inc., the Court analyzed similar language when it rejected a similar attempt to invalidate a permit modification. In Southeast Resource Recovery Inc., the Court opined:

¹ For example, see Regulation 61-107.19, Part IV(B)(1)(a),(d), & (f).

² The minimum standards for site location include that the disposal conform with the surrounding environment and future development of the area. Those standards are silent on any specific standards, specific requirements, and specific criteria to measure conformity. The terms "conform with" and "surrounding environment" and "future development" and "of the area" are all subjective standards. Each standard means something potentially different to this Court, the ALC, Charleston County, DHEC and Grand Bees. Without more specificity, those standards are immeasurable and require a lack of precision upon which an effective application may be made.

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.

Southeast Resource Recovery, Inc. v. S.C. Dep't of Health & Envtl. Control, 358 S.C. 402, 409, 595 S.E.2d 468, 471-72 (2004).

Here, the ALC has fallen prey to the same trap, without making a finding of inconsistency on the record. The ALC denied the Second Permit Modification ostensibly because it is not consistent with the County's Solid Waste Disposal Ordinance Section 10-22. This proposition is not supported by substantial evidence in the record. "Substantial evidence sufficient to support a finding of the ALC is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached." Greeneagle, Inc. v. S.C. Dep't of Health & Envtl. Control, 399 S.C. 91, 95, 730 S.E.2d 869, 871 (Ct.App.2012), reh'g denied (July 23, 2012). The ALC concluded that consideration of Section 10-22 would have materially influenced DHEC's permitting decision because of "future development in the area," including, but not limited to, Petitioner's development (R. at 0013). However, Grand Bees submitted limited evidence demonstrating future development in the area.

The ALC heard testimony from Grand Bees' own expert that the City of Charleston's intention behind planned unit developments is to ensure compatibility of developments with surrounding areas. (R. at 0093). This testimony was given in the context of the expert's review of the City's ordinances in preparing Grand Bees' application for a planned unit

development for submittal to the City and subsequent amendments. The expert testified that the City's criteria for approval (zonings and rezoning) addresses the zoning for adjacent undeveloped areas and their uses and looks at what is going on with neighboring properties. (R. at 0093). The City approved Grand Bees' application and amendments for a planned unit development after taking those criteria into consideration. The criteria the City considered are specific - it looked at undeveloped areas, those areas' uses, and those of neighboring properties.

In the same vein as the City approved the PUD as a compatible development with the pre-existing landfill, DHEC found the same in the situation involving its review of the C&D cell in terms of the future development of the Grand Bees PUD. Therefore, this Court should find that DHEC's failure to consider the County's 1974 Solid Waste Disposal Ordinance Section 10-22 does not invalidate its consistency finding, and the permit modification should be affirmed.

II. THE COURT ERRED 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.

A. Directly Affected by the Proposed Improvement.

The ALC incorrectly found that "... the Second Permit Modification is not consistent with the County's vegetative and landscaping standards because no landscaping plan or other documentation demonstrating compliance was made part of the permit application or the Second Permit Modification." (R. at 0015). The ALC based this finding on the fact that "[t]hese regulations, as applied, require a one hundred (100) foot vegetative buffer between

the Class II Landfill and Petitioner's property.” (R. at 0015). The ZLDR does not mandate that all landfills must have a 100-foot vegetative buffer separating it from adjacent properties as indicated in the ALC's Order; however, DHEC Regulations do require a 100-foot buffer, with which the Bees Ferry Landfill is in compliance.

The Charleston County ZLDR Ordinance, Article 9.5 titled Landscaping, Screening and Buffers, does not apply to the Second Permit Modification because the buffer standards only apply to portions of the landfill property directly affected by the proposed improvement.

Section 9.5.1 titled Applicability provides in part:

When modifications or additions are being made to an existing non-residential building or site, the standards of this Article shall apply to those portions of the subject parcel that are directly affected by the proposed improvements, as determined by the Planning Director

Charleston County ZLDR Ordinance, Article 9.5 Landscaping, Screening and Buffers, Section 9.5.1. Applicability (emphasis added).

“The cardinal rule of statutory interpretation is to ascertain and effectuate the intent of the Legislature.” Eagle Container Co., LLC v. County of Newberry, 366 S.C. 611, 621, 622 S.E.2d 733, 738 (2005) (citations omitted). “What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will.” Id., supra, at 621-22, 738 (citations omitted).

The County intended to apply Article 9.5 to portions of property directly affected by the proposed improvements and by DHEC Regulations, the County could not encroach into the existing 100-foot buffer that separates the landfill from Grand Bees. The expansion is not along the boundary of the Grand Bees' property. It is approximately 1,100 feet away

from the boundary of the fill area next to the 100 foot buffer abutting the Grand Bees' property. (R. at 0179). Plan Sheet C-04 of the application shows no modification, expansion or addition being made to the boundary of the fill area next to the 100 foot buffer abutting the Grand Bees' property. (R. at 0231). Moreover, the vertical expansion will not encroach into the existing 100-foot buffer around the entire landfill parcel. The proposed expansion is contained entirely within the existing permitted boundaries and existing buffer zones for the facility. This is shown on Grand Bees' Exhibit No.1., Plan Sheet G-01 of the County's application, which shows that the proposed expansion of area of the construction and demolition portion of the landfill is a 5.5 acre area that is located interior to the property. Article 9 of the ZLDR applies "to those portions of the subject parcel that are directly affected by the proposed improvement." ZLDR Art. 9, Section 9.5.1. There is no proposed improvement in the buffer.

B. As Determined by the Planning Director.

The Planning Director must make a determination of need before Article 9, Section 9.5.1 is applicable. That did not happen here. Equally, DHEC has not made a determination that the landscaping, screening, and buffers are needed pursuant to Article 9.5, beyond the 100-foot buffer required by the Regulations. See, Regulation 61-107.19, Part IV(B)(1)(e).³ The County utilizes an existing 100-foot buffer adjacent to Grand Bess property for drainage, vehicular access, and as a maintenance shelf for the roads and

³ Regulation 61-107.19, Part IV(B)(1)(e) provides: 1. Buffers. Unless otherwise approved by the Department, the site for a new landfill or expansion of an existing landfill shall meet the following standards . . .
e. The boundary of the fill area shall not be located within 100 feet of any property line. An exemption may be issued by the Department upon receipt of written approval from adjacent property owners.

drainage ditches. It is clear under South Carolina law that “. . . Section 44-96-290(F) requires a proposed facility comply with local standards, it does not designate the county as the final arbiter on whether the proposed facility complies with its local zoning, land use, and other ordinances.” Southeast Resource Recovery, Inc. v. S.C. Dep’t of Health & Env’tl. Control, 358 S.C. 402, 408, 595 S.E.2d 468, 471 (2004). However, the Court in Southeast Resource Recovery, Inc. did not abrogate the final arbiter decision to oblivion.

The ALC has not made a determination that buffers are needed pursuant to the ZLDR, nor has anyone else with authority to do so. Instead, the ALC found that “the Second Permit Modification constitutes a modification to a non-residential site, thereby triggering the County’s landscaping, screening, and buffering regulations contained in Article 9.5 of the ZLDRs.” (R. at 0015). This finding is completely silent regarding Article 9.5’s limited applicability and more importantly its discretionary application, which DHEC determined was not applicable. Here again, the ALC has found a provision in a local ordinance that was not specifically addressed in DHEC’s Second Permit Modification and has determined that the permit modification must be inconsistent with the ZLDR because its provisions were not applied, without affirming its discretionary applicability, as needed. The Solid Waste Management Act does not mandate this ridged application of the statute and regulations. Because the proposed expansion of the C&D cell is on the interior portion of the landfill and not within 100 feet of the Grand Bees’ property line, the ALC’s conclusion is a misapplication of the County’s ordinance, State law, and DHEC regulations.

III. THE ALC ERRED 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.

A. Residence Means Structure for Human Habitation.

The ALC erred when it expanded the plain meaning of the word "residence" to include planned or proposed residences with 1,000 feet of the boundary of the fill area of a landfill. Although the ALC did not adopt a specific definition for residence, the ALC did apply the rules of statutory construction to reach the conclusion that the purposes of the South Carolina Solid Waste Policy and Management Act would be "considerably undermined if 'residence' was interpreted in a way that effectively eliminates this basic protection for property located next to landfills" by looking at what was planned or shown on an approved plat as the basis to reverse DHEC's permit modification approval. (R. at 0017-18). The South Carolina DHEC Regulations provide that:

Buffers. Unless approved by the Department, the site for a new landfill or expansion of an existing landfill shall meet the following standards:

The boundary of the fill area shall not be located within 1,000 feet of any residence, school, day-care center, church, hospital, or publicly owned recreational park area. The Department will determine whether the new landfill or expansion meets this requirement prior to the publication of the Notice of Intent to File a Permit Application pursuant to Part I, Section D.1. of this Regulation.

S.C. Regulation 61-107.19, Part IV, B.1.a.

The word "residence" is not defined in S.C. Regulation 61-107; however, its plain meaning in this context is "a building used as a home." Merriam-Webster Online, <http://www.merriam-webster.com/dictionary/residence> (last visited June 24, 2013). The

ALC incorrectly found that the landfill's waste disposal boundaries shall not be located within 1,000 feet of any planned or proposed residence by adding words to the Regulation that do not exist and inserting the words "planned" or "proposed" residence. The parties stipulated that no residences exist within 1,000 feet of the construction and demolition cell disposal boundary. (R. at 0081; 0082; 0085). Further, a Grand Bees witness testified that according to its 2006 site plan, no actual residences have been constructed on the property. (R. at 0074).

"The cardinal rule of statutory interpretation is to ascertain and effectuate the intent of the Legislature." Eagle Container Co., LLC v. County of Newberry, 366 S.C. 611, 621, 622 S.E.2d 733, 738 (2005) (citations omitted). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will." Id., supra, at 621-22, 738 (citations omitted). "The legislature's intent should be ascertained primarily from the plain language of the statute." Id. at 622, 738 (citations omitted). "When the terms of a statute are clear the court must apply those terms according to their literal meaning." Id. at 622-23, 739 (citations omitted).

"A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers." Id. at 624, 740 (citations omitted). "Courts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention." Id. at 624, 740 (citations omitted). "The language must also be read in a sense which 'harmonizes with its subject matter and accords with its general purpose.'" Id. at 624, 740 (citations omitted).

The legislative intent of residence can be found by looking at the regulation as a whole. The ALC incorrectly notes that “[w]hat is meant by residence for purposes of measuring the minimum regulatory buffer is neither defined by S.C. Regulation 61-107.19, Part IV, **nor elsewhere in the regulations.**” (R. at 16) (emphasis added). Although “residence” may not be defined for purposes of measuring the minimum regulatory buffer in Regulation 61-107.19, the term is defined in the Regulations. It is defined in Regulation 61-107.18, which precedes the Section (61-107.19) that does not define it.

“Residence” is defined in the context of minimum standards for the off-site treatment of contaminated soil, which is part of the Solid Waste Management Regulations that include Regulation 61-107.19. Regulation 61-107.18(B)(29) defines “residence” as “any structure, all or part of which is designed or used for human habitation that has received a final permit for electricity, permanent potable water supply, permanent sewage disposal, and a certificate of occupancy, if required by the local government.” See S.C. Regulation 61-107.18(B)(29). The definition conforms with the definition adopted by the County and DHEC. (R. at 0018).

Here, the planned residences do not physically exist. There is no structure, nor is there any final permit for electricity, permanent potable water supply, permanent sewage disposal, and a certificate of occupancy.

B. The ALC Erred When it Failed to Give Deference to DHEC’s Application of the Term “Residence.”

The Court did not give deference to DHEC staff’s interpretation of the term residence. Instead, the Court accepted Grand Bees’ definition of “planned residence,” which in effect allows any person or entity to prevent DHEC from permitting a site for a new

landfill, or expansion of an existing landfill, if the landfill or expansion is located within 1,000 feet of any "planned residence." "The construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons." Buist v. Huggins, 367 S.C. 268, 276, 625 S.E.2d 636, 640 (2006). In addition, where an agency is charged with the execution of a statute, the agency's interpretation should not be overruled without cogent reason. Nucor Steel v. S.C. Public Serv. Comm'n, 310 S.C. 539, 426 S.E.2d 319 (1992).

The ALC did not give deference to the agency charged with the administration of the Solid Waste Management Act's Regulations, and it did not give cogent reasons for disregarding the agency's universal application of the definition of residence. Instead, the ALC's reasoning was based on the following hypothetical scenario:

Under the Respondents' interpretation, if the permit applicant to DHEC can 'win the race' - that is, succeed in obtaining a permit before a planned house, school, hospital, or park is finished with construction - these neighbors will be ignored for the purposes of S.C. Code Regs. 61-107.19, Part IV(B)(1)(a). The logical extension of the Respondents' argument is that any planned "residence" - no matter how far along the development or construction process - must be ignored. And since many of these ignored, planned developments are likely to ultimately be constructed and occupied after the permit has been granted, under Respondents interpretation, they will end up being located within 1,000 feet of the Class II Landfill - a result the regulations seeks to avoid.

(R. at 0017-18).

The above-referenced hypothetical does not exist for Grand Bees. The tract of land Grand Bees purchased in 2004 is in the City of Charleston and zoned planned unit development. No structures exist on the site, habitable or under construction.⁴ The property's zoning

⁴ When Grand Bees purchased the property and proposed to sell lots within 100 feet from the boundary line

classification is subject to change through the approval of a rezoning of the tract or portions of the tract by the appropriate City board or commission. In fact, the City approved Grand Bees' recent submittal of an amendment to its planned unit development application on February 14, 2012. (R. at 0093).

Interpreting the Regulation in the fashion the ALC seeks to have this Court do produces not only an absurd result, but also leads to a potential disastrous result for all of the existing or expanding landfills in the State. The ALC's interpretation of the Regulation is inconsonant with the common-sense reading of it.

CONCLUSION

The Administrative Law Court erred when it found that the Second Permit Modification for the Bees Ferry Landfill construction and debris cell was inconsistent with the County's local land use ordinance because the Court based its finding not on whether the modification was inconsistent with the ordinance, but on DHEC's failure to review the ordinance. The Court further erred when it expanded the application of the County's vegetative buffer regulations and ignored the County's legislative act intending to have its ordinance mean exactly what it already says.

The ALC disregarded the rules of statutory construction when it found that "residence" includes a planned or proposed residence designated as a lot on site plan. The ALC's construction is unreasonable and leads to an absurd and potentially disastrous result. Therefore, this Honorable Court should reverse the ALC's Final Order and Decision

of the landfill that are depicted on its development application, it had full knowledge that the residences would be within 1,000 feet of the boundary of the construction and demolition fill area and any future expansion of that portion of the landfill.

and affirm the Second Permit Modification.

Respectfully submitted,

COUNTY OF CHARLESTON



JOSEPH DAWSON, III, County Attorney

BERNARD E. FERRARA, JR., Deputy County Attorney

AUSTIN A. BRUNER, Assistant County Attorney

BRADLEY A. MITCHELL, Assistant County Attorney

JOHANNA S. GARDNER, Assistant County Attorney

CHARLESTON COUNTY ATTORNEY'S OFFICE

Lonnie Hamilton, III Public Services Building

4045 Bridge View Drive

North Charleston, South Carolina 29405

(843) 958-4010

ATTORNEYS FOR APPELLANT

Charleston, South Carolina
October 23, 2013

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Shirley C. Robinson, Administrative Law Judge

Appellate Case No. 2011-001141

Grand Bees Development, LLC,

Respondent,

v.

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

Appellants,

FINAL BRIEF OF APPELLANT SOUTH CAROLINA
DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

Jacquelyn S. Dickman (SC Bar No. 16811)
Deputy General Counsel

Etta R. Williams Linen (SC Bar No. 16663)
Assistant General Counsel

2600 Bull Street
Columbia, South Carolina 29201-1708
(803)898-3350
Attorneys for Appellant SC DHEC

Table of Contents

Table of Authorities	3
Statement of Issues on Appeal.....	5
Statement of the Case.....	5
Facts	7
Standard of Review	8
Arguments	
I. THE ADMINISTRATIVE LAW COURT'S CONCLUSION OF LAW THAT DHEC'S FAILURE TO REVIEW ORDINANCE 180, SECTION 10-22, IS SIGNIFICANT, AND THAT THE SECTION IS AN APPLICABLE ORDINANCE, IS ERROR OF LAW AND CLEARLY ERRONEOUS IN VIEW OF THE RELIABLE, PROBATIVE, AND SUBSTANTIAL EVIDENCE ON THE WHOLE RECORD	8
A. DHEC ensured that the Modified Permit issued to Charleston County was consistent with applicable ordinances	9
1. DHEC based its consistency determination upon the ZLDR, the more specific ordinance	9
2. Vagueness made Section 10-22 inapplicable, but even if applicable, it is too vague for the Department to perform a meaningful review for the purpose of rendering a consistency determination; and the Supreme Court prefers the specific, when available, to the general	11
a. Section 10-22 provides no criteria upon which to base a consistency determination	11
b. The South Carolina Supreme Court discourages the use of broad, general statements as the basis for a consistency determination	13

B.	If this Court finds that Section 10-22 of Ordinance 180 is an applicable ordinance for the purpose of a consistency determination, then the Department fulfilled its responsibility by reviewing the more specific ordinance, the ZLDR, and finding that the proposed Landfill does "conform" with the surrounding environment and with future development of the area.	13
II.	THE ADMINISTRATIVE LAW COURT ERRED AS A MATTER OF LAW BY CONCLUDING THAT DHEC IS REQUIRED TO CONSULT ALL APPLICABLE LAND USE ORDINANCES PURSUANT TO S.C. CODE ANN § 44-96-290(F) (REV. 2002)	16
III.	THE ADMINISTRATIVE LAW COURT ERRED AS A MATTER OF LAW BY CONCLUDING THAT SECOND PERMIT MODIFICATION IS NOT COMPLIANT WITH LOCAL ZONING AND LAND USE REGULATIONS AS IT RELATES TO THE COUNTY'S VEGETATIVE BUFFERING REQUIREMENTS.	17
IV.	THE ADMINISTRATIVE LAW COURT ERRED AS A MATTER OF LAW BY CONCLUDING THAT THERE IS NO EVIDENCE IN THE RECORD THAT DHEC PERFORMED A REGULATORY COMPLIANCE DETERMINATION WITH RESPECT TO ITS OWN ONE THOUSAND FOOT SETBACK REQUIREMENT	20
A.	The record establishes that DHEC performed a proper consistency determination regarding the setback requirement, pursuant to 8 S.C. Code Ann. Regs. 61-107.19, Part IV, (B)(1)(a).....	20
B.	The ALC's interpretation of the meaning of "residence" is incorrect.....	22
C.	DHEC's staff interpretation of the meaning of "residence" is entitled to deference	24
	Conclusion	26

Table of Authorities

Cases

<u>Bayle v. South Carolina Dept. of Transp.</u> , 344 S.C. 115, 542 S.E.2d 736 (Ct.App.2001)	22
<u>Capco of Summerville v. J.H. Gayle Constr. Co., Inc.</u> , 368 S.C. 137, 628 S.E.2d 38 (2006)	9
<u>Kiawah Development Partners, II v. South Carolina Department of Health and Environmental Control</u> , 2013 WL 696729	24, 25
<u>Kim Murphy v. South Carolina Department of Health and Environmental Control and District 5 of Lexington and Richland Counties</u> , 396 S.C. 633, 723 S.E.2d 191 (2012)	24
<u>Mid-State Auto Auction of Lexington, Inc. v. Altman</u> , 324 S.C. 65, 476 S.E.2d 690 (1996)	21, 22
<u>Mikell v. County of Charleston</u> , 386 S.C. 153, 687 S.E.2d 326, 330 (2009)	9
<u>S.C. Coastal Conservation League v. South Carolina Dept. of Health and Environmental Control</u> , 363 S.C. 67, 610 S.E.2d 482 (2005)	11
<u>Sloan v. S.C. Bd. Of Physical Therapy Exam'rs</u> , 370 S.C. 452, 636 S.E.2d 598 (2006)	16
<u>South Carolina Elec. & Gas Co. v. South Carolina Public Service Authority</u> , 215 S.C. 193, 54 S.E.2d 777 (1949)	9
<u>Southeast Resource Recovery, Inc. vs. South Carolina Department of Health and Environmental Control</u> , 358 S.C. 402, 595 S.E.2d 488 (2004)	12
<u>Spartanburg County v. Pace</u> , 204 S.C. 322, 29 S.E.2d 333 (1944)	9
<u>State ex rel. South Carolina Tax Commission v. Brown</u> , 154 S.C. 55, 151 S.E.2d 218 (1930)	9
<u>Truesdell v. Johnson</u> , 144 S.C. 188, 142 S.E. 343 (1928)	9

Statutes

S.C. Code Ann. § 44-96-290 (REV. 2002)..... 15

S.C. Code Ann. § 1-23-610 (Supp. 2009)..... 7

S.C. Code Ann. § 44-96-290 (Rev. 2002)..... 8, 15, 16, 18

Other Authorities

Charleston County Zoning Land Development Regulations, Article 9.5..... 16, 17, 18

Ordinance 180, Section 10-22..... passim

Newberry County Solid Waste Management Plan, Section 10.2 12

Webster’s Third New International Dictionary 1931 (1966)..... 22

Regulations

8 S.C. Code Ann. Regs. 61-107.19, Part IV, (B)(1)(a)..... passim

STATEMENT OF ISSUES ON APPEAL

1. DID THE ADMINISTRATIVE LAW COURT ERR BY CONCLUDING THAT DHEC'S FAILURE TO REVIEW ORDINANCE 180, SECTION 10-22, IS SIGNIFICANT, AND IN CONCLUDING THAT THE SECTION IS AN APPLICABLE ORDINANCE?
2. DID THE ADMINISTRATIVE LAW COURT ERR AS A MATTER OF LAW BY CONCLUDING THAT DHEC IS REQUIRED TO CONSULT *ALL* APPLICABLE LAND USE ORDINANCES PURSUANT TO S.C. CODE ANN § 44-96-290(F) (REV. 2002)?
3. DID THE ADMINISTRATIVE LAW COURT ERR AS A MATTER OF LAW BY CONCLUDING THAT THE SECOND PERMIT MODIFICATION IS NOT COMPLIANT WITH LOCAL ZONING AND LAND USE REGULATIONS AS IT RELATES TO THE COUNTY'S VEGETATIVE BUFFERING REQUIREMENTS?
4. DID THE ADMINISTRATIVE LAW COURT ERR AS A MATTER OF LAW BY CONCLUDING THAT THERE IS NO EVIDENCE IN THE RECORD THAT DHEC EVER PERFORMED A REGULATORY COMPLIANCE DETERMINATION WITH RESPECT TO ITS OWN ONE THOUSAND FOOT SETBACK REQUIREMENT BECAUSE THERE IS NO WRITTEN DETERMINATION IN THE RECORD OF COMPLIANCE WITH THE APPLICABLE REGULATION?

STATEMENT OF THE CASE

On January 17, 2008, Appellant South Carolina Department of Health and Environmental Control ("DHEC" or "the Department") issued to Appellant Charleston County ("County") a modification to the construction, demolition, and land-clearing debris ("C&D") landfill permit ("Modified Permit") for the Bees Ferry Landfill ("Landfill")¹, Facility ID # 101001-1201, located at 1344 Bees Ferry Road in Charleston County, South Carolina. The initial permit was issued on October 17, 1997, however, the County has operated the Landfill in its current location since 1977. (*R. p. 4; Decision, P. 4, Findings of Fact # 15*). The Modified Permit allowed an increase in the

¹ Before a new landfill regulation went into effect in May 2008, the Landfill was referred to as a construction, demolition, and land-clearing debris ("C&D") landfill. After the promulgation of the regulation, R. 61-107.19, the Landfill became known as a Class II landfill.

Grand Bees Development; DHEC File No.: 21294

DHEC's Final Brief; October 2013

annual disposal limit, and in the expansion of the footprint and height of the existing landfill. These modifications were approved pursuant to S.C. CODE ANN. REGS. § 61-107.11 (Supp. 2006).

Respondent Grand Bees Development, LLC ("Grand Bees") filed a Request for Review of the Modified Permit by the DHEC Board on February 1, 2008. The Department informed Respondent by Memorandum dated February 19, 2008, that the DHEC Board had decided not to conduct a Final Review Conference. On April 18, 2008, Respondent filed a Notice of Request for a Contested Case Hearing with the Administrative Law Court ("ALC" or "Court").

The ALC held a hearing in the above-captioned matter on Tuesday, January 13th and Wednesday, January 14th, 2009, with the Honorable Ralph King Anderson, Jr. presiding. On June 2, 2009, the ALC issued its *Final Order and Decision* holding that "DHEC's decision to grant the Modified Permit is vacated and this case is remanded for review in accordance with the ZLDR." (**R. p. 103; tr. p. 180, lines 16-19**). "ZLDR" is the acronym for County's Zoning Land Development Regulations.

Pursuant to the ALC's Order, Appellant DHEC reviewed the Modified Permit application in accordance with the ZLDR, which had been revised and amended by County on December 16, 2010. Upon Appellant's review of the amended ZLDR, it determined that the Modified Permit was consistent with the County's local zoning and land use ordinances. After review, Appellant re-issued the Modified Permit ("Second Modified Permit") on September 1, 2011.

On September 12, 2011, Respondent Grand Bees filed a Request for Review by the DHEC Board of the Second Modified Permit for a review of the issuance of the

Permit. Respondent was notified by Memorandum on October 13, 2011, that the Board declined to conduct a Final Review Conference. On November 2, 2011, Respondent requested a contested case hearing regarding Appellant DHEC's re-issuance of the Second Modified Permit.

This matter was assigned to the Honorable Shirley C. Robinson, ALC Judge, on November 7, 2011. On March 20, 2012, a hearing on the merits was held. One year later, on March 19, 2013, the Judge Robinson issued the *Final Order and Decision* ("*Decision*") in this matter, ordering "that DHEC'S decision on the Second Modified Permit (DHEC #101001-1201) is REVERSED and the Second Modified Permit is hereby VACATED." (R. p. 19.)

Both Appellants DHEC and Charleston County timely moved the Court for Reconsideration of the ALC's *Final Order and Decision* ("*Decision*"), but such Reconsideration was denied by formal Order on May 8, 2013.

FACTS

County's initial request for a modification to the Landfill's prior permit sought a five (5) acre expansion of the Class 2 Landfill within its three hundred and twelve (312) acre solid waste complex on Bees Ferry Road in Charleston, South Carolina. The expansion also sought to increase the Landfill's height to match the previously adjacent permitted Class 3 Landfill.

On September, 1, 2011, Appellant DHEC issued a Second Modified Permit for the Bees Ferry Landfill, Facility ID # 101001-1201, which is located at 1344 Bees Ferry Road in Charleston County, South Carolina. The initial permit was issued on October 17, 1997. The Second Modified Permit allowed an increase in the annual disposal limit

and the expansion of the footprint and height of the existing landfill. These modifications were approved pursuant to S.C. CODE ANN. REGS. § 61-107.19 (Supp. 2006).

STANDARD OF REVIEW

Appellate review of an ALC decision is governed by S.C. Code Ann. § 1-23-610, which states:

(B) The review of the administrative law judge's order must be confined to the record. The court may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact. The court of appeals may affirm the decision or remand the case for further proceedings; or, it may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable probative and substantial evidence on the whole record; or
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-610(B) (Supp. 2012):

ARGUMENTS

- I. THE ADMINISTRATIVE LAW COURT'S CONCLUSION OF LAW THAT DHEC'S FAILURE TO REVIEW ORDINANCE 180, SECTION 10-22, IS SIGNIFICANT, AND THAT THE SECTION IS AN APPLICABLE ORDINANCE, AND IS CLEARLY ERRONEOUS IN VIEW OF THE RELIABLE, PROBATIVE, AND SUBSTANTIAL EVIDENCE ON THE WHOLE RECORD.

The ALC's *Conclusions of Law* # 13 on page 13 of its *Decision* states that "DHEC's failure to review Section 10-22 is significant." This Conclusion is error of law and clearly erroneous in view of the reliable, probative, and substantial evidence on the

whole record. The Department's failure to review Section 10-22 is not significant for two reasons:

- 1) Since DHEC is required to approve issuance of permits that are consistent with applicable ordinances, DHEC achieved this by basing its consistency determination on the applicable, and more succinct, recent, and specific ordinance, the ZLDR, which encompassed any purported standards that could be ascertained from the less specific and inapplicable ordinance, Section 10-22 of Ordinance 180; and
 - 2) Because Section 10-22 is vague, even if the ordinance was applicable, DHEC would have been unable to perform a succinct or meaningful review for the purpose of a consistency determination.
- A. **DHEC ensured that the Modified Permit issued to Charleston County was consistent with applicable ordinances.**
1. **DHEC based its consistency determination upon the ZLDR, the more specific ordinance.**

Pursuant to S.C. Code Ann. § 44-96-290(F) (Rev. 2002), County Ordinance 180, Section 10-22 ("Section 10-22"), referenced in *Conclusions of Law* # 9 on page 12 of the *Decision*, is not an *applicable* local land use ordinance for a consistency determination. Because the ZLDR is a more specific ordinance regarding local zoning and land use requirements, Section 10-22 is inapplicable as an ordinance for determining whether the Landfill's proposed modification is consistent with local zoning and land use requirements. It is well-settled case law that "where two ordinance provisions deal with the same issue, one in a general and the other in a more specific and definite manner, the more specific prevails." Mikell v. County of Charleston, 386 S.C. 153, 687 S.E.2d 326,

330 (2009), *quoting* Capco of Summerville v. J.H. Gayle Constr. Co., Inc., 368 S.C. 137, 628 S.E.2d 38 (2006). It is well-settled case law that “if there be conflict between a **general** law and a special law on the same subject, the latter will **prevail**.” South Carolina Elec. & Gas Co. v. South Carolina Public Service Authority, 215 S.C. 193, 54 S.E.2d 777 (1949), *quoting*, Truesdell v. Johnson, 144 S.C. 188, 142 S.E. 343 (1928); State ex rel. South Carolina Tax Commission v. Brown, 154 S.C. 55, 151 S.E.2d 218 (1930); Spartanburg County v. Pace, 204 S.C. 322, 29 S.E.2d 333 (1944). In this case, Section 10-22 is the general law because it fails to provide any criteria upon which DHEC can base a consistency determination, and the ZLDR is the “special law” because it is the more specific and detailed law, which provides specific criteria upon which DHEC can and did make a consistency determination.

Mr. Kent Coleman, DHEC’s Director of Solid Waste and Mining, testified that the wording of Section 10-22 was “very general . . . not specific.” (R. 107; tr. p. 196, lines 9-10). He further testified that instead of reviewing Section 10-22, he would have looked “to how the County has implemented conformity through their zoning and other land use planning documents.” (R. p. 107; tr. p. 196, lines 14-17). Mr. Coleman also testified that local governments had made decisions regarding what is conforming, and that Charleston County had “a very detailed zoning ordinance that talks about all the various uses, how those uses are to be applied.” (R. p. 108; tr. p. 200, 14-16). He also testified that by reviewing the ZLDR and making a decision, “DHEC . . . determined that the permit that we issued is consistent with local zoning . . . and this generalized language is not applicable . . . in the sense that it doesn’t change anything and doesn’t specify anything about . . . the requirements that the local zoning does not already cover.”

(Referencing Section 10-22 of Ordinance 180). (R. p. 108; tr. p. 200, lines 17-25). Mr. Coleman also answered an emphatic “yes” when he was asked whether DHEC reviewed the applicable zoning ordinances regarding the Landfill and made a consistency determination based upon the review of the applicable zoning ordinances. (R. p. 109; tr. p. 201, lines 1-6).

Mr. Coleman’s testimony is also the best evidence on the record explaining why Section 10-22 is inapplicable for consistency determination purposes. Also, after review of Mr. Coleman’s testimony and of the ZLDR, which was enacted in 2001 – long after Section 10-22 - it is clear that the ZLDR encompassed any purported standards and/or criteria that Section 10-22 aimed to address. Therefore, *Conclusions of Law* # 9 on page 12 of the *Decision* is error of law and clearly erroneous, in view of the reliable, probative, and substantial evidence on the whole record.

2. Vagueness made Section 10-22 inapplicable, but even if applicable, it is too vague for the Department to perform a meaningful review for the purpose of rendering a consistency determination; and the Supreme Court prefers the specific, when available, to the general.

- a. Section 10-22 provides no criteria upon which to base a consistency determination.

Section 10-22, which was adopted in 1974 (R. p. 66; tr. p. 31, line 11), shows two short phrases that both include the word “conform” in (d.) and (e.) of the Section. Specifically, the Section states that “the disposal site shall: d. conform with the surrounding environment; and e. conform with future development of the area.” A reading of Section 10-22 and the testimony of Mr. Kent Coleman, evidences that the general wording of the Section contains no definition of “conform”; and therefore, no criteria by which to make a judgment regarding whether a disposal site meets Section 10-

22's requirements. Mr. Coleman also testified that in determining conformity with future uses, DHEC reviewed the Charleston County ("County") ZLDR to ensure that the Landfill was properly zoned. (R. p. 112; tr. p. 214, lines 10-12).

The situation that Mr. Coleman has described is analogous to the situation in the case of S.C. Coastal Conservation League v. South Carolina Dept. of Health and Environmental Control, 363 S.C. 67, 610 S.E.2d 482, (2005). In this instance, the threshold issue was whether an island is "small" for the purposes of determining whether the Transportation Regulation or the Small Islands Regulation is the governing project-specific regulation. *Id.*, at 486. However, there was no statute or regulation defining "small island." The circuit court held that the ALJ and Panel's test for determining whether an island is small was invalid because it was not promulgated by regulation. The Supreme Court agreed and held that "'small' is a term of subjective relativity, and the regulations provide no benchmark for comparative size . . . The problem is that there is nothing to interpret or apply." *Id.* at 486. The Supreme Court further held "that there is no promulgated test means that the Small Islands Regulation fails for vagueness." *Id.* at 486.

The holding in S.C. Coastal Conservation League is instructive in this case. Because there is no definition of "conform" in Section 10-22, the term is one of subjective relativity, and as Mr. Coleman essentially testified, the word provides no "benchmark" for comparison and "nothing to interpret or apply." Therefore, Section 10-22 cannot be applied because of its vagueness and thus is inapplicable for use in a consistency determination for the proposed Landfill.

- b. The South Carolina Supreme Court discourages the use of broad, general statements as the basis for a consistency determination.

Section 10-22's vague language is a prime example of one of the issues addressed in the holding of Southeast Resource Recovery, Inc. vs. South Carolina Department of Health and Environmental Control, 358 S.C. 402, 595 S.E.2d 488 (2004). In that case, the Supreme Court held that the Circuit Court erred by relying on Section 10.2 of the Newberry County Solid Waste Management Plan. Section 10.2 was a section in the Plan that discussed goals associated with waste disposal in Newberry County. The Court stated that "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." *Id.* at 472.

Analogous to SRRI, if DHEC had reviewed Section 10-22 and made its consistency determination based upon the Section, it would have done exactly what the Supreme Court has deemed improper, which is base a consistency determination on a vague, rather than a more specific local ordinance.

- B. If this Court finds that Section 10-22 of Ordinance 180 is an applicable ordinance for the purpose of a consistency determination, then the Department fulfilled its responsibility by reviewing the more specific ordinance, the ZLDR, and finding that the proposed Landfill does "conform" with the surrounding environment and with future development of the area.**

The Landfill's co-existence for several years with the overall Planned Unit Development ("PUD") and the residents in the developed communities in close proximity to the Landfill, and vice-versa, are evidence that the Landfill's Second Modified Permit

conforms to the surrounding environment and to the future development of the area as prescribed by the ZLDR.

Respondent Grand Bees stated that the Grand Bees development of Bees Landing, which is the tract of land that Grand Bees owns adjacent to the Bees Ferry Landfill, has been zoned Planned Unit Development ("PUD") residential since 1993. (R. p. 60; tr. p. 8, lines 18-25). The zoning category for the Landfill is industrial. (R. p. 60; tr. p. 11, lines 22-23). The Landfill received its original permit in 1997. (R. p. 4; *Finding of Facts* # 15). The forgoing evidence on the record establishes that the Landfill has co-existed with the PUD property designation, and with residents in the surrounding residential developments in the Bees Ferry Community, such as Bees Landing (i.e. Grand Oaks), and vice-versa, for approximately twenty (20) years. (R. p. 72; tr. p. 54, lines 19-25; tr. p. 55, lines 1-10). Other developed communities that are in close proximity to the Landfill are Hunt Club, Carolina Bay, and Fulton's Landing. (R. p. 73; tr. p. 59, lines 14-25; tr. p. 60, line 1, and lines 11-12).

Mr. Kent Coleman testified that "DHEC doesn't make decisions for local governments on what conforms and what does not conform. Local governments do that through zoning and . . . they have made decisions of what types of uses can be next to other types of land uses . . . through their zoning . . . on . . . what is conforming, what conforms." (R. p. 108; tr. p. 200, lines 2-12). Mr. Coleman also testified that "Charleston County . . . have a very detailed zoning ordinance that talks about all the various uses, how those uses are to be applied. So by reviewing that – that document and making a decision, DHEC has determined that the permit that we issued is consistent with local zoning." (R. p. 108; tr. p. 200, lines 13-20). Mr. Coleman further testified

that the generalized language in Section 10-22 was not applicable to a consistency determination and did not change or specify anything about the requirements that the local zoning did not already cover. (R. p. 108; tr. p. 200, lines 20-25). Therefore, based on Mr. Coleman's testimony, conformity with the surrounding environment and with future development of the area is evidenced by the fact that the County has designated the Landfill area as industrial and has designated the areas adjacent to the Landfill as "PUD", and the area designations have co-existed for a long period of time. Agreement with the co-existence of the two designations is further evidenced by the fact that Grand Bees purchased property in close proximity to the Landfill with the full realization that the Landfill was there and would be in operation for many years to come. All these things, taken together, is evidence that Grand Bees' agrees that the Landfill and Grand Bees' future development of the property can co-exist.

Section 10-22's vagueness; the lack of criteria by which to analyze "conformity"; Mr. Coleman's testimony regarding the Department's review of the Landfill's proposed modification pertaining to conformity with the surrounding area and future uses; the fact that the Landfill and the surrounding residents have co-existed with one another for several years; and, that developers have continued to purchase property adjacent to the Landfill, make it clear that pursuant to the statutory requirements, DHEC properly determined consistency with local zoning, land use, and other applicable ordinances.

Therefore, the ALC's Conclusions of Law that DHEC's failure to review Section 10-22 is significant, and that the Section is an applicable ordinance, is error of law and clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. However, if this Court finds that Section 10-22 is applicable, DHEC's

consistency review of the proposed Landfill against the ZLDR encompassed a consistency review of Section 10-22; therefore, DHEC's final consistency determination is proper.

II. THE ADMINISTRATIVE LAW COURT ERRED AS A MATTER OF LAW BY CONCLUDING THAT DHEC IS REQUIRED TO CONSULT *ALL* APPLICABLE LAND USE ORDINANCES PURSUANT TO S.C. CODE ANN § 44-96-290(F) (REV. 2002).

The ALC's *Conclusions of Law # 12*, on page 12 of its *Decision*, is in violation of statutory provisions, in excess of statutory authority, and is affected by error of law. The Conclusion stated that "DHEC was required to consult *all* applicable land use ordinances in the Code" (*Emphasis in original quote*). However, S.C. Code Ann. § 44-96-290(F) (Rev. 2002), the statute governing this matter, states that "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 . . .*" (*Emphasis added*). There is no requirement in the statute for DHEC to "consult *all* applicable land use ordinances" (*Emphasis added*). (**R. p. 12, *Conclusions of Law # 12***). The statute's requirement is that DHEC approve the issuance of permits that are consistent with local zoning, land use, and other "applicable" local ordinances. DHEC fulfilled its requirements.

The ALC's Conclusion that DHEC was required to consult *all* applicable land use ordinances is an incorrect understanding of the statute, and thus creates an error of law. Nowhere in the statute does it state that *all* land use ordinances must be consulted. DHEC ensured that the Modified Permit issued to Charleston County for the Bees Ferry Landfill was consistent with local zoning, land use, and other applicable local ordinances.

It is well-settled case law that “the Court should give words their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute’s operation.” Sloan v. S.C. Bd. Of Physical Therapy Exam’rs, 370 S.C. 452, 459, 636 S.E.2d 598, 607 (2006). Here, the Court has resorted to a forced construction of the statute in order to expand DHEC’s statutory requirements. Even if DHEC did not consult local land use ordinance, Section 10-22, prior to the issuance of its consistency determination, the requirement of the statute was complied with because the end result is that the determination of consistency with the ZLDR encompassed a consistency determination with Section 10-22. Therefore, if the Court finds that DHEC’s consistency determination with local zoning, land use, and other applicable ordinances was proper, it will have also found that the proposed landfill is consistent with Section 10-22.

The ALC’s interpretation of S.C. Code Ann. § 44-96-290(F) is error of law; thus, the ALC’s *Decision* should be reversed and DHEC’s issuance of the Second Modified Permit should be upheld.

III. THE ADMINISTRATIVE LAW COURT ERRED AS A MATTER OF LAW BY CONCLUDING THAT THE SECOND PERMIT MODIFICATION IS NOT COMPLIANT WITH LOCAL ZONING AND LAND USE REGULATIONS AS IT RELATES TO THE COUNTY’S VEGETATIVE BUFFERING REQUIREMENTS.

The *Decision’s Conclusions of Law* # 25 on page 15, stating that “the Second Permit Modification is not compliant with local zoning and land use regulations, as it relates to the county’s vegetative buffering regulations . . .,” is affected by error of law and is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, because determination of compliance with Article 9.5 of the ZLDR does not rest with DHEC. Article 9.5 of the ZLDR places the decision of whether County was

required to adhere to “the standards of this Article . . .,” squarely upon the County’s Planning Director, not DHEC. This is supported by Grand Bees’ own witness, Mr. John Stewart Lester, a licensed professional engineer and registered land surveyor employed by HLA, a land planning civil engineering, landscape architecture firm. (R. p. 78; tr. p. 80, lines 12-20). “Mr. Lester testified that in practice, landscaping plans are submitted and required by **local government** to prove compliance with buffer regulations as a precondition to land development.” (*Emphasis added*). (R. p. 9; Finding of Facts # 44). There is no evidence on the record stating that an applicant is required to submit landscaping plans to DHEC or that DHEC is required to request plans. (R. pp. 109-110; tr. pp. 201-205). In fact, DHEC is not required by statute or regulation to request landscaping plans from applicants, nor is it the Department’s practice to request such plans, particularly in the County’s situation where the vegetative buffer is determined, pursuant to ordinance, by the County’s Planning Director.

Section § 9.5.1 of the ZLDR states that: “When modifications or additions are being made to an existing non-residential building or site, the standards of this Article shall apply to those portions of the subject parcel that are directly affected by the proposed improvements, as determined by the Planning Director . . .” (ZLDR, P. 9-23). This passage makes it clear that standards, if any, requiring compliance with the Article, is within the purview and authority of the County’s Planning Director. Therefore, it would be the Planning Director’s responsibility to determine whether County’s proposed modification to the Landfill affects those portions of the “subject parcel,” which will require the implementation of landscaping, screenings, or buffers.

DHEC's consistency review involves: 1) review of the application including maps, etc., to make sure there is nothing impeding the implementation of the referenced landscaping, screenings, and buffers, if required by the Planning Director or a person to whom this authority is given (R. p. 109; tr. p. 204, lines 1-10 and 20-25; R. p. 110; tr. p. 205, lines 1-4); and 2) pursuant to S.C. Code Ann. § 44-96-290(F) (Rev. 2002), a consistency determination of "not consistent" is issued if it is determined from the Department's review that the implementation of the landscaping, screenings, and buffers would be impeded. During DHEC's review of County's proposed Landfill application, there was nothing that suggested that landscaping, screenings, or buffers could not be implemented if and when the County's Planning Director made the determination that such implementation was required. (R. p. 114; tr. p. 224, lines 1-8 and lines 18-24). Based on Mr. Lester's and Mr. Coleman's testimony, and upon a cogent reading of the ZLDR's Section 9.5.1, it is clear that it is the County's responsibility, not DHEC's, to determine whether vegetative buffers are required by the Landfill. DHEC did not err in granting the Second Permit Modification to the Landfill.

Therefore, pursuant to the foregoing, *Conclusions of Law* # 25 on page 15 of the *Decision* is affected by error of law, and is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record.

IV. THE ADMINISTRATIVE LAW COURT ERRED AS A MATTER OF LAW BY CONCLUDING THAT THERE IS NO EVIDENCE IN THE RECORD THAT DHEC PERFORMED A REGULATORY COMPLIANCE DETERMINATION WITH RESPECT TO ITS OWN ONE THOUSAND FOOT SETBACK REQUIREMENT.

The ALC's *Conclusions of Law* # 29 (on page 16), # 36 (on page 17) , #'s 37 and # 38 (both on page 18), in the *Decision*, are affected by error of law, and are clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record.

A. The record establishes that DHEC performed a proper consistency determination regarding the setback requirement, pursuant to 8 S.C. Code Ann. Regs. 61-107.19, Part IV, (B)(1)(a).

Conclusions of Law # 29 erroneously states that "there is no evidence in the record that DHEC ever performed a regulatory compliance determination with respect to its own one thousand foot setback requirement . . . the permit file of DHEC the parties stipulated into evidence does not disclose a written determination of compliance with this regulation." (R. p. 16; *Conclusions of Law* # 29). DHEC's own setback requirement states that "the waste disposal boundary of the landfill shall not be located within one thousand feet of any residence, school, day-care center, hospital or publicly owned recreational park area." 8 S.C. Code Ann. Regs. 61-107.19, Part IV, (B)(1)(a). The ALC's holding regarding this matter is incorrect, as the issuance of the Second Modified Permit is evidence that DHEC determined that the Landfill's proposed modification was consistent with the one thousand foot setback requirement contained in R.61-107.19, Part IV(B)(1)(a). Moreover, Kent Coleman, DHEC Director of Solid Waste and Mining, testified that the DHEC staff did site visits to ensure the agency had the most up-to-date information to use in its consistency determination and that those visits did not reveal anything "new or different" from previous visits to the site as it related to the permit

application or the permit decision. (R. p. 107; tr. p. 194, lines 2-23 and R. p. 113; tr. p. 219, lines 2-10). There was no evidence in the record that any “residences” existed adjacent to the Landfill at the time the Second Permit Modification was issued on September 1, 2011. Therefore, if no “residences” (or “school, day-care center, hospital or publicly owned recreational park”), pursuant to 8 S.C. Code Ann. Regs. 61-107.19, Part IV, (B)(1)(a), existed adjacent to the Landfill, the only determination that could be rendered by DHEC is that County’s proposed Landfill modification was consistent with the referenced Regulation. Furthermore, there is no requirement that DHEC issue a written determination of compliance with each and every statutory or regulatory provision that it uses to evaluate whether a proposed modification is consistent.

There are several reasons why the ALC should have found that DHEC satisfactorily determined that the Landfill’s proposed modification was consistent with its own “setback” regulation: 1) during the hearing, Kent Coleman attested to the proposed modification’s consistency with the Regulation and testified staff had made site visits and that there were no residences or other factors requiring a buffer. (R. p. 113; tr. p. 219, lines 8-10); 2) the evidence on the record showing that there were no “residences” within one thousand feet of the boundary of the landfill (R. p. 65; tr. p. 25, lines 20-25; R. p. 65; tr. p. 26, lines 1-5; R. p. 74; tr. p. 63, lines 20-25; R. p. 106; tr. p. 191, lines 2-7; R. p. 118; tr. p. 237, line 25; and R. p. 118; tr. p. 238, lines 1-5); 3) the fact that Respondent Grand Bees stipulated to the fact that there were only “proposed” and “planned” residences to be built onto the Grand Bees property (R. p. 85; tr. p. 108, lines 14-16); and 4) the fact that Grand Bees admitted that “residences do not exist at this time.” (R. p. 88; tr. p. 118, lines 7-8; R. p. 10, *Findings of Fact # 51*). The foregoing

reasons are ample evidence to find that the proposed Landfill is consistent with the referenced Regulation and to conclude that DHEC properly considered and determined that the proposed Landfill modification is consistent with the Regulation.

B. The ALC's interpretation of the meaning of "residence" is incorrect.

The ALC states the following in its *Decision in Conclusions of Law* # 36 on pages 17 and 18:

" . . . under the Respondents' interpretation, if the permit applicant to DHEC can 'win the race' that is, succeed in obtaining a permit before a planned house, school, hospital, or park is finished with construction these neighbors will be ignored for the purposes of S.C. Code Regs. 61-107.19, Part IV(B)(1)(a). The logical extension of the Respondents' argument is that any planned "residence" no matter how far along the development or construction process - must be ignored. And since many of these ignored, planned developments are likely to ultimately be constructed and occupied after the permit has been granted, under Respondents' interpretation, they will end up being located within 1,000 feet of the Class II Landfill - a result the regulations seeks to avoid."

The way the ALC has interpreted the definition of residence, which is to include the word "planned" as a part of its definition, is not reasonable in light of the fact that the setback of one thousand feet, as required by the Regulation, would serve no purpose if there were no people occupying or utilizing a "residence, school, day-care center, church, hospital, or publically owned recreational park area" that is within 1000 feet of the landfill. Since the word "planned" is not a part of the dictionary definition of "residence," it is inappropriate to insert "planned" into the definition in an attempt to "harmonize" the definition with R. 61-107.19, Part IV(B)(1). A "planned" residence is no residence at all because unless there is something in the statute requiring a different interpretation, the words used in a statute must be given their ordinary meaning. Mid-State Auto Auction of Lexington, Inc. v. Altman, 324 S.C. 65, 476 S.E.2d 690, 692

(1996). When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning. *Id.* "When statutory language is unambiguous, this Court may not impose a contrary meaning." Bayle v. South Carolina Dept. of Transp., 344 S.C. 115, 542 S.E.2d 736, 739 (Ct.App.2001). Here, the common meaning of *residence*, as found in Webster's Third New International Dictionary 1931 (1966) is "the act or fact of abiding or dwelling in a place for some time; an act of making one's home in a place; the place where one actually lives or has his home as distinguished from his technical domicile; the place where something is permanently established; a building used as a home." Therefore, to expand "residence" by including "planned" goes against case law that states that "words used in a statute must be given their ordinary meaning." Mid-State Auto Auction of Lexington, Inc. v. Altman, 324 S.C. 65, 476 S.E.2d 690, 692 (1996).

The ALC further states that DHEC and County's position "conflicts with the legislative intent and produces an absurd result." (**R. p. 18; *Conclusions of Law # 37***). Contrarily, by applying the plain language of the statute, the legislative intent is that there is a one thousand foot setback established from a "residence," not from a "planned" or "proposed" residence. It is improbable that the Legislature intended for DHEC to take into consideration planned residential lots, because the obvious intent of the regulation is to make sure that there is ample distance between where people actually reside or gather and the waste disposal boundary of the landfill. Construing the statute to include "planned" residences is an unauthorized reading of the statute and leads to an unreasonable and absurd result because one cannot institute a setback from a residence that is non-existent.

Moreover, if the Court's expanded definition were to be accepted, the Landfill could be prohibited from expanding indefinitely because as long as the Grand Bees property is zoned "residential," it can continuously claim that there are "planned" residences to be built at the site. A residence that is "likely to ultimately be constructed and occupied" and "likely" to be situated within one thousand feet of a landfill, is the opposite of what the Regulation prescribes. The outcome of employing the ALC's interpretation would be to unjustly deny a Landfill the opportunity to expand because of something that may never happen and would be unreasonable. It would be the result of a forced and misconstrued construction of the referenced Regulation. Because of the absurd result that this type of action would create, this is why only a residence that is occupied or occupiable (*see R. p. 106; tr. p. 191, lines 2-7*), meets the definition of "residence" and is the only definition that should be used to determine if the Landfill's proposed modification meets the regulations' setback requirement. Therefore, the ALC's ruling that a "planned" residence must be considered is error of law, and is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record.

C. DHEC's staff interpretation of the meaning of "residence" is entitled to deference.

The ALC committed error of law when it rejected DHEC's and the County's argument that the Court must afford its staff's interpretation of "residence" deference. The ALC's position is that "only the interpretation of DHEC's Board is entitled to deference by this Court." (*R. p. 18; Conclusions of Law # 38*).

The Supreme Court gave deference to Jennifer Haynes, a DHEC project manager, when she interpreted the "vicinity of the project," when there was no definition for "vicinity" in the applicable DHEC regulation. The Court stated that Ms. Haynes

“considered the vicinity [to include] more than just the 727 feet of stream and noted that although she did not have an exact area, it included many miles.” Kim Murphy v. South Carolina Department of Health and Environmental Control and District 5 of Lexington and Richland Counties, 396 S.C. 633, 723 S.E.2d 191, 195 (2012). Further, the Court stated that “because this interpretation is both reasonable and consistent with the plain language of the regulation, we see no reason to deviate from DHEC’s construction and application.” *Id.* at 195. Here, analogous to the foregoing, the Department made an interpretation of the language in R. 61-107.19, Part IV (B)(I) of “residence” that was both reasonable and consistent, and there being no evidence to the contrary, the ALC committed error of law by failing to give deference to the DHEC staff’s interpretation of “residence.”

Since the Murphy case, another Supreme Court decision has been issued that further validates the fact that DHEC is entitled to deference. Kiawah Development Partners, II v. South Carolina Department of Health and Environmental Control, 2013 WL 696729 at *2, states that “courts defer to the relevant administrative agency’s decisions with respect to its own regulations unless there is a compelling reason to differ.” The Court further stated that:

DHEC’s decision to refuse to conduct a Final Review Conference, pursuant to section 44-1-60(F) of the South Carolina Code, is analogous to the Panel decision in Coastal to affirm the ALC’s decision without analysis. In both situations, regardless of the mechanism, **the staff decision became the agency decision and was entitled to deference.** Thus, the appropriate question is not whether DHEC’s decision was entitled to deference, but instead whether there was a compelling reason for the ALJ not to defer to this decision.” (*Emphasis added*).

(Kiawah Development Partners at *3).²

² A second rehearing of KDP is pending.
Grand Bees Development; DHEC File No.: 21294
DHEC’s Final Brief; October 2013

Here, analogous to the opinion in Kiawah, the *Request for Review* by Grand Bees was denied by the Board on October 13, 2011. Thus, once Grand Bees' *Request for Review* was denied, DHEC's Staff decision became the Agency's final decision and was entitled to deference. Further, there are no significant or compelling reasons why DHEC's interpretation of the Regulation should not be afforded deference, and no such reasons are stated in the *Decision*. Therefore, the ALC committed error of law in rejecting DHEC's argument that it should be afforded deference and in not affording the Department deference, as required by case law.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the Administrative Law Court.

Respectfully submitted,

10-17-, 2013

Etta R. Williams Linen
Etta R. Williams Linen (SC Bar No. 16663)
Assistant General Counsel

Jacquelyn S. Dickman (SC Bar No. 1681)
Chief Deputy General Counsel

Office of General Counsel
South Carolina Department of Health
and Environmental Control
2600 Bull Street
Columbia, South Carolina 29201-1708
(803)898-3350
Attorney for Appellant SCDHEC

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Shirley C. Robinson, Administrative Law Judge

Appellate Case No. 2011-001141

Grand Bees Development, LLC,

Respondent,

v.

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

Appellants.

CERTIFICATE OF COUNSEL

The undersigned counsel hereby certifies that this Final Brief complies with Rule 211(b), SCACR.

Etta R. Williams Linen
Etta R. Williams Linen (SC Bar No. 16663)
Assistant General Counsel
2600 Bull Street
Columbia, South Carolina 29201-1708
(803)898-3350
Attorney for Appellant

October 16, 2013
Columbia, South Carolina

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Shirley C. Robinson, Administrative Law Judge

Case No. 2011-ALJ-07-0556-CC

Grand Bees Development, LLC, ... Respondent,

vs.

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

BRIEF OF RESPONDENT
(IN RESPONSE TO APPELLANT COUNTY OF CHARLESTON'S BRIEF)

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
68 1/2 Queen Street
Charleston, SC 29401
Phone: (843) 937-0705

ATTORNEYS FOR RESPONDENT
GRAND BEES DEVELOPMENT, LLC

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
STATEMENT OF ISSUES ON APPEAL.....	1
STATEMENT OF THE CASE	2
STATEMENT OF THE FACTS	4
STANDARD OF REVIEW	13
ARGUMENT	14
I. SUBSTANTIAL EVIDENCE SUPPORTS THE ADMINISTRATIVE LAW COURT'S FINDING AND CONCLUSION THAT DHEC VIOLATED S.C. CODE ANN. §44-96-290(F). DHEC FAILED TO EVALUATE WHETHER THE PROPOSED LANDFILL EXPANSION SOUGHT BY THE COUNTY WAS CONSISTENT WITH CHARLESTON COUNTY'S SOLID WASTE ORDINANCE THAT REQUIRES, AMONG OTHER THINGS, THAT ALL EXPANSIONS OF SOLID WASTE DISPOSAL SITES CONFORM WITH THE SURROUNDING ENVIRONMENT AND WITH FUTURE DEVELOPMENT OF THE AREA.	14
A. The County's Solid Waste Ordinance is an Applicable Local Land Use Ordinance Under S.C. Code Ann. §44-96-290(F).	14
B. By Failing to Identify and Assess the County's Solid Waste Ordinance, DHEC's Consistency Determination Under §44-96-290(F), was Incomplete and Materially Insufficient.....	18
II. SUBSTANTIAL EVIDENCE SUPPORTS THE ADMINISTRATIVE LAW COURT'S DECISION TO REVERSE AND VACATE THE PROPOSED LANDFILL EXPANSION SOUGHT BY THE COUNTY BECAUSE IT FOUND AND CONCLUDED THAT THE PERMIT AMENDMENT IS INCONSISTENT WITH CHARLESTON COUNTY'S LANDSCAPING, SCREENING AND BUFFERING REGULATIONS.....	25
A. The Permit Amendment is Inconsistent, as a Matter of Fact, with Article 9.5 of the ZLDR Because it Fails to Incorporate the County's Landscaping, Screening and Buffering Requirements.....	25

B.	The Entire Mound is Subject to Article 9.5 of the ZLDR Due to the Permit Amendment's Dramatic Height Expansion.....	27
C.	Article 9.5 of the ZLDR is Not Rendered Inapplicable, for the Purposes of S.C. Code Ann. §44-96-290(F) Because the Planning Director Has Discretion under Section 9.5.1.....	28
III.	THE ALC'S INTERPRETATION OF "RESIDENCE" AS SET FORTH IN S.C. CODE ANN. REGS. 61-107.19, PART IV(B)(1)(a) IS NOT AN ERROR OF LAW. SUBSTANTIAL EVIDENCE SUPPORTS THE ALC'S FINDING THAT, UNDER THE PERMIT AMENDMENT, APPROXIMATELY ONE HUNDRED AND THIRTY RESIDENCES ARE LOCATED WITHIN ONE THOUSAND FEET OF THE LANDFILL AND THIS VIOLATES THE AFOREMENTIONED REGULATION	30
A.	The ALC Correctly Interpreted "Residence" as Used in S.C. Code Ann. Regs. 61-107.19, Part IV(B)(1)(a).	30
B.	DHEC Staff's Interpretation of "Residence" is Not Entitled to Deference Because the Interpretation is Unreasonable and Produces Absurd Results.....	35
C.	The ALC Correctly Concluded that the Permit Amendment Violates S.C. Code Ann. Regs. 61-107.19, Part IV(B)(1)(a).....	36
	CONCLUSION.....	37

TABLE OF AUTHORITIES

CASES

<u>Biales v. Young,</u> 315 S.C. 166, 432 S.E.2d 482 (1993)	18
<u>Brown v. S.C. Dept. of Health and Env'tl. Control,</u> 348 S.C. 507, 560 S.E.2d 410 (2002)	18
<u>Byrd v. City of Hartsville,</u> 365 S.C. 650, 620 S.E.2d 76 (2005)	15
<u>Chem-Nuclear Sys., LLC v. S.C. Bd. of Health and Env'tl. Control,</u> 374 S.C. 201, 648 S.E.2d 601 (2007)	31
<u>Clemson Univ. v. Speth,</u> 344 S.C. 310, 543 S.E.2d 572 (Ct. App. 2001)	31
<u>Converse Power Corp. v. S.C. Dept. of Health and Env'tl. Control,</u> 350 S.C. 39, 564 S.E.2d 341 (Ct. App. 2002)	31
<u>Greenville County v. Kenwood Enterprises,</u> 353 S.C. 157, 577 S.E.2d 428 (2003)	15
<u>Hainer v. American Med. Int'l, Inc.,</u> 328 S.C. 128, 492 S.E.2d 103 (1997)	32
<u>Hill v. S.C. Dept. of Health and Env'tl. Control,</u> 389 S.C. 1, 698 S.E.2d 612 (2010)	13
<u>Kiawah Development Partners, II v. S.C. Dept. of Health and Env'tl. Control,</u> 401 S.C. 570, 738 S.E.2d 455 (2013)	13
<u>Mikell v. County of Charleston,</u> 386 S.C. 153, 687 S.E.2d 326 (2009)	16
<u>MRI at Belfair, LLC v. S.C. Dept. of Health & Env'tl. Control,</u> 379 S.C. 1, 664 S.E.2d 471 (2008)	13
<u>Mun. Ass'n of S.C. v. AT&T Communications of the Southern States, Inc.,</u> 361 S.C. 576, 606 S.E.2d 468 (2004)	31
<u>Murphy v. South Carolina Dept. of Env'tl. Control,</u> 396 S.C. 633, 723 S.E.2d 191 (2012)	36

<u>Ray Bell Constr. Co. v. Sch. Dist. of Greenville County,</u> 331 S.C. 19, 501 S.E.2d 725 (1998).....	32
<u>Snipes v. Augusta-Aiken Railway & Electric Corp.,</u> 151 S.C. 391, 149 S.E. 111 (1929).....	18
<u>S.C. Coastal Conservation League v. S.C. Dept. of Health and Env'tl. Control,</u> 380 S.C. 349, 669 S.E.2d 899 (Ct. App. 2008).....	31
<u>Southeast Resource Recovery, Inc. v. S.C. Dept. of Health and Env'tl. Control,</u> 358 S.C. 402, 595 S.E.2d 468 (S.C. 2004).....	14, 17, 18, 19, 20, 25, 28, 29, 30
<u>State v. Hudson,</u> 336 S.C. 237, 519 S.E.2d 577 (Ct. App. 1999).....	31
<u>Ventures South Carolina, LLC v. South Carolina Dept. Rev.,</u> 378 S.C. 5, 661 S.E.2d 339 (2008).....	32

STATUTES

S.C. Code Ann. §1-23-600(E).....	18
S.C. Code Ann. §1-23-610(B).....	6, 13
S.C. Code Ann. §44-96-20(B)(1), (3), (5).....	33
S.C. Code Ann. §44-96-290(B).....	33
S.C. Code Ann. §44-96-290(F).....	2, 7, 14, 15, 16, 17, 18, 19, 20, 25, 26, 28, 29, 30
S.C. Code Ann. Regs. 61-107.11	7
S.C. Code Ann. Regs. 61-107.18(B)(29)	32, 33
S.C. Code Ann. Regs. 61-107.19	7, 31
S.C. Code Ann. Regs. 61-107.19, Part IV	30
S.C. Code Ann. Regs. 61-107.19, Part IV(A).....	32
S.C. Code Ann. Regs. 61-107.19, Part IV(B)(1)(a).....	3, 10, 29, 31, 32, 33, 35, 36
S.C. Code Ann. Regs. 61-107.19, Part IV(B)(1)(e).....	26

LOCAL ORDINANCES

Article 9.5 of Charleston County's ZLDR	2, 10, 11, 25, 26, 27
Section 9.5.1 of Charleston County's ZLDR	11, 25, 26, 28, 29, 30
Section 10-22 of Charleston County's Code of Ordinances	2, 9, 14, 15, 16, 17, 18, 19, 20, 22, 24, 25
Section 10-22(1) of Charleston County's Code of Ordinances	9, 15
Section 10-22(2)(d) of Charleston County's Code of Ordinances.....	9, 15
Section 10-22(2)(e) of Charleston County's Code of Ordinances.....	9, 15

STATEMENT OF ISSUES ON APPEAL

- I. WAS THE ADMINISTRATIVE LAW COURT'S FINDING AND CONCLUSION THAT DHEC VIOLATED S.C. CODE ANN. §44-96-290(F) SUPPORTED BY SUBSTANTIAL EVIDENCE AND NOT AFFECTED BY ERROR OF LAW WHERE DHEC ADMITTED IT NEVER CONSIDERED CHARLESTON COUNTY'S LONGSTANDING SOLID WASTE ORDINANCE, MUCH LESS MADE A DETERMINATION WHETHER THE PERMIT AMENDMENT SOUGHT BY THE COUNTY ITSELF WAS CONSISTENT WITH THIS ORDINANCE?**
- II. WAS THE ADMINISTRATIVE LAW COURT'S FINDING AND CONCLUSION THAT DHEC VIOLATED S.C. CODE ANN. §44-96-290(F) SUPPORTED BY SUBSTANTIAL EVIDENCE AND NOT AFFECTED BY ERROR OF LAW WHERE DHEC GRANTED THE PERMIT AMENDMENT SOUGHT BY THE COUNTY EVEN THOUGH IT WAS INCONSISTENT WITH AND VIOLATED THE VEGETATIVE BUFFER REQUIREMENTS OF THE COUNTY'S ZONING AND LAND DEVELOPMENT REGULATIONS?**
- III. WAS THE ADMINISTRATIVE LAW COURT'S FINDING AND CONCLUSION THAT THE PERMIT AMENDMENT SOUGHT BY THE COUNTY VIOLATED S.C. CODE ANN. REGS. 61-107.19, PART IV(B)(1)(a) SUPPORTED BY SUBSTANTIAL EVIDENCE AND NOT AFFECTED BY ERROR OF LAW WHERE THE PERMIT AMENDMENT AUTHORIZES A CLASS II LANDFILL THAT IS CLOSER THAN ONE THOUSAND FEET TO APPROXIMATELY ONE HUNDRED AND THIRTY PLANNED RESIDENCES THAT PREVIOUSLY RECEIVED SITE PLAN APPROVAL FROM THE CITY OF CHARLESTON?**

STATEMENT OF THE CASE

On September 1, 2011, the South Carolina Department of Environmental Control ("DHEC") approved Charleston County's (the "County") application to modify DHEC Permit Number 101001-1201, pertaining to 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, ¶[29]).

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 and 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 one hundred and thirty (130)

planned residences on Grand Bees' Property are located within one thousand (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 Notice of Appeals with the Court of Appeals on May 29, 2013. (R.p. 0033). The Court of Appeals consolidated these appeals of the ALC's Order.

STATEMENT OF FACTS

Respondent, Grand Bees, is the owner of approximately three hundred and eleven (311) acres located off Bees Ferry Road within the City of Charleston (Charleston County TMS # 301-00-00-035) (the "Grand Bees Property"). (R.p. 0002, ¶2). Appellant Charleston County is the owner and operator of the Bees Ferry Landfill (Charleston County TMS # 301-00-00-026) (the "Landfill"), which is also located off Bees Ferry Road but in the unincorporated part of Charleston County. (R.pp. 0002-0003, ¶7). The Grand Bees Property abuts the Landfill and shares a common boundary along the Grand Bees Property's southwest property line. (R.pp. 0002-0003, ¶7; R.p. 0518).

The Grand Bees Property is zoned "Planned Unit Development" ("PUD") by the City of Charleston (the "City") and is designated for residential land use. (R.p. 0002, ¶3; R.p. 0068, page 38, lines 4-18; R.pp. 0338-0412, R.p. 0515). The Grand Bees Property represents approximately twenty-five (25%) percent of the land area of a larger PUD within the City of Charleston known as Grand Oaks that was first approved by City Council in 1993. (R.p. 0002, ¶4). At the time of the hearing before the ALC, Grand Oaks consisted of nine districts and completed neighborhoods totaling approximately 1,500 homes, infrastructure, parks, and other amenities. (R.p. 0002, ¶3; R.p. 0096, page 149, lines 11-21; R.p. 0096, page 150, line 24-page 152, line 10; R.p. 0097, page 153, lines 3-16; R.pp. 0338-0412). Various other existing residential PUDs are located in the immediate vicinity of Grand Oaks and the Landfill including The Hunt Club and Long Savannah. (R.p. 0002, ¶6; R.p. 0073, page 58, lines 2-15; R.p. 0073, page 59, line 12-page 60, line 9; R.pp. 516-517).

Grand Bees is in the business of residential development and purchased the Grand Bees Property on November 15, 2004 for \$4,141,518.00. (R.p. 0003, ¶¶9,12; R.p. 0332). Prior to purchase, Respondent Grand Bees conducted due diligence on, among other things, the Landfill and the County's zoning and land use ordinances applicable to the Landfill. (R.p. 0003, ¶10; R.pp. 0067-0068, page 34, line 18-page 40, line 20). In February 2006, Grand Bees obtained site plan approval from the City for 507 residential units on the Grand Bees Property and afterwards proceeded to spend approximately four million dollars (\$4,000,000.00) in engineering and other development costs towards realization of its residential development (R.pp. 0038-0039, ¶¶ 13,14; R.pp. 0069-0070, page 42, line 10-page 48, line 2; R.p. 0074, page 61, line 23-page 62, line 4; R.p. 0514).

Grand Bees' planned residential development consists of various engineered phases, including Phase 7 adjacent to the Class II Landfill's common boundary. (R.pp. 0010, ¶47; R.p. 0070, page 45, lines 21-24; R.p. 0513). At the time of the County's initial application to expand the Landfill, Phase 7 had been both permitted for residential development by the City and engineered for water, sewer, storm system, and roadway infrastructure improvements. (R.pp. 0010, ¶47; R.p. 0070, page 46, line 19-page 47, line 17; R.p. 0513).

The County has operated the Landfill at its present location since 1977. (R.p. 0004, ¶15). Pursuant to the S.C. Solid Waste Policy and Management Act of 1991 (the "Act"), the Landfill includes several cells. (R.p. 0004, ¶15). One of the cells is a construction, demolition, and land clearing debris or "Class II" mound (the "Mound") that

the County operates under DHEC Permit Number 101001-1201 issued in October 17, 1997 (the "Permit"). (R.pp. 0167-0331; R.pp. 0413-0417; R.pp. 0425-0434).

In 2007 the County applied to DHEC to modify the Permit so as to enlarge the Mound's vertical height limitation from seventy-four (74) feet above mean sea level ("MSL") to one hundred sixty-eight (168) feet above MSL and to expand the footprint of the Mound by five and a half (5.5) acres. (R.p. 0004, ¶16; R.p. 0174). The modification would more than double the size of the Mound by increasing the maximum disposal capacity from approximately 2.5 million cubic yards to 5.4 million cubic yards.¹ (R.p. 0004, ¶16; R.pp. 0185). The County's application was subsequently amended in November 2007. (R.p. 0004, ¶16; R.pp. 0167).

Despite knowing Grand Bees was developing residences on the adjoining property, the County did not directly notify Grand Bees about its application to DHEC to modify the Permit to authorize an enormous expansion of the height and size of the Mound. (R.p. 0004, ¶18; R.p. 0068, page 37, lines 1-4; R.p. 0071, page 49, line 9-page 50, line 5; R.p. 0073, page 57, lines 9-15). DHEC granted the modification of DHEC Permit Number 101001-1201 on January 17, 2008 (the "First Permit Modification"). (R.p. 0004, ¶19). Respondent Grand Bees first learned of the County's permit expansion plans a few days after the First Permit Modification was issued. (R.p. 0004, ¶19; R.p. 0071, page 49, line 9-page 50, line 5).

¹ In its Brief, the County claims that the landfill expansion is needed "to protect the public health, safety and general welfare of the citizens of the County by providing a central location for disposal of this type of waste and thereby minimizing unlawful dumping and littering throughout the County and surrounding municipalities." This statement, however, appears nowhere in the record, does not have a citation in the County's Initial Brief, and must be ignored for the purposes of this appeal pursuant to S.C. Code Ann. § 1-23-610(B) ("the review of the administrative law judge's order must be confined to the record.").

On April 18, 2008, Respondent Grand Bees requested a contested case hearing to challenge the First Permit Modification. (R.p. 0004, ¶20). By Order dated June 2, 2009, the Honorable Ralph King Anderson, III, held that DHEC erred in granting the First Permit Modification because the County failed to obtain a "special exception" for the expansion of the Mound in accordance with the terms of its own ZLDR (R.p. 0004, ¶20). As such, Judge Anderson found that the First Permit Modification violated S.C. Code Ann. §44-96-290(F) that requires landfill permits be consistent with local zoning, land use and other ordinances. (R.p. 0004, ¶20). Judge Anderson vacated the First Permit Modification and remanded it to DHEC for further analysis. (R.pp. 0004-0005, ¶¶20,21).

After the First Permit Modification was reversed and remanded by Judge Anderson, the County amended its ZLDR to eliminate the requirement of a "special exception" as a prerequisite to expanding its Landfill. (R.pp. 0005, ¶21; R.pp. 0105-0106, page 188, line 14-page 189, line 12). Once DHEC learned of this zoning amendment, it again took up the County's 2007 permit modification application. (R.p. 0005, ¶22). DHEC did not require the County to submit a new application, but the County did provide some additional information, primarily dealing with zoning, to supplement its 2007 application. (R.p. 0005, ¶22; R.pp. 0113-0114, page 220, line 19-page 221, line 18). Additional information involving groundwater monitoring was also submitted to account for regulatory changes since the County's initial application.² (R.p. 0005, ¶24).

² S.C. Code Ann. Regs. 61-107.19 repealed and replaced S.C. Code Ann. Regs. 61-107.11 on May 23, 2008. These regulatory changes, among other things, reclassified C&D landfills as Class II landfills. (R. p. 0005, ¶ 23).

During the contested case hearing over the Second Permit Modification, Kent Coleman, Director of DHEC's Division of Mining and Solid Waste Management testified that, on remand from the ALC, DHEC reviewed the County's application under the DHEC's new landfill regulations, but only as to whether it complied with the County's ZLDR that had been the subject of the prior contested case proceeding. (R.p. 0005, ¶24; R.p. 0110, page 207, lines 1-23). Mr. Coleman also testified that, on remand, DHEC once more relied on the vicinity map on Page G-04 of the 2007 application that is dated 2004 and utilizes an aerial photograph from 2001. (R.p. 0004, ¶17; R.p. 0005, ¶25; R.pp. 0113-0114, page 220, line 7-page 221, line 18; R.p. 0224; R.p. 0515). This map identifies the adjoining Grand Bees Property as being zoned PUD with the land use denoted as "residential." (R.p. 0224; R.p. 0515). Mr. Coleman further testified that "numerous aerial photographs throughout the process . . . that were more updated through time" were consulted, but none of these photographs are in the record.³ (R.p. 0005, ¶25, R.pp. 0118-0119, page 240, line 23-page 241, line 3).

DHEC rendered a "Consistency Memorandum" dated April 12, 2011, that found the Second Permit Modification to be "consistent with the Charleston County land-use planning and zoning." (R.pp. 0005-0006, ¶¶26,27; R.p. 0436). The Consistency Memorandum is the sole written documentation of the consistency determination in the record. Mr. Coleman testified that DHEC made a determination of consistency after DHEC learned the County had amended its zoning ordinance to remove the special exception requirement for the expansion of the landfill. (R.pp. 0006-0007, ¶32; R.p.

³ The aerial photographs from 2008 and 2012 introduced as Trial Exhibits 14 and 15 were prepared by Respondent's experts. (R.pp.0516-0517). They are not part of DHEC's official permit review file, and there is no evidence in the record that DHEC ever consulted these photographs.

0110, page 207, lines 1-8; R.p. 0111, page 209, lines 15-18). DHEC did not consider any other applicable local laws that may have been pertinent to the application for the Second Permit Modification. (R.pp. 0006-0007, ¶32).

Counsel for all parties stipulated that Section 10-22 of the Charleston County Code of Ordinances ("Disposal Sites and Facilities") was in effect at all times relevant to the application for the Second Permit Modification. (R.p. 0007, 33; R.p. 0068, page 39, line 10-page 40, line 8; R.pp. 0437-0444). Section 10-22(1) is a local land use ordinance that applies to "[a]ll owners or operators of solid waste disposal facilities including governmental units or agencies," and is triggered "[w]hen a new sanitary landfill is constructed or an existing site is extensively re-designed." (R.p. 0007, ¶33; R.p. 0012, ¶¶9,10; R.p. 0443). 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." (R.p. 0007, ¶34; R.p. 0443).

DHEC's "Consistency Memorandum" does not refer to Section 10-22 or the Charleston County Code of Ordinances. (R.p. 0007, ¶35; R.p. 0436). There is no evidence DHEC ever reviewed Section 10-22 prior to issuing the Second Permit Modification. (R.pp. 0006-0007, ¶¶32,35; R.p. 0436). Mr. Coleman testified at his deposition that the first time he had seen Section 10-22 was a week before the hearing before the ALC. (R.p. 0111, page 212, lines 8-15).

John S. Lester, P.E. (Grand Bees' expert and the President of HLA, Inc., a civil engineering and landscape architecture firm in Charleston), Wallace A. Jack (a board member of the Grand Oaks Boulevard Association), and Taylor Bush (on behalf of

Grand Bees) all testified about the rapidly expanding residential development in the immediate area surrounding the landfill since 2001. (R.pp. 0007-0008, ¶¶37,38; R.p. 0073, page 57, line 9-page 60, line 25; R.pp. 0089-0090, page 123, line 21-page 125, line 2; R.p. 0096, page 150, line 24-page 151, line 11). They also testified that the landfill expansion allowed by the Second Permit Modification would be incompatible with these residential uses and not conform with the future development in the area. (R.pp. 0007-0008, ¶¶37,38; R.pp. 0071-0072, page 50, line 22-page 54, line 13; R.p. 0087, page 115, lines 13-21; R.p. 0098, page 157, line 24-page 158, line 11; R.p. 0098, page 160, lines 2-12). At the hearing, Grand Bees entered into evidence two aerial photographs from 2008 and 2012 that show several new residential neighborhoods near the Landfill that have been constructed since 2001 and others that are under construction. (R.p. 0008, ¶39; R.pp. 0516-0517). Grand Bees also introduced several surveys and computer generated sketch-ups that depict the effect of the proposed landfill on the surrounding area. (R.p. 0010, ¶48; R.pp. 0518-0526).

In addition, the Second Permit Modification and DHEC's consistency determination neither addresses nor incorporates the landscaping, screening, and buffering regulations found in Article 9.5 of the County's ZLDR. (R.p. 0009, ¶43; R.p. 0114, page 223, line 16-page 224, line 8; R.pp. 0167-0331; R.pp. 0413-0417; R.pp. 0425-0434). Article 9.5 provides as follows:

[T]he landscaping, screening and buffering standards of [Article 9.5] shall apply to all new non-residential development . . . "[w]hen modifications or additions are being made to an existing non-residential building or site, the standards of this Article shall apply to those portions of the subject parcel that are directly affected by the proposed improvements, as determined by the Planning Director

(R.p. 0469, §9.5.1). Article 9.5 provides for specific vegetative buffers between residential and industrial uses. (R.pp. 0469-0478, §9.5.4; R.p. 0084, page 101, line 12-page 102, line 16). Neither the Second Permit Modification nor DHEC's consistency determination references these County standards, describes or requires what type and amount of vegetation must be planted, and contains or incorporates a planting or landscaping plan. (R.p. 0044, ¶43; R.pp. 0167-0331; R.pp. 0413-0417; R.pp. 0425-0434; R.p. 436; R.p. 0085, page 105, line 21-page 107, line 11). No landscaping plan or similar documentation was included in the 2007 application either, even though it is standard professional practice to prove compliance with buffer regulations as a precondition of permit approval. (R.p. 0044, ¶44; R.p. 0085, page 105, lines 12-24; p. 0114, page 223, line 16-page 224, line 8).

Furthermore, S.C. Code Ann. Regs. 61-107.19, Part IV(B)(1)(a) imposes a one thousand (1,000) foot buffer from the boundary of the fill area of a Class II Landfill from any "residence." (R.pp. 0044-0045, ¶46). According to a survey performed by Mr. Lester, approximately one hundred and thirty (130) residential lots that have received site-plan approval are located on the Grand Bees Property within one thousand (1,000) feet of the fill area boundary of the Class II Landfill. (R.p. 0045, ¶48; R.p. 0082, page 96, lines 1-10; R.pp. 0513-0514). The Parties further stipulated that there are planned and proposed residences on the property within one thousand (1,000) feet of the landfill fill area. (R.p. 0010, ¶51; R.p. 0081, page 90, line 17-page 91, line 8). In granting the Second Permit Modification, DHEC admitted to not taking into account the planned and approved residences on the Grand Bees Property. (R.p. 0010, ¶50; R.p. 0106, page 190, lines 19-23).

Judge Robinson reversed and vacated the Second Permit Modification. (R.p. 0054). In her Order, Judge Robinson additionally ruled that if the County sought to continue pursuing its landfill expansion permit, it must submit "an entirely new and updated permit application . . . given the long period of time between this Order and the County's initial application in 2007, the rapid changes in residential development in the surrounding area since that time, the repeal and replacement of the governing regulation, and the outdated materials on which the permit relies including, but not limited to, the vicinity map from 2001." (R.p. 0054).

STANDARD OF REVIEW

"In an appeal from an ALC decision, the Administrative Procedures Act (APA) provides the appropriate standard of review." Kiawah Development Partners, II v. S.C. Dept. of Health and Env'tl. Control, 401 S.C. 570, 738 S.E.2d 455, 458 (2013) (citing S.C. Code Ann. §1-23-610(B)). An appellate court will only reverse the decision of an ALC if that decision is:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (f) arbitrary or capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion.

Id. at 459. "The court may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact." S.C. Code Ann. §1-23-610(B). Moreover, "[t]he review of the administrative law judge's order must be confined to the record." Id.

"As to factual issues, judicial review of administrative agency orders is limited to a determination [of] whether the order is supported by substantial evidence." MRI at Belfair, LLC v. S.C. Dept. of Health & Env'tl. Control, 379 S.C. 1, 6, 664 S.E.2d 471, 474 (2008). "In determining whether the ALC's decision was supported by substantial evidence, this Court need only find, looking at the entire record on appeal, evidence from which reasonable minds could reach the same conclusion that the ALC reached." Kiawah Development Partners, II, 401 S.C. 570, 738 S.E.2d at 459 (citing Hill v. S.C. Dept. of Health and Env'tl. Control, 389 S.C. 1, 9-10, 698 S.E.2d 612, 617 (2010)).

ARGUMENT

- I. SUBSTANTIAL EVIDENCE SUPPORTS THE ADMINISTRATIVE LAW COURT'S FINDING AND CONCLUSION THAT DHEC VIOLATED S.C. CODE ANN. § 44-96-290(F). DHEC FAILED TO EVALUATE WHETHER THE PROPOSED LANDFILL EXPANSION SOUGHT BY THE COUNTY WAS CONSISTENT WITH CHARLESTON COUNTY'S SOLID WASTE ORDINANCE THAT REQUIRES, AMONG OTHER THINGS, THAT ALL EXPANSIONS OF SOLID WASTE DISPOSAL SITES CONFORM WITH THE SURROUNDING ENVIRONMENT AND WITH FUTURE DEVELOPMENT OF THE AREA.

- A. The County's Solid Waste Ordinance is an Applicable Local Land Use Ordinance Under S.C. Code Ann. §44-96-290(F).

The County argues that Section 10-22 of the Charleston County Code of Ordinances titled "Disposal Sites and Facilities" ("Section 10-22") is not an applicable local land use ordinance under S.C. Code Ann. §44-96-290(F).⁴ That statute requires DHEC to perform a consistency review with all local laws, stating as follows:

[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"

(Emphasis added) The South Carolina Supreme Court has interpreted S.C. Code Ann. §44-96-290(F) to mean that consistency with local land use ordinances is a *condition precedent* to DHEC issuing a solid waste permit. See Southeast Resource Recovery, Inc. v. S.C. Dept. of Health and Env'tl. Control, 358 S.C. 402, 407-08, 595 S.E.2d 468, 471 (S.C. 2004) ("DHEC cannot issue a permit unless the proposed facility is consistent with "local zoning, land use, and other applicable ordinances.")

⁴ Section 10-22 is the current citation to the ordinance at hand which was formerly classified as "Ordinance 180" in the Charleston County Code of Ordinances, adopted on March 5, 1974. (R.pp. 0437-0444).

The ALC concluded, as a matter of fact and law, that Section 10-22 is an applicable local land use ordinance. This conclusion is supported by substantial evidence. Admitted as a trial exhibit, Section 10-22 has been an operative ordinance of the County since its adoption in 1974. (R.p. 0437).

Section 10-22(1) applies to "[a]ll owners or operators of solid waste disposal facilities including governmental units or agencies," and is triggered "[w]hen a new sanitary landfill is constructed or an existing site is extensively re-designed," (R.p. 0443). (Emphasis added). 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 sites "conform with future development of the area." (R.p. 0443).

The ALC concluded that "Section 10-22 is an applicable local land use ordinance under S.C. Code Ann. §44-96-290(F) [because] it specifically governs solid waste disposal facilities (both new and expanded), including those owned and operated by governmental entities, including the County." (R.p. 0012, ¶9). The ALC supported this conclusion by correctly observing that "zoning ordinances are not the only means by which local governments can regulate land use." See Greenville County v. Kenwood Enterprises, 353 S.C. 157, 165, 577 S.E.2d 428, 432 (2003), *overruled on other grounds by*, Byrd v. City of Hartsville, 365 S.C. 650, 620 S.E.2d 76 (2005). (R.p. 0012, ¶11).

Realizing that the proposed expansion of the Mound is incompatible with Section 10-22, the County takes the unusual position of disclaiming its own valid ordinance. The County refers to Section 10-22 as "archaic" and "outdated." (Initial Brief of County, p. 11-12) However, County Council has never chosen to repeal Section 10-22. It is

undisputed it is a valid local law in effect both when the original permit application was filed and when the Second Permit Modification was issued.

What is more, the ALC found "no authority to support the view that the ZLDR [the County's Zoning and Land Development Regulations] preempts, for the purposes of DHEC's consistency analysis, an otherwise applicable and valid land use ordinance [such as Section 10-22] simply due to the latter's being more specific." (R.p. 0013, ¶14). (citing Mikell v. County of Charleston, 386 S.C.153, 687 S.E.2d 326 (2009)). Nor has the County cited in its brief to any section of the ZLDR that purported to repeal Section 10-22.

Finally, there is no evidence in the record that DHEC, in performing its §44-96-290(F) consistency review, or the County itself, determined that Section 10-22 was preempted, replicated, or otherwise subsumed by provisions in the ZLDR or the state laws and regulations governing solid waste permitting. In fact, as the ALC found, "[t]here is no evidence in the record that Section 10-22 or the County's Code of Ordinances, more generally, was *ever reviewed* by DHEC to determine whether the requested permit modification was consistent with all applicable local ordinances. (R.p. 0007, ¶35). Given the foregoing, based on the express terms of Section 10-22 and the total lack of evidence in the record that DHEC ever acknowledged Section 10-22 during its review of the Second Permit Modification, the ALC's finding and conclusion that Section 10-22 was an applicable local land use ordinance under S.C. Code Ann. §44-96-290(F) is supported by substantial evidence and not an error of law.

The County also attacks the substantive criteria expressed in Section 10-22 as being too subjective and indefinite for DHEC to apply during its consistency

determination. (Initial Brief of County, p. 11-14) On this point, the ALC found that, on its face, "the critical language of Section 10-22, namely 'conform with the surrounding environment' and 'conform with future development of the area,' are not the sort of 'broad, general statements of goals' that worried the Supreme Court in Southeast Resource Recovery." (R.p. 0013, ¶16). (citing Southeast Resource Recovery, Inc. v. S.C. Dept. of Health and Env'tl. Control, 358 S.C. 402, 595 S.E.2d 468 (S.C. 2004)). Instead, the ALC found that Section 10-22 contains "specific standards, requirements and criteria" that "simply do not lend themselves to more precise, quantitative measures" and that these standards "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, ¶16). (Emphasis in original.)

Moreover, the ALC did not find that the Second Permit Modification was inconsistent with Section 10-22 per se, although the only evidence in the record on this topic supports inconsistency with Section 10-22. Rather, the ALC found simply that Section 10-22 is an applicable ordinance for the purposes of consistency review, and that DHEC failed to identify and review it in violation of S.C. Code Ann. §44-96-290(F) and Southeast Resource Recovery.

For the aforementioned reasons, the ALC's finding and conclusion that Section 10-22 is an applicable land use ordinance is supported by substantial evidence and not based on any errors of law.

B. By Failing to Identify and Assess the County's Solid Waste Ordinance, DHEC's Consistency Determination Under §44-96-290(F), was Incomplete and Materially Insufficient.

The County does not challenge the ALC's finding that "DHEC never considered Section 10-22 in its consistency review." (R.p. 0012, ¶12).⁵ Rather, the County's argument seems to be that this omission was harmless error and the ALC erred by not "finding that the permit modification was *in fact* inconsistent with [Section 10-22]." (Initial Brief of County, p. 9) (Emphasis added) However, in so doing, the County misapprehends the role of the ALC in contested case hearings, DHEC's obligations under S.C. Code Ann. §44-96-290(F), and the South Carolina Supreme Court's holding in Southeast Resource Recovery, Inc. v. S.C. Dept. of Health and Env'tl. Control, 358 S.C. 402, 595 S.E.2d 468 (S.C. 2004).

In contested case hearings, the ALC serves as the fact finder and makes a *de novo* determination regarding the matters at issue. Brown v. S.C. Dept. of Health and Env'tl. Control, 348 S.C. 507, 520, 560 S.E.2d 410, 417 (2002). Here, the matter before the ALC was whether DHEC performed a proper consistency determination under S.C. Code Ann. §44-96-290(F) and Southeast Resource Recovery, Inc. The doctrine of harmless error applies to judicial decisions on appeal. Snipes v. Augusta-Aiken Railway & Electric Corp., 151 S.C. 391, 149 S.E. 111 (1929). It has no application to administrative consistency determinations or the review thereof. See S.C. Code Ann. §1-23-600(E) (setting forth standard of review by ALC in contested case hearings).

⁵ An appellate court will affirm a ruling by a lower court if the offended party does not challenge that ruling. *E.g.*, Biales v. Young, 315 S.C. 166, 432 S.E.2d 482 (1993). Therefore, since the County has not challenged the ALC's findings that DHEC never considered Section 10-22 during its consistency review, this finding is the law of the case.

Consistency with local land use ordinances is a *condition precedent* to DHEC issuing a solid waste permit. See Southeast Resource Recovery, Inc. v. S.C. Dept. of Health and Env'tl. Control, 358 S.C. 402, 407-08, 595 S.E.2d 468, 471 (S.C. 2004) (interpreting S.C. Code Ann. §44-96-290(F)). "Consistent with" means "comply with." See, id. at 408, 595 S.E.2d at 471. The Court's holding in Southeast Resource Recovery provides that, in order to comply with S.C. Code Ann. §44-96-290(F), DHEC, not any other party, must ensure that a permit is consistent with all applicable local land use ordinances. Id. ("DHEC, not the county, is charged with ensuring such facilities meet the requirements for permitting.") The only way this can be done is for DHEC to identify all applicable local land use ordinances and review them for consistency with the proposed permitted activity sought, but DHEC failed to do this.

The record demonstrates that DHEC was entirely unaware of Section 10-22 (of Charleston County's Code of Ordinances) during its official, statutorily-mandated consistency review, and, as a result, DHEC never considered Section 10-22 in its consistency review. Therefore, the ALC's findings and conclusions that DHEC should have considered Section 10-22, but did not, are supported by substantial evidence.

The County's "exclusive outcome based approach" for determining compliance with S.C. Code Ann. §44-96-290(F) also ignores the holding in Southeast Resource Recovery that consistency is a *condition precedent* for permit issuance. The County's hypothetical approach, taken to its logical extension, would allow a permit to satisfy S.C. Code Ann. §44-96-290(F) *even if DHEC never reviewed any local ordinances prior to a permit's being issued*, just so long as an ALC, conducting *de novo* review, finds, in fact, that the permit is consistent with local law. This result completely jettisons DHEC's role

from the consistency review process, which is neither what the General Assembly intended when it drafted S.C. Code Ann. §44-96-290(F) nor what the South Carolina Supreme Court held was DHEC's obligation in Southeast Resource Recovery.

Moreover, even if there were a legal basis for the County's misplaced argument of harmless error, there is substantial evidence to support the ALC's finding and conclusion that "[g]iven 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." (R.p. 0013, ¶13). The ALC found DHEC's omission of Section 10-22 from its consistency review to be "significant" because "unlike other County ordinances, such as the ZLDR, Section 10-22 [which is found in the Code of Ordinances] requires consideration of conformity with the surrounding environment and *future* development of the area." (R.p. 0013, ¶13). (Emphasis in original).

Several witnesses testified at the ALC hearing about, what the ALC ultimately found to be, "the rapidly expanding and residential character of the area surrounding the Landfill since 2001." (R.p. 0007, ¶37; R.p. 0073, page 57, line 9-page 60, line 25; R.pp. 0089-0090, page 123, line 21-page 125, line 2; R.p. 0096, page 150, line 24-page 151, line 11). For example, at the hearing, Taylor Bush, one of Respondent Grand Bees' principals, reviewed the vicinity map on page G-04 of the County's original permit application, which utilizes an aerial photograph from 2001,⁶ and he testified as follows:

⁶ According to the record, DHEC relied on the aerial photograph that went all the way back to 2001 when it issued the Second Permit Modification. (R. p. 0004-0005, ¶¶ 17, 25; R. pp. 0113-0114, page 220, line 7-page 221, line 18; R. p. 0224). DHEC never

DIRECT EXAMINATION BY MR. WALKER

Q: . . . has there been a change to this land since 2001, which is the date of this aerial?

A: Yes.

Q: Has there been a residential development constructed since then?

A: Yes.

Q: What would that be --

A: Well --

Q: -- in proximity to the landfill?

A: Well, there's several.

Q: Okay.

A: First of all --

Q: And we're not contending these are within 1,000 feet, okay?

A: This is the Grand Oaks PUD (indicating) and all of this now is developed, this whole area. There are hundreds of homes now here. There's a public park with -- I think it's a city park with a gymnasium that is located here (indicating) in this general area and -- and then there's development all back through here now. This is called Hunt Club. This was the first phase of Hunt Club and now it's -- it's been developed all back in here and actually now connects over to this road (indicating). And then there's a development down here that is by Centex in Carolina Bay, I believe, and it's -- it's expanded dramatically. In fact, it's -- it's expanded up into this -- I believe it's expanded up into this industrial land use area. It's all -- I -- I can't say for certain. I know that there's interconnectivity now back out to this area and so there's -- I'm just speculating that may have been rezoned residential (indicating).

Q: Okay.

A: Again, there's another development over here called Fulton's Landing. There are apartments here now, several other uses.

Q: Mr. Bush, does this 2001 aerial reasonably depict the condition of that land that it shows as of the time of the first application, which is in July of 2007?

A: No.

required the County to submit an updated aerial photograph after the First Permit Modification was reversed and remanded, and there is no evidence in the record that DHEC consulted other, more recent aerial photographs. (R. p. 0005, ¶ 25; R. pp. 0118-0119, page 240, line 23-page 241, line 3).

Q: Does it depict the condition of the land accurately as of the date of the issuance of the first permit in January 2008?

A: No.

Q: Same question as to the issuance of the permit after it was vacated on September 1, 2007?

A: No.

(R.p. 0073, page 58, line 24-page 60, line 25)

Similarly, substantial evidence to support the ALC's finding concerning the relevance of Section 10-22 came from John S. Lester, P.E. (the president of HLA, Inc. a civil engineering and landscape architecture firm in Charleston). He offered expert testimony that aerial photographs from 2008 and 2012 showed several new residential developments that had been constructed and approved for development, all of which were absent in 2001. (R.pp. 0089-0090, page 123, line 21-page 125, line 2; R.pp. 0516-0517) Finally, Wallace A. Jack (a board member of the Grand Oaks Boulevard Association, the master homeowners association for the Bees Landing PUD (commonly known as Grand Oaks)) testified about current and future residential development near the landfill as follows:

DIRECT EXAMINATION BY MR. KHAN

Q: Tell the Court a little bit about Grand Oaks. We touched on it. Do you have an estimate of how many different neighborhoods are inside of it right now?

A: There are nine neighborhoods with housing units in it right now.

Q: Okay. Are there other neighborhoods that are coming forward?

A: There are two other tracts that are designated as residential.

Q: Okay. Does one of those include Grand Bees Development?

A: Yes.

Q: Okay. Do you have a rough figure of how many homes we're talking about in Grand Oaks?

A: My best estimate is, looking at the density of my own neighborhood, knowing -- since how -- treasurer, that's how we bill people is by acreage, using that as a rough estimate. There are

townhouses and apartment buildings, which are more dense, but just using the density of my neighborhood, it's around 1,500 as a rough guess of how many there now.

(R.p. 0096, page 150, line 24-page 151, line 21)

Aside from the surge in residential development in the area since 2001 and the future residential development planned, such as Respondent Grand Bees', Mr. Bush, Mr. Lester, and Mr. Jack all testified that dramatically expanding the footprint, capacity, and height of the Mound, as the Second Permit Modification would do, "would neither be compatible with nor conform to current and future development in the area." (R.pp. 0007-0008, ¶37; R.pp. 0071-0072, page 50, line 22-page 54, line 13; R.p. 0087, page 115, lines 13-21; R.p. 0098, page 157, line 24-page 158, line 11; R.p. 0098, page 160, lines 2-12) For example, Mr. Bush further testified as follows:

DIRECT EXAMINATION BY MR. WALKER

Q: Now, before we talk about that, I want you to tell the Court your specific concerns as a person in the development business, who's been doing this for a long, long time with a proposed expansion, the increasing elevation, the increase in footprint, the increase in volume.

A: Well, the increased elevation would become a visual -- a visual problem from the marketing of the property and -- and from a lifestyle point of view, someone living there. It had -- it had changed from something that was basically treetop level to something that was the height of a 13- or 14-story high-rise building. And so from that point of view, it was extremely concerning, because now we had what was an adjacent land use that we felt was compatible because of its -- of its height, but then obviously by increasing the -- in order to increase the height, they had to increase the footprint. It's just geometry, you know.

Q: Right.

A: And so that increase of a footprint also increased the life of the landfill. And when you increase the life of the landfill, it means it's

going to be going on for a long, long time. Before it had an end of life that was probably consistent with the point at which we would be developing phase eight, nine and ten. But now the end of life is the people living there, their kids would be in college by then. And so it -- it was a dramatic change to us.

Q: Did those concerns that you had include aspects of the operation of the landfill, not just its elevation?

A: Absolutely.

Q: Tell us about that.

A: Well, I'm not an expert on the operation of landfills. I'm sure there's some experts in this room that could testify better than I could. But there's -- it's undeniable that it's -- there's dump trucks, there's bulldozers, there's all kind of activity like that that go on during the day, and so that -- that noise is concerning.

Q: Would that activity be going on at a higher elevation above the tree line?

A: Once the mound with this -- with this modification to this permit, it would be.

Q: And is there noise, to your knowledge, associated with those activities?

A: Yes.

(R.p. 0071, page 50, line 22-page 52, line 23)

Moreover, Mr. Lester offered expert testimony that the landfill expansion is "too large vertically and it's a very significant feature on the landscape" and that "[t]his will be seen for quite a distance away." (R.p. 0087, page 115, lines 18-21) Finally, Mr. Jack testified that his constituents would not welcome dramatic expansions of the neighboring landfill given the lights and other impacts it would cause. (R.p. 0098, page 157, line 24-page 158, line 11)

For these reasons, the ALC's finding of the materiality and pertinence of Section 10-22 is supported by substantial evidence. The ALC correctly concluded that "it is apparent in this instance that DHEC's consistency determination is materially

incomplete and, therefore, facially invalid" under S.C. Code Ann. §44-96-290(F) and Southeast Resource Recovery. (R.p. 0013, ¶13)

II. SUBSTANTIAL EVIDENCE SUPPORTS THE ADMINISTRATIVE LAW COURT'S DECISION TO REVERSE AND VACATE THE PROPOSED LANDFILL EXPANSION SOUGHT BY THE COUNTY BECAUSE IT FOUND AND CONCLUDED THAT THE PERMIT AMENDMENT IS INCONSISTENT WITH CHARLESTON COUNTY'S LANDSCAPING, SCREENING AND BUFFERING REGULATIONS.

A. The Permit Amendment is Inconsistent, as a Matter of Fact, with Article 9.5 of the ZLDR Because it Fails to Incorporate the County's Landscaping, Screening and Buffering Requirements.

The ALC's finding that the Second Permit Modification, as issued, was inconsistent with Article 9.5 and violated S.C. Code Ann. §44-96-290(F) is supported by substantial evidence.⁷

First, the ALC correctly found Article 9.5 to be an applicable local land use ordinance for the purposes of S.C. Code Ann. §44-96-290(F). Article 9.5 of the ZLDR ("Landscaping, Screening and Buffers"), Section 9.5.1 ("Applicability") provides that "[w]hen modifications or additions are being made to an existing non-residential building or site, the standards of this Article shall apply to those portions of the subject parcel that are directly affected by the proposed improvements, as determined by the Planning

⁷ The ALC found that the Second Permit Modification was inconsistent with Section 10-22 because the record revealed that DHEC never considered Section 10-22 during its consistency review. In other words, the consistency review *itself* was defective. This can be referred to as a "procedural defect" in DHEC's consistency review. Regarding Article 9.5, however, the ALC found this local land use ordinance to be actually inconsistent, as granted, with the Second Permit Modification. In other words, the ALC found that even if DHEC did consider Article 9.5 along with the other provisions of the ZLDR, the permit as granted conflicts with Article 9.5. This can be referred to as a "substantive defect" in DHEC's consistency review.

Director” (R.p. 0469, §9.5.1) Article 9.5 provides specific vegetative buffer regulations applicable between residential and industrial uses. (R.pp. 0471-0478, §9.5.4) The ALC found and concluded that “the Second Permit Modification constitutes a modification to a non-residential site, thereby triggering the County’s landscaping, screening, and buffering regulations contained in Article 9.5 of the ZLDR.” (R.p. 0015, ¶22) This finding is supported by substantial evidence because the expanded use is a landfill that is a non-residential use and the height expansion applies to and impacts the entire landfill site.

Having found Article 9.5 to be relevant for the purposes of S.C. Code Ann. §44-96-290(F), the ALC then found the Second Permit Modification to be inconsistent with Article 9.5 “because no landscaping plan or other documentation demonstrating compliance was made part of the permit application or the Second Permit Modification.” (R.p. 0015, ¶22) Specifically, the ALC found that “[i]n this instance, the County’s regulations require a one hundred (100) foot vegetative buffer between the Class II Landfill and Petitioner’s property, specifically containing nine (9) canopy trees, eleven (11) understory trees and fifty (50) shrubs per one hundred (100) feet of linear buffer along the property line.” (R.p. 0009, ¶43) Finally, the ALC found that “the approved Second Permit Modification drawings contain no reference to the County’s landscaping regulations, no description or requirement of the vegetation that would be required to be planted, and no planting or landscaping plan.” (R.p. 0009, ¶43)

Given the foregoing, the ALC’s conclusion that the Second Permit Modification violated S.C. Code Ann. §44-96-290(F), as a matter of fact, is supported by substantial

evidence in the record and is not controlled by an error of law, and, therefore, should be affirmed by this Court.

B. The Entire Mound is Subject to Article 9.5 of the ZLDR Due to the Permit Amendment's Dramatic Height Expansion.

The County does not argue that Article 9.5 is not triggered. Instead, the County disputes that under Article 9.5 "a one hundred (100) foot vegetative buffer between the Class II Landfill and [Respondent Grand Bees'] property" is required because the proposed expansion of Landfill will not cause additional impacts in the direction of the current one hundred (100) foot buffer.⁸ (Initial Brief of County, p. 14-15) Since "[t]he proposed expansion is contained entirely within the existing permitted boundaries and existing buffer zones for the facility," the County contends no landscaping, screening or buffering need be located within the current buffer under Article 9.5. However, this argument misapprehends the extent and nature of the landfill expansion authorized by the Second Permit Modification.

In addition to expanding the landfill laterally, the Second Permit Modification would more than double the Mound's *vertical height* limitation from seventy-four (74) feet above mean sea level ("MSL") to one hundred sixty-eight (168) feet above MSL. (R.p. 0004, ¶16) The ALC found, based on expert testimony from Mr. Lester, an expert surveyor and landscape architect, that one hundred sixty-eight (168) feet above MSL "would match or exceed many of the tallest structures in Charleston County, including

⁸ The current one hundred (100) foot buffer between the Grand Bees Property and the Class II Landfill is the product of DHEC regulations, namely S.C. Code Ann. Regs. 61-107.19, Part IV(B)(1)(e), not the ZLDR and this state regulation is a siting requirement of general applicability that must be present no matter what local regulations require. (R. p. 0015, ¶23). There are no plantings in this current buffer that would satisfy Article 9.5 of the ZLDR. (R. p. 0086, page 109, line 9-page 110, line 24).

the driving surface of the Arthur Ravenel, Jr. Bridge as well as what is possibly Charleston's tallest building, the Holiday Inn along the Ashley River." (R.p. 0008, ¶38; R.p. 0087, page 113, line 9-page 114, line 5; R.p. 0526).

Since this height expansion applies to the entire Mound, the entire Mound is directly affected by the proposed improvements contained in the Second Permit Modification. Therefore, there is substantial evidence in the record to support the ALC's finding that Article 9.5 is triggered and that the current one hundred (100) foot buffer between the Grand Bees Property and the Class II Landfill is where the specific vegetative buffer requirements contained in Article 9.5 would have to be implemented.

C. Article 9.5 of the ZLDR is Not Rendered Inapplicable, for the Purposes of S.C. Code Ann. §44-96-290(F) Because the Planning Director Has Discretion under Section 9.5.1.

The County argues that the landscaping, screening and buffering regulations contained in Article 9.5 are irrelevant, for the purposes of consistency review, because the Planning Director has discretion whether to apply them or not on a case-by-case basis. (Initial Brief of County, p. 16-18) It is true that Section 9.5.1 provides a measure of discretion to the Planning Director, *as a matter of local law*. However, there is no evidence in the record that DHEC, during its mandatory consistency review, made any determinations regarding Article 9.5 whatsoever or that the Planning Director made a determination or granted a waiver to the County for its own landfill expansion. In making this argument, the County also overlooks that in failing to consider Article 9.5, an applicable local land use law, in its consistency determination, DHEC violated its non-delegable responsibility under Southeast Resource Recovery. As that case makes clear, DHEC, not the County, is the ultimate arbiter of land fill permitting decisions.

There is no evidence in the record that DHEC, during its consistency review, considered the applicability of Article 9.5 nor sought any input or a determination from the Planning Director. The Consistency Memorandum is silent both as to Article 9.5 specifically and the Planning Director's determination of applicability. (R.p. 0436). In fact, the County concedes that, to this very day, the Planning Director has never made a determination whether the landscaping standards apply. (Initial Brief of County, p. 16). This is precisely because DHEC never considered the applicability of Article 9.5 during its consistency review as evidenced by the permit file, DHEC's Consistency Memorandum, and the Second Permit Modification. However, under Southeast Resource Recovery, DHEC was required to make a consistency determination regarding Article 9.5.

As such, the County's assertion that "DHEC determined [Article 9.5] was not applicable" is not supported by any evidence in the record. (Initial Brief of County, p. 17). Under Southeast Resource Recovery, DHEC, not the local government or the Planning Director, must make the consistency determination with respect to all applicable local ordinances. 358 S.C. at 407-08, 595 S.E.2d at 471. Here, DHEC abdicated its charge by failing to address Article 9.5 and requiring the Second Permit Modification to be consistent with it.

The mere fact that there may be a discretionary exception to a requirement of a local land use ordinance does not, in and of itself, make it irrelevant for the purposes of DHEC's consistency review. S.C. Code Ann. §44-96-290(F) requires DHEC consider all "local zoning, land use, and other applicable local ordinances, if any." It is undisputed that Article 9.5, as an applicable local ordinance, is within the purview of S.C. Code

Ann. §44-96-290(F). Moreover, the County points to no authority supporting the contention that S.C. Code Ann. §44-96-290(F) and Southeast Resource Recovery applies only to non-discretionary local ordinances.

Given the foregoing, the ALC properly found and concluded, based on substantial evidence, that DHEC violated S.C. Code Ann. §44-96-290(F) in failing to consider Article 9.5.

III. THE ALC'S INTERPRETATION OF "RESIDENCE" AS SET FORTH IN S.C. CODE ANN. REGS. 61-107.19, PART IV(B)(1)(a) IS NOT AN ERROR OF LAW. SUBSTANTIAL EVIDENCE SUPPORTS THE ALC'S FINDING THAT, UNDER THE PERMIT AMENDMENT, APPROXIMATELY ONE HUNDRED AND THIRTY RESIDENCES ARE LOCATED WITHIN ONE THOUSAND FEET OF THE LANDFILL AND THIS VIOLATES THE AFOREMENTIONED REGULATION.

A. The ALC Correctly Interpreted "Residence" as Used in S.C. Code Ann. Regs. 61-107.19, Part IV(B)(1)(a).

The ALC interpreted the term "residence" in the mandatory buffer requirement of S.C. Code Ann. Regs. 61-107.19, Part IV(B)(1)(a) to encompass residences that are planned and shown on an approved site plan, refusing to limit "residences" in this context to fully constructed and occupied residential dwellings. (R.pp. 0017-0018, ¶¶ 35-40). The County's position is that "residence" means only existing structures with occupancy permits. (Initial Brief of County, p. 18-20) The ALC's interpretation is proper because it conforms with settled principles of statutory construction and honors the purpose of the solid waste regulations. Moreover, the ALC found that the County's interpretation produces absurd results.

S.C. Code Ann. Regs. 61-107.19, Part IV(B)(1)(a) imposes the following mandatory setback for solid waste facilities from adjoining properties: "The boundary of

the fill area shall not be located within 1,000 feet of any residence, school, day-care center, church, hospital, or publically owned recreational park area." The ALC correctly observed that "'residence' for purposes of measuring the minimum regulatory buffer is neither defined by S.C. Code Ann. Regs. 61-107.19, Part IV, nor elsewhere in the regulations." (R.p. 0016, ¶ 30).

The ALC correctly set forth and applied the rules guiding the interpretation of regulations in its Order. (R.pp. 0016-0017, ¶¶ 32-34). For example, the rules of statutory construction apply to regulations, Converse Power Corp. v. S.C. Dept. of Health and Env'tl. Control, 350 S.C. 39, 564 S.E.2d 341 (Ct. App. 2002), and the cardinal rule of statutory interpretation is to ascertain and effectuate the legislature's intent. Chem-Nuclear Sys., LLC v. S.C. Bd. of Health and Env'tl. Control, 374 S.C. 201, 205, 648 S.E.2d 601, 603 (2007). Also, a statute must be read in a sense that harmonizes with its subject matter and accords with its general purpose. Mun. Ass'n of S.C. v. AT&T Communications of the Southern States, Inc., 361 S.C. 576, 580, 606 S.E.2d 468, 470 (2004). An ambiguity in a statute should be resolved in favor of a just, beneficial, and equitable operation of the law. State v. Hudson, 336 S.C. 237, 247, 519 S.E.2d 577, 582 (Ct. App. 1999). Finally, the goal of statutory construction is to harmonize statutes whenever possible and to prevent an interpretation that would lead to a result that is plainly absurd, Clemson Univ. v. Speth, 344 S.C. 310, 313, 543 S.E.2d 572, 573 (Ct. App. 2001), because courts will reject statutory interpretations that lead to absurd results clearly unintended. S.C. Coastal Conservation League v. S.C. Dept. of Health and Env'tl. Control, 380 S.C. 349, 369, 669 S.E.2d 899, 909 (Ct. App. 2008).

The County first suggests that the ALC should have interpreted "residence" based only on the dictionary definition that, according to the County's Brief, is "a building used as a home," not one that is permitted and planned (Initial Brief of County, p. 19). However, a reviewing court "will reject the plain meaning of the words used in a statute if it would lead to an absurd result and will 'construe the statute so as to escape the absurdity and carry the intention into effect.'" Ventures South Carolina, LLC v. South Carolina Dept. Rev. 378 S.C. 5, 9, 661 S.E.2d 339, 341 (2008) (citing Ray Bell Constr. Co. v. Sch. Dist. of Greenville County, 331 S.C. 19, 26, 501 S.E.2d 725, 729 (1998)). In other words, a court should reject a dictionary definition (put forth to establish a regulatory term's "plain meaning") where doing so yields absurd results and fails to honor legislative intent. This is precisely why the ALC rejected the foregoing dictionary definition in this case. The ALC's determination is supported by substantial evidence and not affected by an error of law.

The County's other suggestion is that the definition of "residence" in S.C. Code Ann. Regs. 61-107.19, Part IV(B)(1)(a) should be interpreted according to the definition of "residence" found in S.C. Code Ann. Regs. 61-107.18(B)(29).⁹ However, as mentioned above, the ALC correctly observed that the term "residence" is not defined in the regulations governing the permitting of the landfill class at issue in this case. The legislature could have, but did not, define "residence" to mirror the definition found in S.C. Code Ann. Regs. 61-107.18(B)(29). Since the legislature chose not to do so, this demonstrates legislative intent that the term not be defined in this manner. See Hainer

⁹ S.C. Code Ann. Regs. 61-107.18(B)(29) is titled "Solid Waste Management: Off-site Treatment of Contaminated Soil" and it has nothing to do with the permitting of solid waste landfills under S.C. Code Ann. Regs. 61-107.19, which contain the regulations under which the Second Permit Modification was processed and issued by DHEC.

v. American Med. Int'l, Inc., 328 S.C. 128, 492 S.E.2d 103 (1997) (if legislature had intended a certain result in statute, it would have said so). As with the dictionary definition of "residence," the definition found in S.C. Code Ann. Regs. 61-107.18(B)(29), also produces absurd results since it includes only existing structures, and was therefore properly rejected by the ALC.

Examining legislative intent, the ALC found the purpose of S.C. Code Ann. Regs. 61-107.19, Part IV(B)(1)(a) to be as follows:

The purpose of the regulations relevant to this case is to establish a setback distance to protect residences . . . from the obvious adverse effects of landfills on surrounding property. Moreover, the purposes and findings of the [Solid Waste Policy and Management Act] express the importance of, among other things, preserving and protecting public health and coordinating landfill planning between state and local government. These purposes would be considerably undermined if "residence" was interpreted in a way that effectively eliminates this basic protection for property next to landfills.

(R.p. 0017, ¶35). (citing S.C. Code Ann. §44-96-290(B) and S.C. Code Ann. Regs. 61-107.19, Part IV(A)) This finding is further supported by the purposes of the Act, which among other things, are as follows:

(1) protect the public health and safety, protect and preserve the environment of this State, and recover resources which have the potential for further usefulness by providing for, in the most environmentally safe, economically feasible and cost-effective manner, the storage, collection, transport, separation, treatment, processing, recycling, and disposal of solid waste;

...

(3) require local governments to adequately plan for and provide efficient, environmentally acceptable solid waste management services and programs;

...

(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)(1), (3), (5).

Interpreting "residence" to mean, as the County suggests, only completed and final-permitted dwellings frustrates these purposes. Under this view, an adjacent parcel next to a landfill could be previously planned and permitted for hundreds of residences, but this would not impact DHEC's application of S.C. Code Ann. Regs. 61-107.19, Part IV(B)(1)(a) in any way. Under the County's proposed interpretation of the regulation, DHEC must ignore residential development within one thousand (1,000) feet even if it involves active construction of houses or fully built structures without certificates of occupancy. As the ALC found, "since many of these ignored, planned developments are likely to ultimately be constructed and occupied after the permit has been granted, under [the County's] interpretation, they will end up being located within 1,000 feet of the Class II Landfill – a result the regulations seek to avoid." (R.pp. 0017-18, ¶ 36). This view succinctly summarizes why adopting the County's narrow definition of residence would do violence to the stated policy and purposes of the Act and lead to absurd results.

Finally, the County's interpretation of "residence" produces absurd results that could not have been intended by the legislature and should be rejected. Essentially, the County's interpretation turns S.C. Code Ann. Regs. 61-107.19, Part IV(B)(1)(a), a buffering rule intended by the legislature to promote efficient and orderly planning, into a race between a landfill owner/operator and its neighbors to see who can obtain its permits first. The ALC found as follows:

Under [the County's] interpretation, the necessity of having a CO ["Certificate of Occupancy"] for there to be a "residence" under the regulation would mean that DHEC must continuously monitor (up to the minute before making its consistency determination) the activities of local building departments to determine when and if a CO has been issued. Additionally, should a CO be granted for a residence adjacent to the

proposed landfill during the permitting process, this sort of "springing" residence could essentially stop a permit in its tracks.

(R.p. 0018, ¶ 37). From this, the ALC concluded that "[t]his narrow interpretation could not have been intended by the legislature because it creates extreme administrative difficulty for DHEC and the potential for unforeseen, yet easily avoidable, expenses and problems for all parties." (R.p. 0018, ¶ 37).

The ALC properly concluded, as a matter of law, that the County's interpretation of "residence" produces absurd results because it creates a permit race between neighbors that interferes with sound solid waste facility planning and permit administration, creates major administrative demands and strains on DHEC, and requires DHEC permits to be completely re-engineered prior to issuance when a residential structure, within the one thousand (1,000) foot buffer, is finally permitted prior to the DHEC permit's issuance. These findings are supported by substantial evidence in the record and not controlled by an error of law and therefore should be affirmed.

B. DHEC Staff's Interpretation of "Residence" is Not Entitled to Deference Because the Interpretation is Unreasonable and Produces Absurd Results.

Regarding the above discussion of the proper definition of "residence," the County argues that DHEC's staff interpretation should have been given deference by the ALC, and the ALC exceeded its authority by interposing its own view of what "residence" means. (Initial Brief of County, p. 21-22) However, the ALC found that DHEC staff's interpretation, in this case, was not entitled to deference precisely because it was unreasonable.

The South Carolina Supreme Court recently found that under certain circumstances DHEC staff's interpretation of regulatory, undefined terms and phrases

are entitled deference. Murphy v. South Carolina Dept. of Env'tl. Control, 396 S.C. 633, 723 S.E.2d 191 (2012). However, Murphy makes clear that this deference is due only when the interpretation is "both reasonable and consistent with the plain language of the regulation." Id. at 640-41, 723 S.E.2d at 195.

Here, for the reasons set forth in the previous subsection, the ALC found that DHEC's interpretation that "residence" means only completed and final-permitted residential dwellings both frustrates the policy behind the Act, generally, and the buffer regulations, specifically. Moreover, as set forth above, the ALC found that both DHEC's and the County's interpretation produces absurd results, which could not have been intended by the General Assembly. For these reasons, the ALC was not persuaded to give deference to DHEC staff as it relates to the interpretation of "residence" in S.C. Code Ann. Regs. 61-107.19, Part IV(B)(1)(a) as it was not reasonable and consistent with the plain language of the regulation and should be affirmed.

C. The ALC Correctly Concluded that the Permit Amendment Violates S.C. Code Ann. Regs. 61-107.19, Part IV(B)(1)(a).

According to a survey performed by Mr. Lester, an expert surveyor and landscape architect, approximately one hundred and thirty (130) approved and planned residential lots on Respondent Grand Bees' Property are closer than one thousand (1,000) feet to the fill area boundary of the Mound. (R.p. 0010, ¶ 48; R.p. 0082, page 96, lines 1-10; R.p. 0514). In addition, based on the testimony of Mr. Bush, the ALC found that the planned residential development for the Grand Bees Property consists of various engineered phases, including Phase 7 adjacent to the Class II Landfill's common boundary. (R.p. 0010, ¶ 47; R.p. 0070, page 45, lines 21-24). Phase 7 has been both permitted for residential development by the City and engineered for water,

sewer, storm system, and roadway infrastructure improvements. (R.p. 0010, ¶ 47; R.p. 0070, page 46, line 19-page 47, line 17; R.p. 0513).

Given the evidence in the record of there being approximately one hundred and thirty (130) planned and permitted residences within one thousand (1,000) feet of the fill boundary, which will be constructed, the ALC properly concluded that the Second Permit Modification violated S.C. Code Ann. Regs. 61-107.19, Part IV(B)(1)(a).

Having found "residence" to encompass residences that are planned and shown on an approved site plan – not only fully constructed and occupied residential dwellings, as suggested by the County – the ALC concluded that the Second Permit Modification violated S.C. Code Ann. Regs. 61-107.19, Part IV(B)(1)(a). This decision is supported by substantial evidence and should be affirmed as there is no error of law.

CONCLUSION

For the foregoing reasons, the ALC's Order should be affirmed in all respects and the County's appeal should be denied.

[SIGNATURE APPEARS ON NEXT PAGE]

Respectfully Submitted,

BY: *G. Trenholm Walker*

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
68 1/2 Queen Street
Charleston, SC 29401
Phone: 843-937-0400
jamie@mklawsc.com

Charleston, South Carolina
October 22, 2013

ATTORNEYS FOR RESPONDENT,
GRAND BEES DEVELOPMENT, LLC

Certificate of Counsel

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

October 23, 2013

BY: G. Trenholm Walker

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

Jamie A. Khan
Ross A. Appel
McCULLOUGH KAHN, LLC
68 ½ Queen Street
Charleston, SC 29401
T: 843.937.0400
jamie@mklawsc.com
ross@mklawsc.com

ATTORNEYS FOR RESPONDENT
GRAND BEES DEVELOPMENT, LLC

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Shirley C. Robinson, Administrative Law Judge

Case No. 2011-ALJ-07-0558-GC

Grand Bees Development, LLC, ... Respondent,

vs.

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

BRIEF OF RESPONDENT
(IN RESPONSE TO APPELLANT SOUTH CAROLINA DEPARTMENT OF
HEALTH AND ENVIRONMENTAL CONTROL'S BRIEF)

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
88 1/2 Queen Street
Charleston, SC 29401
Phone: (843) 937-0705

ATTORNEYS FOR RESPONDENT
GRAND BEES DEVELOPMENT, LLC

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
STATEMENT OF ISSUES ON APPEAL.....	1
STATEMENT OF THE CASE	2
STATEMENT OF THE FACTS	4
STANDARD OF REVIEW	13
ARGUMENT	14
I. SUBSTANTIAL EVIDENCE SUPPORTS THE ADMINISTRATIVE LAW COURT'S FINDING AND CONCLUSION THAT DHEC VIOLATED S.C. CODE ANN. § 44-96-290(F) IN GRANTING THE PERMIT AMENDMENT. DHEC FAILED TO EVALUATE WHETHER THE PROPOSED LANDFILL EXPANSION SOUGHT BY THE COUNTY WAS CONSISTENT WITH CHARLESTON COUNTY'S SOLID WASTE ORDINANCE, REQUIRING, AMONG OTHER THINGS, THAT ALL EXPANSIONS OF SOLID WASTE DISPOSAL SITES CONFORM WITH THE SURROUNDING ENVIRONMENT AND WITH FUTURE DEVELOPMENT OF THE AREA.	14
A. The County's Solid Waste Ordinance is an Applicable Local Land Use Ordinance under S.C. Code Ann. § 44-96-290(F).....	14
B. The County's Solid Waste Ordinance is not void for vagueness as it contains specific standards and calls for the review of up-to-date, detailed, and objective data.....	19
C. DHEC violated S.C. Code Ann. § 44-96-290(F), as a matter of law, by not reviewing the County's Solid Waste Ordinance because DHEC is required by law to review and analyze all applicable land use ordinances in making its consistency determination.....	20
D. Had DHEC reviewed the County's Solid Waste Ordinance, substantial evidence in the record indicates that the Second Permit Modification would have been deemed inconsistent with said ordinance.....	23

II.	SUBSTANTIAL EVIDENCE SUPPORTS THE ADMINISTRATIVE LAW COURT'S DECISION TO REVERSE AND VACATE THE PROPOSED LANDFILL EXPANSION SOUGHT BY THE COUNTY BECAUSE IT FOUND AND CONCLUDED THAT THE PERMIT AMENDMENT IS INCONSISTENT WITH CHARLESTON COUNTY'S LANDSCAPING, SCREENING AND BUFFERING REGULATIONS.	29
A.	The Permit Amendment is Inconsistent with Article 9.5 of the ZLDR, as a Matter of Fact Supported by Substantial Evidence, Because it Fails to Incorporate the County's Landscaping, Screening and Buffering Requirements.	29
B.	Article 9.5 of the ZLDR is Not Rendered Inapplicable, for the Purposes of S.C. Code Ann. § 44-96-290(F), Because the Planning Director Has Discretion under Section 9.5.1	30
III.	THE ALC'S INTERPRETATION OF "RESIDENCE" AS SET FORTH IN S.C. CODE ANN. REGS. 61-107.19, PART IV(B)(1)(a) IS NOT AN ERROR OF LAW. SUBSTANTIAL EVIDENCE SUPPORTS THE ALC'S FINDING THAT, UNDER THE PERMIT AMENDMENT, APPROXIMATELY ONE HUNDRED AND THIRTY RESIDENCES ARE LOCATED WITHIN ONE THOUSAND FEET OF THE LANDFILL AND THIS VIOLATES THE AFOREMENTIONED REGULATION.....	33
A.	The ALC Correctly Interpreted "Residence" as Used in S.C. Code Ann. Regs. 61-107.19, Part IV(B)(1)(a).[SECTION IV(B)]	33
B.	DHEC Staff's Interpretation of "Residence" is Not Entitled to Deference Because the Interpretation is Unreasonable and Produces Absurd Results	37
C.	The ALC Correctly Concluded that the Permit Amendment Violates S.C. Code Ann. Regs. 61-107.19, Part IV(B)(1)(a).....	38
	CONCLUSION	39

TABLE OF AUTHORITIES

CASES

<u>Biales v. Young,</u> 315 S.C. 166, 432 S.E.2d 482 (1993)	20
<u>Brown v. S.C. Dept. of Health and Env'tl. Control,</u> 348 S.C. 507, 560 S.E.2d 410 (2002)	21
<u>Byrd v. City of Hartsville,</u> 365 S.C. 650, 620 S.E.2d 76 (2005)	16
<u>Chem-Nuclear Sys., LLC v. S.C. Bd. of Health and Env'tl. Control,</u> 374 S.C. 201, 648 S.E.2d 601 (2007)	34
<u>Clemson Univ. v. Speth,</u> 344 S.C. 310, 543 S.E.2d 572 (Ct. App. 2001)	34
<u>Converse Power Corp. v. S.C. Dept. of Health and Env'tl. Control,</u> 350 S.C. 39, 564 S.E.2d 341 (Ct. App. 2002)	34
<u>Greenville County v. Kenwood Enterprises,</u> 353 S.C. 157, 577 S.E.2d 428 (2003)	16
<u>Hill v. S.C. Dept. of Health and Env'tl. Control,</u> 389 S.C. 1, 698 S.E.2d 612 (2010)	14
<u>Kiawah Development Partners, II v. S.C. Dept. of Health and Env'tl. Control,</u> 401 S.C. 570, 738 S.E.2d 455 (2013)	38
<u>Mikell v. County of Charleston,</u> 386 S.C. 153, 687 S.E.2d 326 (2009)	17
<u>MRI at Belfair, LLC v. S.C. Dept. of Health & Env'tl. Control,</u> 379 S.C. 1, 664 S.E.2d 471 (2008)	13
<u>Mun. Ass'n of S.C. v. AT&T Communications of the Southern States, Inc.,</u> 361 S.C. 576, 606 S.E.2d 468 (2004)	34
<u>Murphy v. South Carolina Dept. of Env'tl. Control,</u> 396 S.C. 633, 723 S.E.2d 191 (2012)	13, 37
<u>Ray Bell Constr. Co. v. Sch. Dist. of Greenville County,</u> 331 S.C. 19, 501 S.E.2d 725 (1998)	36

<u>S.C. Coastal Conservation League v. S.C. Dept. of Health and Env'tl. Control,</u> 380 S.C. 349, 669 S.E.2d 899 (Ct. App. 2008)	34
<u>Southeast Resource Recovery, Inc. v. S.C. Dept. of Health and Env'tl. Control,</u> 358 S.C. 402, 595 S.E.2d 468 (S.C. 2004)	15, 19, 20, 21, 22, 23, 28, 31, 32
<u>State v. Hudson,</u> 336 S.C. 237, 519 S.E.2d 577 (Ct. App. 1999)	34
<u>Ventures South Carolina, LLC v. South Carolina Dept. Rev.,</u> 378 S.C. 5, 661 S.E.2d 339 (2008)	36

STATUTES

S.C. Code Ann. § 1-23-610(B)	7, 13,
S.C. Code Ann. § 44-96-20(B)(1), (3), (5)	35
S.C. Code Ann. § 44-96-290(B)	35
S.C. Code Ann. § 44-96-290(F)	1, 2, 7, 14, 15, 17, 18, 19, 20, 21, 22, 23, 28, 29, 30, 31, 32
S.C. Code Ann. Regs. 61-107.11	8
S.C. Code Ann. Regs. 61-107.19, Part IV(A)	35
S.C. Code Ann. Regs. 61-107.19, Part IV(B)(1)(a)	1, 2, 11, 33, 34, 36, 38, 39

LOCAL ORDINANCES

Article 9.5 of Charleston County's ZLDR	2, 11, 29, 30, 31, 33
Section 10-22 of Charleston County's Code of Ordinances	2, 9, 10, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 28, 29
Section 10-22(1) of Charleston County's Code of Ordinances	9, 15
Section 10-22(2)(d) of Charleston County's Code of Ordinances	9, 15, 20
Section 10-22(2)(e) of Charleston County's Code of Ordinances	10, 15, 20

STATEMENT OF ISSUES ON APPEAL

- I. WAS THE ADMINISTRATIVE LAW COURT'S FINDING AND CONCLUSION THAT DHEC VIOLATED S.C. CODE ANN. §44-96-290(F) SUPPORTED BY SUBSTANTIAL EVIDENCE AND NOT AFFECTED BY ERROR OF LAW WHERE DHEC ADMITTED IT NEVER CONSIDERED CHARLESTON COUNTY'S LONGSTANDING SOLID WASTE ORDINANCE, MUCH LESS MADE A DETERMINATION WHETHER THE PERMIT AMENDMENT SOUGHT BY THE COUNTY ITSELF WAS CONSISTENT WITH THIS ORDINANCE?**
- II. WAS THE ADMINISTRATIVE LAW COURT'S FINDING AND CONCLUSION THAT DHEC VIOLATED S.C. CODE ANN. §44-96-290(F) SUPPORTED BY SUBSTANTIAL EVIDENCE AND NOT AFFECTED BY ERROR OF LAW WHERE DHEC GRANTED THE PERMIT AMENDMENT SOUGHT BY THE COUNTY EVEN THOUGH IT WAS INCONSISTENT WITH AND VIOLATED THE VEGETATIVE BUFFER REQUIREMENTS OF THE COUNTY'S ZONING AND LAND DEVELOPMENT REGULATIONS?**
- III. WAS THE ADMINISTRATIVE LAW COURT'S FINDING AND CONCLUSION THAT THE PERMIT AMENDMENT SOUGHT BY THE COUNTY VIOLATED S.C. CODE ANN. REGS. 61-107.19, PART IV(B)(1)(a) SUPPORTED BY SUBSTANTIAL EVIDENCE AND NOT AFFECTED BY ERROR OF LAW WHERE THE PERMIT AMENDMENT AUTHORIZES A CLASS II LANDFILL THAT IS CLOSER THAN ONE THOUSAND FEET TO APPROXIMATELY ONE HUNDRED AND THIRTY PLANNED RESIDENCES THAT PREVIOUSLY RECEIVED SITE PLAN APPROVAL FROM THE CITY OF CHARLESTON?**

STATEMENT OF THE CASE

On September 1, 2011, the South Carolina Department of Environmental Control ("DHEC") approved Charleston County's (the "County") application to modify DHEC Permit Number 101001-1201, pertaining to the construction, demolition, and land clearing debris ("C&D" or "Class II") component (the "Mound") of the County-owned Bees Ferry Landfill (the "Second Permit Modification"). (R.p. 0006, ¶129).

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 and 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 one hundred and thirty (130)

planned residences on Grand Bees' Property are located within one thousand (1,000) feet of the Landfill's fill area boundary under the Second Permit Modification. (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 Notice of Appeals with the Court of Appeals on May 29, 2013. (R.p. 0033). The Court of Appeals consolidated these appeals of the ALC's Order.

STATEMENT OF FACTS

Respondent, Grand Bees, is the owner of approximately three hundred and eleven (311) acres located off Bees Ferry Road within the City of Charleston (the "City") (Charleston County TMS # 301-00-00-035) (the "Grand Bees Property"). (R.p. 0002, ¶2). Appellant Charleston County is the owner and operator of the Bees Ferry Landfill (Charleston County TMS # 301-00-00-026) (the "Landfill") that is also located off Bees Ferry Road outside the City limits in an unincorporated part of Charleston County. (R.p. 0002-0003, ¶7). The Grand Bees Property abuts the Landfill and shares a common boundary along the Grand Bees Property's southwest property line. (R.p. 0002-0003, ¶7; R.p. 0518).

The City has zoned the Grand Bees Property as "Planned Unit Development" ("PUD"), specifically designating it for residential use. (R.p. 0002, ¶3; R.p. 0068, page 38, lines 4-18; R.pp. 0338-0412, R.p. 0515). The Grand Bees Property consists of approximately twenty-five (25%) percent of the land area of a larger PUD within the City of Charleston known as Grand Oaks that was first approved by City Council in 1993. (R.p. 0002, ¶4). At the time of the hearing before the ALC, Grand Oaks consisted of nine districts and completed neighborhoods totaling approximately 1,500 homes, infrastructure, parks, and other amenities. (R.p. 0002, ¶3; R.p. 0096, page 149, lines 11-21; R.p. 0096, page 150, line 24-page 152, line 10; R.p. 0097, page 153, lines 3-16; R.pp. 0338-0412). Various other existing residential PUDs are located in the immediate vicinity of Grand Oaks and the Landfill including The Hunt Club and Long Savannah. (R.p. 0002, ¶6; R.p. 0073, page 58, lines 2-15; R.p. 0073, page 59, line 12-page 60, line 9; R.pp. 516-517).

Grand Bees is in the business of residential development; it purchased the Grand Bees Property on November 15, 2004 for \$4,141,518.00. (R.p. 0003, ¶¶9,12; R.p. 0332). Prior to purchase, Respondent Grand Bees conducted due diligence on, among other things, the Landfill and the County's zoning and land use ordinances applicable to the Landfill. (R.p. 0003, ¶10; R.pp. 0067-0068, page 34, line 18-page 40, line 20). In February 2006, Grand Bees obtained site plan approval from the City for 507 residential units on the Grand Bees Property. In reliance on this approval, Grand Bees spent approximately four million dollars (\$4,000,000.00) more in engineering and other development costs towards realization of its residential development (R.pp. 0038-0039, ¶¶13,14; R.pp. 0069-0070, page 42, line 10-page 48, line 2; R.p. 0074, page 61, line 23-page 62, line 4; R.p. 0514).

Grand Bees' planned residential development consists of various engineered phases, including Phase 7 adjacent to the Class II Landfill's common boundary. (R.pp. 0010, ¶47; R.p. 0070, page 45, lines 21-24; R.p. 0513). At the time the County initially applied to DHEC to expand the Landfill, Phase 7 had been both permitted for residential development by the City and engineered for water, sewer, storm system, and roadway infrastructure improvements. (R.pp. 0010, ¶47; R.p. 0070, page 46, line 19-page 47, line 17; R.p. 0513).

The County has operated the Landfill at its present location since 1977. (R.p. 0004, ¶15). Pursuant to the S.C. Solid Waste Policy and Management Act of 1991 (the "Act"), the Landfill includes several cells. (R.p. 0004, ¶15). One of the cells consists of construction, demolition, and land clearing debris that is classified as a "Class II" mound (the "Mound") under current regulations. The County operates the Landfill under DHEC

Permit Number 101001-1201 issued in October 17, 1997 (the "Permit"). (R.pp. 0167-0331; R.pp. 0413-0417; R.pp. 0425-0434).

In 2007 the County applied to DHEC to modify the Permit so as to enlarge the Mound's vertical height limitation from seventy-four (74) feet above mean sea level ("MSL") to one hundred sixty-eight (168) feet above MSL and to expand the footprint of the Mound by five and a half (5.5) acres. (R.p. 0004, ¶16; R.p. 0174). The modification would more than double the size of the Mound by increasing the maximum disposal capacity from approximately 2.5 million cubic yards to 5.4 million cubic yards. (R.p. 0004, ¶16; R.pp. 0185). The County's application was subsequently amended in November 2007. (R.p. 0004, ¶16; R.pp. 0167). DHEC granted the modification of DHEC Permit Number 101001-1201 on January 17, 2008 (the "First Permit Modification"). (R.p. 0004, ¶19).

Despite knowing Grand Bees was developing residences on the adjoining property, the County did not directly notify Grand Bees about its application to DHEC to modify the Permit to authorize this enormous expansion of the height and size of the Mound. (R.p. 0004, ¶18; R.p. 0068, page 37, lines 1-4; R.p. 0071, page 49, line 9-page 50, line 5; R.p. 0073, page 57, lines 9-15). Respondent Grand Bees first learned of the County's permit expansion plans a few days after the First Permit Modification was issued. (R.p. 0004, ¶19; R.p. 0071, page 49, line 9-page 50, line 5).

On April 18, 2008, Respondent Grand Bees requested a contested case hearing to challenge the First Permit Modification. (R.p. 0004, ¶20). By Order dated June 2, 2009, the Honorable Ralph King Anderson, III, held that DHEC erred in granting the First Permit Modification. (R.p. 0004, ¶20). Judge Anderson held the County failed to

obtain a "special exception" for the expansion of the Mound in accordance with the terms of its own Zoning and Land Development Regulations ("ZLDR") (R.p. 0004, ¶20). For this reason Judge Anderson found that the First Permit Modification violated S.C. Code Ann. §44-96-290(F) that requires landfill permits be consistent with local zoning, land use and other ordinances. (R.p. 0004, ¶20). Judge Anderson vacated the First Permit Modification and remanded it to DHEC for further analysis. (R.p. 0004, ¶20).

After the First Permit Modification was reversed and remanded by Judge Anderson, the County amended its ZLDR to eliminate the requirement of a "special exception" as a prerequisite to expanding its Landfill. (R.pp. 0005, ¶21; R.pp. 0105-0106, page 188, line 14-page 189, line 12). Once DHEC learned of this zoning amendment, it again took up the County's 2007 permit modification application.¹ (R.p. 0005, ¶22). DHEC did not require the County to submit a new application, but the

¹ In its Brief, DHEC claims that "[u]pon [DHEC's] review of the amended ZLDR, it determined that the Modified Permit was consistent with the County's local zoning and land use ordinances." (Initial Brief of DHEC, p. 6). (emphasis added). The only evidence of DHEC's consistency determination in the record subsequent to Judge Anderson's decision, namely DHEC's "Consistency Memorandum" dated April 12, 2011, provides that the Second Permit Modification was "consistent with the Charleston County land-use planning and zoning." (R. pp. 0005-0006, ¶¶26,27; R. p. 0436). The Consistency Memorandum makes it clear that DHEC reviewed *only the ZLDR*, which contains the County's land-use planning and zoning ordinances, and not any other land use ordinances appearing in the Charleston County Code of Ordinances (a body of law distinct from the ZLDR). The only other evidence in the record of a consistency determination, namely, a similar memorandum from 2009, also does not state that the Code of Ordinances were ever reviewed by DHEC. (R. p. 0436). Therefore, there is no evidence in the record that DHEC determined that the Second Permit Modification to be consistent will *all County land use ordinances*, including those in the Code of Ordinances, because the consistency documents refer only to the ZLDR. As such, DHEC's assertion that DHEC "determined that the Modified Permit was consistent with the County's local zoning and land use ordinances" should be disregarded for the purposes of this appeal insofar as it suggests the Code of Ordinances were ever reviewed. S.C. Code Ann. §1-23-610(B) ("the review of the administrative law judge's order must be confined to the record.").

County did provide some additional information, primarily dealing with zoning, to supplement its 2007 application. (R.p. 0005, ¶22; R.pp. 0113-0114, page 220, line 19-page 221, line 18). Additional information involving groundwater monitoring was also submitted to account for regulatory changes since the County's initial application.² (R.p. 0005, ¶24).

During the contested case hearing over the Second Permit Modification, Kent Coleman, Director of DHEC's Division of Mining and Solid Waste Management testified that, on remand from the ALC, DHEC reviewed the County's application under DHEC's new landfill regulations, but only as to whether it complied with the ordinances in the ZLDR that had been the basis for Judge Anderson's ruling vacating the First Permit Modification. (R.p. 0005, ¶24; R.p. 0110, page 207, lines 1-23). Mr. Coleman also testified that, on remand, DHEC once more relied on the vicinity map on Page G-04 of the 2007 application that is dated 2004 and utilizes an aerial photograph from 2001. (R.p. 0004, ¶17; R.p. 0005, ¶25; R.pp. 0113-0114, page 220, line 7-page 221, line 18; R.p. 0224; R.p. 0515). This map identifies the adjoining Grand Bees Property as being zoned PUD with the land use denoted as "residential." (R.p. 0224; R.p. 0515). Mr. Coleman further testified that "numerous aerial photographs throughout the process . . . that were more updated through time" were consulted, but none of these photographs

² S.C. Code Ann. Regs. 61-107.19 repealed and replaced S.C. Code Ann. Regs. 61-107.11 on May 23, 2008. These regulatory changes, among other things, reclassified C&D landfills as Class II landfills. (R. p. 0005, ¶23).

are in the record.³ (R.p. 0005, ¶25, R.pp. 0118-0119, page 240, line 23-page 241, line 3).

DHEC rendered a "Consistency Memorandum" dated April 12, 2011, that found the Second Permit Modification to be "consistent with the Charleston County land-use planning and zoning." (R.pp. 0005-0006, ¶¶26, 27; R.p. 0436). The Consistency Memorandum is the sole written documentation of the consistency determination in the record. Mr. Coleman testified that DHEC made a determination of consistency after DHEC learned the County had amended its ZLDR to remove the special exception requirement for the expansion of the landfill. (R.pp. 0006-0007, ¶32; R.p. 0110, page 207, lines 1-8; R.p. 0111, page 209, lines 15-18). DHEC did not consider any other pertinent local laws. (R.pp. 0006-0007, ¶32).

Counsel for all parties stipulated that Section 10-22 of the Charleston County Code of Ordinances ("Disposal Sites and Facilities") was in effect at all times relevant to the application for the Second Permit Modification. (R.p. 0007, 33; R.p. 0068, page 39, line 10-page 40, line 8; R.pp. 0437-0444). Section 10-22(1) is a local land use ordinance, which appears outside of the ZLDR that applies to "[a]ll owners or operators of solid waste disposal facilities including governmental units or agencies," and is triggered "[w]hen a new sanitary landfill is constructed or an existing site is extensively re-designed." (R.p. 0007, ¶33; R.p. 0012, ¶¶9, 10; R.p. 0443). Among other things, Section 10-22(2)(d) requires that all solid waste disposal sites "conform with the

³ The aerial photographs from 2008 and 2012 introduced as Trial Exhibits 14 and 15 were prepared by Respondent's experts. (R.pp. 0516-0517). They are not part of DHEC's official permit review file, and there is no evidence in the record that DHEC ever consulted these photographs.

surrounding environment," and Section 10-22(2)(e) requires that the sites "conform with future development of the area." (R.p. 0007, ¶34; R.p. 0443).

DHEC's "Consistency Memorandum" does not refer to Section 10-22 or the Charleston County Code of Ordinances, more generally. (R.p. 0007, ¶35; R.p. 0436). Moreover, there is no evidence DHEC ever reviewed Section 10-22 prior to issuing the Second Permit Modification. (R.pp. 0006-0007, ¶¶32,35; R.p. 0436). Mr. Coleman testified at his deposition that the first time he saw Section 10-22 was a week before the hearing before the ALC. (R.p. 0111, page 212, lines 8-15).

John S. Lester, P.E. (Grand Bees' expert and the President of HLA, Inc., a civil engineering and landscape architecture firm in Charleston), Wallace A. Jack (a board member of the Grand Oaks Boulevard Association), and Taylor Bush (on behalf of Grand Bees) all testified about the rapidly expanding residential development in the immediate area surrounding the landfill since 2001. (R.pp. 0007-0008, ¶¶37,38; R.p. 0073, page 57, line 9-page 60, line 25; R.pp. 0089-0090, page 123, line 21-page 125, line 2; R.p. 0096, page 150, line 24-page 151, line 11). They also testified that the landfill expansion allowed by the Second Permit Modification would be incompatible with these residential uses and would not conform with the future development in the area. (R.pp. 0007-0008, ¶¶37,38; R.pp. 0071-0072, page 50, line 22-page 54, line 13; R.p. 0087, page 115, lines 13-21; R.p. 0098, page 157, line 24-page 158, line 11; R.p. 0098, page 160, lines 2-12). At the hearing, Grand Bees entered into evidence two aerial photographs from 2008 and 2012 that show several new residential neighborhoods near the Landfill constructed since 2001 and others under construction. (R.p. 0008, ¶39; R.pp. 0516-0517). Grand Bees also introduced several surveys and

computer generated sketch-ups that depict the effect of the proposed landfill on the surrounding area. (R.p. 0010, ¶48; R.pp. 0518-0526).

In addition, the Second Permit Modification and DHEC's consistency determination neither addressed nor incorporated the landscaping, screening, and buffering regulations found in Article 9.5 of the County's ZLDR. (R.p. 0009, ¶43; R.p. 0114, page 223, line 16-page 224, line 8; R.pp. 0167-0331; R.pp. 0413-0417; R.pp. 0425-0434) Article 9.5 provides as follows:

[T]he landscaping, screening and buffering standards of [Article 9.5] shall apply to all new non-residential development . . . "[w]hen modifications or additions are being made to an existing non-residential building or site, the standards of this Article shall apply to those portions of the subject parcel that are directly affected by the proposed improvements, as determined by the Planning Director

(R.p. 0469, §9.5.1). Article 9.5 provides for specific vegetative buffers between residential and industrial uses. (R.pp. 0469-0478, §9.5.4; R.p. 0084, page 101, line 12-page 102, line 16). Neither the Second Permit Modification nor DHEC's consistency determination references these County standards, describes or requires what type and amount of vegetation must be planted, and contains or incorporates a planting or landscaping plan. (R.p. 0044, ¶43; R.pp. 0167-0331; R.pp. 0413-0417; R.pp. 0425-0434; R.p. 436; R.p. 0085, page 105, line 21-page 107, line 11). No landscaping plan or similar documentation was included in the 2007 application either, even though, according to Mr. Lester, it is standard professional practice to prove compliance with buffer regulations as a precondition of permit approval. (R.p. 0044, ¶44; R.p. 0085, page 105, lines 12-24; p. 0114, page 223, line 16-page 224, line 8).

Furthermore, S.C. Code Ann. Regs. 61-107.19, Part IV(B)(1)(a) imposes a one thousand (1,000) foot buffer between the boundary of the fill area of a Class II Landfill

and any "residence." (R.pp. 0044-0045, ¶¶46). According to a survey performed by Mr. Lester, approximately one hundred and thirty (130) residential lots that have received site-plan approval from the City are located on the Grand Bees Property within one thousand (1,000) feet of the fill area boundary of the Class II Landfill. (R.p. 0045, ¶¶48; R.p. 0082, page 96, lines 1-10; R.pp. 0513-0514). The Parties stipulated that these planned and proposed residences on the property are within one thousand (1,000) feet of the proposed Mound. (R.p. 0010, ¶¶51; R.p. 0081, page 90, line 17-page 91, line 8). In granting the Second Permit Modification, DHEC admitted it did not consider these planned and approved residences on the Grand Bees Property. (R.p. 0010, ¶¶50; R.p. 0106, page 190, lines 19-23).

Judge Robinson reversed and vacated the Second Permit Modification. (R.p. 0054). In her Order, Judge Robinson additionally ruled that if the County continued to pursue modification of the DHEC permit to expand the Mound, it must submit "an entirely new and updated permit application . . . given the long period of time between this Order and the County's initial application in 2007; the rapid changes in residential development in the surrounding area since that time, the repeal and replacement of the governing regulation, and the outdated materials on which the permit relies including, but not limited to, the vicinity map from 2001." (R.p. 0054).

STANDARD OF REVIEW

"The standard of review that an appellate court is to apply to appeals from the ALC is set forth in the South Carolina Administrative Procedures Act (APA), specifically in section 1-23-610 of the South Carolina Code (Supp. 2012)." Murphy v. S.C. Dep't of Health & Env'tl. Control, 396 S.C. 633, 639, 723 S.E.2d 191, 191, 194 (2012). "Under section 1-23-610(B), a reviewing court may reverse or modify a decision by the ALC if the substantive rights of the appellant have been prejudiced because of a finding, conclusion, or decision that:

1. violates constitutional or statutory provisions;
2. exceeds the agency's statutory authority;
3. is made upon unlawful procedure;
4. is affected by other error of law;
5. is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
6. is arbitrary, capricious, or characterized by either abuse of discretion or clearly unwarranted exercise of discretion."

See Bailey v. S.C. Dep't of Health & Env'tl. Control, 388 S.C. 1, 4-8, 693 S.E.2d 426, 428-30 (Ct. App. 2010).

"The court may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact." S.C. Code Ann. §1-23-610(B). Moreover, "[t]he review of the administrative law judge's order must be confined to the record." Id. "As to factual issues, judicial review of administrative agency orders is limited to a determination [of] whether the order is supported by substantial evidence." MRI at Belfair, LLC v. S.C. Dept. of Health & Env'tl. Control, 379 S.C. 1, 6, 664 S.E.2d 471, 474 (2008). "In determining whether the ALC's decision was supported by substantial evidence, this Court need only find, looking at the entire record on appeal, evidence from which reasonable minds could reach the same conclusion that the ALC

reached." Hill v. S.C. Dept. of Health and Env'tl. Control, 389 S.C. 1, 9-10, 698 S.E.2d 612, 617 (2010)).

ARGUMENT

- I. **SUBSTANTIAL EVIDENCE SUPPORTS THE ADMINISTRATIVE LAW COURT'S FINDING AND CONCLUSION THAT DHEC VIOLATED S.C. CODE ANN. §44-96-290(F) IN GRANTING THE PERMIT AMENDMENT. DHEC FAILED TO EVALUATE WHETHER THE PROPOSED LANDFILL EXPANSION SOUGHT BY THE COUNTY WAS CONSISTENT WITH CHARLESTON COUNTY'S SOLID WASTE ORDINANCE, REQUIRING, AMONG OTHER THINGS, THAT ALL EXPANSIONS OF SOLID WASTE DISPOSAL SITES CONFORM WITH THE SURROUNDING ENVIRONMENT AND WITH FUTURE DEVELOPMENT OF THE AREA.**

- A. **The County's Solid Waste Ordinance is an Applicable Local Land Use Ordinance Under S.C. Code Ann. §44-96-290(F).**

DHEC argues that Section 10-22 of the Charleston County Code of Ordinances titled "Disposal Sites and Facilities" ("Section 10-22") is not an applicable local land use ordinance under S.C. Code Ann. §44-96-290(F).⁴ As Judge Robinson concluded, DHEC is incorrect.

Section 44-96-290(F) requires DHEC to review all local laws to determine whether the application is consistent with them. This statutory section provides as follows:

[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"

⁴ Section 10-22 is the current citation to the ordinance at hand which was formerly classified as "Ordinance 180" in the Charleston County Code of Ordinances, adopted on March 5, 1974. (R.pp. 0437-0444):

(Emphasis added). The South Carolina Supreme Court interprets S.C. Code Ann. §44-96-290(F) to mean that consistency with local land use ordinances is a *condition precedent* to DHEC issuing a solid waste permit. See Southeast Resource Recovery, Inc. v. S.C. Dept. of Health and Envtl. Control, 358 S.C. 402, 407-08, 595 S.E.2d 468, 471 (S.C. 2004) ("DHEC cannot issue a permit unless the proposed facility is consistent with "local zoning, land use, and other applicable ordinances.").

The ALC's conclusion, as a matter of fact and law, that Section 10-22 is an applicable local land use ordinance is supported by substantial evidence. Admitted as a trial exhibit, Section 10-22 has been an operative ordinance of the County since its adoption in 1974. (R.p. 0437). In addition, County Council has never chosen to repeal Section 10-22. It remains a valid, enforceable local law. Moreover, it is undisputed that Section 10-22 was in effect both when the original permit application was filed and when the Second Permit Modification was issued.

Section 10-22(1) applies to "[a]ll owners or operators of solid waste disposal facilities including governmental units or agencies." It is triggered "[w]hen a new sanitary landfill is constructed or an existing site is extensively re-designed." (R.p. 0443). (Emphasis added). Section 10-22(2)(d) requires that all solid waste disposal sites "conform with the surrounding environment." Section 10-22(2)(e) requires that sites "conform with future development of the area." (R.p. 0443).

The ALC concluded that "Section 10-22 is an applicable local land use ordinance under S.C. Code Ann. §44-96-290(F) [because] it specifically governs solid waste disposal facilities (both new and expanded), including those owned and operated by governmental entities, including the County." (R.p. 0012, ¶9). Moreover, the ALC

"reject[ed] Respondents' argument that Section 10-22 is less specific and more vague than the ZLDR and therefore superseded by the ZLDR, making section 10-22 irrelevant for the purposes of consistency review." (R.p. 0013, ¶14). The ALC supported this conclusion by correctly observing that "zoning ordinances are not the only means by which local governments can regulate land use." See Greenville County v. Kenwood Enterprises, 353 S.C. 157, 165, 577 S.E.2d 428, 432 (2003), *overruled on other grounds by*, Byrd v. City of Hartsville, 365 S.C. 650, 620 S.E.2d 76 (2005). (R.p. 0012, ¶11). Therefore, she reasoned, zoning ordinances do not necessarily preempt land use ordinances appearing in the general code of ordinances.

DHEC takes the position that Section 10-22 is not an applicable ordinance "[b]ecause the ZLDR is a more specific ordinance regarding local zoning and land use requirements." (Initial Brief of DHEC, p. 9). In support of its argument, DHEC offers the trial testimony of Kent Coleman who described Section 10-22 as "very general . . . not specific." (Initial Brief of DHEC, p. 10). However, as already shown, Section 10-22 contains several specific criteria. Further, as the ALC pointed out, "Respondents have presented no authority to support the view that the ZLDR preempts . . . an otherwise applicable [and] valid land use ordinance simply due to the latter's being more specific." (R.p. 0013, ¶14).

Issues involving the construction of an ordinance are reviewed as a matter of law under a broader standard of review than is applied in reviewing issues of fact. Eagle Container LLC v. County of Newberry, 379 S.C. 564, 666 S.E.2d 892 (2008). Whether one ordinance preempts another calls for an ascertainment of legislative intent, which

too is a question of law. Mikell v. County of Charleston, 386 S.C.153, 158, 687 S.E.2d 326 (2009).

Here, as previously mentioned, there is no debating that Section 10-22 was a valid ordinance in effect at all times relevant to this case. Moreover, Charleston County Council has taken no action to repeal or otherwise invalidate Section 10-22, and the County itself is the permit applicant. Equally, there is no doubt that the ZLDR does not specifically reference, so as to preempt, Section 10-22. Therefore, ALC concluded that Section 10-22 is a distinct, independent, and, most important, "applicable ordinance" for the purposes of S.C. Code Ann. §44-96-290(F) based on this clear record of legislative intent.

Additionally the ZLDR consists of only zoning ordinances and does not include the County's solid waste policies. As part of the Solid Waste Policy and Management Act, the General Assembly required that each county implement policies in furtherance of the Act. S.C. Code §44-96-80 ("County or regional solid waste management plans; local government responsibilities; local Solid Waste Advisory Councils")⁵ Section 10-22 constitutes the County's expression of some of those policies in response to the mandate of the General Assembly. Neither DHEC nor the County presented any other

⁵ S.C. Code §44-96-80 provides, in part, as follows: "(A) Not later than fifteen months after the date on which the department submits its state solid waste management plan to the Governor and to the General Assembly, the governing body of each county, if the county intends to submit a single county plan, or the governing bodies of the counties in a region, if two or more counties intend to submit a regional plan, in cooperation with the local governments located in the county or region, shall prepare a solid waste management plan for the area within that county or region. Local governments within the county or region shall participate in the development of the county or regional plan and are required to be a part of the plan. This plan must provide for public participation and include, at a minimum, the following:"

County ordinances specifically implementing the County's solid waste management policies.

Contrary to DHEC's arguments, as a solid waste ordinance, Section 10-22 is far more specific than the general zoning provisions in the ZLDR applicable to the Landfill site. For example, according to the Consistency Memorandum, the Landfill property is zoned "I" (Industrial) district. (R.p. 0436). The ZLDR provides certain zoning conditions governing any landfill located in any "I" district. (R.p. 0436). In contrast, Section 10-22 mandates each proposed landfill (or landfill expansion), including government owned and operated facilities, "conform with the surrounding environment," and "conform with future development of the area." (R.p. 0443). Section 10-22 thereby directs a case-by-case comparison of the nature of the specific landfill proposal against the current and future condition of the surrounding environment.

As further testament to its specificity in its governance of solid waste facilities, Section 10-22(3) calls for "properly prepared plans and specifications by a registered professional engineer" to be submitted for review. (R.p. 0443). Specifically, a "[m]ap or aerial photograph of the area showing land use and zoning within one-fourth mile of the solid waste disposal site" must be submitted. (R.p. 0443). None of these materials are required by the general zoning provisions of the ZLDR. In comparison, Section 10-22 sets forth specific standards for the location and expansion of solid waste landfills.

Finally, there is no evidence in the record that DHEC, in performing its §44-96-290(F) consistency review, or the County itself, determined that Section 10-22 was preempted, replicated, or otherwise subsumed by provisions in the ZLDR or the state laws and regulations governing solid waste permitting. In fact, as the ALC found, "[t]here

is no evidence in the record that Section 10-22 or the County's Code of Ordinances, more generally, was **ever reviewed** by DHEC to determine whether the requested permit modification was consistent with all applicable local ordinances." (R.pp. 0006-0007, ¶¶32,35; R.p. 0436). DHEC did not even know Section 10-22 existed until Respondent brought it to its attention soon before the hearing before the ALJ. (R.p. 0111, page 212, lines 8-15).

Given the foregoing, based on the express terms of Section 10-22 and the total lack of evidence in the record that DHEC ever acknowledged Section 10-22 during its review of the Second Permit Modification, the ALC's finding and conclusion that Section 10-22 was an applicable local land use ordinance under S.C. Code Ann. §44-96-290(F) is supported by substantial evidence and not an error of law.

B. The County's Solid Waste Ordinance is not void for vagueness as it contains specific standards and calls for the review of up-to-date, detailed, and objective data.

DHEC also attacks the substantive criteria expressed in Section 10-22 as being too subjective and indefinite for DHEC to have applied during its consistency determination. (Initial Brief of DHEC, pp. 11-14). On this very point, the ALC found that, on its face, "the critical language of Section 10-22, namely 'conform with the surrounding environment' and 'conform with future development of the area,' are not the sort of 'broad, general statements of goals' that worried the Supreme Court in Southeast Resource Recovery." (R.p. 0013, ¶16). (citing Southeast Resource Recovery, Inc. v. S.C. Dept. of Health and Env'tl. Control, 358 S.C. 402, 595 S.E.2d 468 (S.C. 2004)).

Instead, the ALC found that Section 10-22 contains "specific standards, requirements and criteria" that "simply do not lend themselves to more precise,

quantitative measures" and that these standards "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, ¶16). (Emphasis in original). For one thing, unlike the "broad, general statement of goals" that were improperly relied upon in Southeast Resource Recovery, Sections 10-22(2)(d) and 10-22(2)(e) are both actual regulatory criteria carrying the force of law. Furthermore, as previously discussed, unlike the ZLDR, in implementing specific criteria governing solid waste disposal sites, Section 10-22 requires the submission of a myriad of site-specific plans, maps and schematics. These materials provide an objective basis to apply the specific criteria contained in the ordinance. The ALC found these features prevent Section 10-22 from being void for vagueness, and this decision is not affected by an error of law.

C. DHEC violated S.C. Code Ann. §44-96-290(F), as a matter of law, by not reviewing the County's Solid Waste Ordinance because DHEC is required by law to review and analyze all applicable land use ordinances in making its consistency determination.

DHEC does not challenge the ALC's finding that "DHEC never considered Section 10-22 in its consistency review." (R.p. 0012, ¶12).⁶ Rather, its argument seems to be that S.C. Code Ann. §44-96-290(F) does not require DHEC to have reviewed Section 10-22 because "the determination of consistency with the ZLDR encompassed a consistency." (Initial Brief of DHEC, p. 17). In other words, Section 10-22 review would have been superfluous.

⁶ An appellate court will affirm a ruling by a lower court if the offended party does not challenge that ruling. E.g., Biales v. Young, 315 S.C. 166, 432 S.E.2d 482 (1993). Therefore, since DHEC has not challenged the ALC's findings that it never considered Section 10-22 during its consistency review, this finding is the law of the case.

By making this argument, DHEC takes for granted that the ZLDR preempts or otherwise subsumes Section 10-22. However, for the reasons discussed above, the ALC found that Section 10-22 is materially distinct from and not preempted or otherwise subsumed by the ZLDR. Substantial evidence supports the ALC's decision, and the decision is not otherwise affected by an error of law. In addition, DHEC's argument misapprehends the role of the ALC in contested case hearings, DHEC's obligations under S.C. Code Ann. §44-96-290(F), and the South Carolina Supreme Court's holding in Southeast Resource Recovery, Inc. v. S.C. Dept. of Health and Env'tl. Control, 358 S.C. 402, 595 S.E.2d 468 (S.C. 2004).

In contested case hearings, the ALC serves as the fact finder and makes a de novo determination regarding the matters at issue. Brown v. S.C. Dept. of Health and Env'tl. Control, 348 S.C. 507, 520, 560 S.E.2d 410, 417 (2002). Here, the matter before the ALC was whether DHEC performed a proper consistency determination under S.C. Code Ann. §44-96-290(F) and Southeast Resource Recovery, Inc. – not only whether the permit issued by DHEC was actually consistent with local laws.

Consistency with local land use ordinances is a *condition precedent* to DHEC issuing a solid waste permit. See Southeast Resource Recovery, Inc. v. S.C. Dept. of Health and Env'tl. Control, 358 S.C. 402, 407-08, 595 S.E.2d 468, 471 (S.C. 2004) (interpreting S.C. Code Ann. §44-96-290(F)). "Consistent with" means "comply with." See, id. at 408, 595 S.E.2d at 471. The Court's holding in Southeast Resource Recovery provides that, in order to comply with S.C. Code Ann. §44-96-290(F), DHEC, not any other party, must ensure that a permit is consistent with all applicable local land use ordinances. Id. ("DHEC, not the county, is charged with ensuring such facilities

meet the requirements for permitting.”). Logically, the only way this can be done is for DHEC to identify all potentially applicable local land use ordinances and review them for consistency with the proposed permitted activity. However, in order to determine which local land use ordinances are applicable, DHEC must, necessarily, perform a comprehensive review in order to discern which ordinances apply and which do not.

By omitting from its review Section 10-22, a materially significant and applicable land use ordinance governing solid waste facilities, DHEC failed to perform a proper consistency determination as a matter of law. Having failed to even consider Section 10-22, as a matter of pure logic, DHEC could not have made any determination with regards to Section 10-22 during its consistency review, much less a determination that it was preempted or otherwise subsumed by the ZLDR. In any event, DHEC appears to be taking the a posteriori position that even though it did not review Section 10-22, it does not matter because the Second Permit is actually consistent with Section 10-22.

DHEC's "exclusive outcome based approach" for determining compliance with S.C. Code Ann. §44-96-290(F) ignores the holding in Southeast Resource Recovery that consistency is a *condition precedent* for permit issuance. DHEC's hypothetical approach, taken to its logical extension, would allow a permit to satisfy S.C. Code Ann. §44-96-290(F) *even if DHEC never reviewed any local ordinances prior to a permit's being issued*, just so long as an ALC, conducting de novo review, finds, in fact, that the permit is consistent with local law. This result completely jettisons DHEC's role from the consistency review process, which is neither what the General Assembly intended when it adopted S.C. Code Anni. §44-96-290(F) nor what the South Carolina Supreme Court held was DHEC's obligation in Southeast Resource Recovery.

Given the foregoing, substantial evidence supports the ALC's finding that DHEC's failure to review all applicable ordinances, including Section 10-22, means it violated S.C. Code Ann. §44-96-290(F) as a matter of law.

D. Had DHEC reviewed the County's Solid Waste Ordinance, substantial evidence in the record indicates that the Second Permit Modification would have been deemed inconsistent with said ordinance.

Having found that DHEC failed to perform a proper consistency determination as a matter of law, the ALC did not need to determine whether the Second Permit Modification was, in fact, inconsistent with Section 10-22. As previously mentioned, this is DHEC's job – and DHEC's job alone – under Southeast Resource Recovery. Nevertheless, the only evidence in the record on this topic supports inconsistency with Section 10-22, and, as such, the ALC's finding that DHEC's failure to review Section 10-22 made a material difference in its decision to issue the permit is supported by substantial evidence.

The ALC found and concluded that “[g]iven 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.” (R.p. 0013, ¶13). The ALC further found that DHEC's omission of Section 10-22 from its consistency review to be “significant” because “unlike other County ordinances, such as the ZLDR, Section 10-22 (which is found in the Code of Ordinances) requires consideration of conformity with the surrounding environment and *future* development of the area.” (R.p. 0013, ¶13). (Emphasis in original).

Several witnesses testified at the ALC hearing about, what the ALC ultimately found to be, "the rapidly expanding and residential character of the area surrounding the Landfill since 2001." (R.p. 0007, ¶37; R.p. 0073, page 57, line 9-page 60, line 25; R.pp. 0089-0090, page 123, line 21-page 125, line 2; R.p. 0096, page 150, line 24-page 151, line 11). For example, at the hearing, Taylor Bush, one of Respondent Grand Bees' principals, reviewed the vicinity map on page G-04 of the County's original permit application, which utilizes an aerial photograph from 2001,⁷ and he testified as follows:

DIRECT EXAMINATION BY MR. WALKER

Q: . . . has there been a change to this land since 2001, which is the date of this aerial?

A: Yes.

Q: Has there been a residential development constructed since then?

A: Yes.

Q: What would that be --

A: Well --

Q: -- in proximity to the landfill?

A: Well, there's several.

Q: Okay.

A: First of all --

Q: And we're not contending these are within 1,000 feet, okay?

A: This is the Grand Oaks PUD (indicating) and all of this now is developed, this whole area. There are hundreds of homes now here. There's a public park with -- I think it's a city park with a gymnasium that is located here (indicating) in this general area and -- and then there's development all back through here now. This is called Hunt Club. This was the first phase of Hunt Club and now it's -- it's been developed all back in here and actually now connects

⁷ According to the record, DHEC relied on the aerial photograph that went all the way back to 2001 in issuing the Second Permit Modification. (R. p. 0004-0005, ¶¶17,25; R. pp. 0113-0114, page 220, line 7-page 221, line 18; R. p. 0224). DHEC never required the County to submit an updated aerial photograph after the First Permit Modification was reversed and remanded, and there is no evidence in the record that DHEC consulted other, more recent aerial photographs. (R. p. 0005, ¶25; R. pp. 0118-0119, page 240, line 23-page 241, line 3).

over to this road (indicating). And then there's a development down here that is by Centex in Carolina Bay, I believe, and it's -- it's expanded dramatically. In fact, it's -- it's expanded up into this -- I believe it's expanded up into this industrial land use area. It's all -- I -- I can't say for certain. I know that there's interconnectivity now back out to this area and so there's -- I'm just speculating that may have been rezoned residential (indicating).

Q: Okay.

A: Again, there's another development over here called Fulton's Landing. There are apartments here now, several other uses.

Q: Mr. Bush, does this 2001 aerial reasonably depict the condition of that land that it shows as of the time of the first application, which is in July of 2007?

A: No.

Q: Does it depict the condition of the land accurately as of the date of the issuance of the first permit in January 2008?

A: No.

Q: Same question as to the issuance of the permit after it was vacated on September 1, 2007?

A: No.

(R.p. 0073, page 58, line 24-page 60, line 25).

Similarly, substantial evidence to support the ALC's finding concerning the relevance of Section 10-22 came from John S. Lester, P.E. (the president of HLA, Inc. a civil engineering and landscape architecture firm in Charleston). He offered expert testimony that aerial photographs from 2008 and 2012 showed several new residential developments that had been constructed and approved for development, all of which were absent in 2001. (R.pp. 0089-0090, page 123, line 21-page 125, line 2; R.pp. 0516-0517). Finally, Wallace A. Jack (a board member of the Grand Oaks Boulevard Association, the master homeowners association for the Bees Landing PUD (commonly known as Grand Oaks)) testified about current and future residential development near the landfill as follows:

DIRECT EXAMINATION BY MR. KHAN

Q: Tell the Court a little bit about Grand Oaks. We touched on it. Do you have an estimate of how many different neighborhoods are inside of it right now?

A: There are nine neighborhoods with housing units in it right now.

Q: Okay. Are there other neighborhoods that are coming forward?

A: There are two other tracts that are designated as residential.

Q: Okay. Does one of those include Grand Bees Development?

A: Yes.

Q: Okay. Do you have a rough figure of how many homes we're talking about in Grand Oaks?

A: My best estimate is, looking at the density of my own neighborhood, knowing -- since how -- treasurer, that's how we bill people is by acreage, using that as a rough estimate. There are townhouses and apartment buildings, which are more dense, but just using the density of my neighborhood, it's around 1,500 as a rough guess of how many there now.

(R.p. 0096, page 150, line 24-page 151, line 21).

Aside from the surge in residential development in the area since 2001 and the future residential development planned in the surrounding area, such as Respondent Grand Bees, Mr. Bush, Mr. Lester, and Mr. Jack all testified that dramatically expanding the footprint, capacity, and height of the Mound, as the Second Permit Modification would do, "would neither be compatible with nor conform to current and future development in the area." (R.pp. 0007-0008, ¶37; R.pp. 0071-0072, page 50, line 22-page 54, line 13; R.p. 0087, page 115, lines 13-21; R.p. 0098, page 157, line 24-page 158, line 11; R.p. 0098, page 160, lines 2-12). For example, Mr. Bush further testified as follows:

DIRECT EXAMINATION BY MR. WALKER

Q: Now, before we talk about that, I want you to tell the Court your specific concerns as a person in the development business, who's been doing this for a long, long time with a proposed expansion, the increasing elevation, the increase in footprint, the increase in volume.

A: Well, the increased elevation would become a visual -- a visual problem from the marketing of the property and -- and from a lifestyle point of view, someone living there. It had -- it had changed from something that was basically treetop level to something that was the height of a 13- or 14-story high-rise building. And so from that point of view, it was extremely concerning, because now we had what was an adjacent land use that we felt was compatible because of its -- of its height, but then obviously by increasing the -- in order to increase the height, they had to increase the footprint. It's just geometry, you know.

Q: Right.

A: And so that increase of a footprint also increased the life of the landfill. And when you increase the life of the landfill, it means it's going to be going on for a long, long time. Before it had an end of life that was probably consistent with the point at which we would be developing phase eight, nine and ten. But now the end of life is the people living there, their kids would be in college by then. And so it -- it was a dramatic change to us.

Q: Did those concerns that you had include aspects of the operation of the landfill, not just its elevation?

A: Absolutely.

Q: Tell us about that.

A: Well, I'm not an expert on the operation of landfills. I'm sure there's some experts in this room that could testify better than I could. But there's -- it's undeniable that it's -- there's dump trucks, there's bulldozers, there's all kind of activity like that that go on during the day, and so that -- that noise is concerning.

Q: Would that activity be going on at a higher elevation above the tree line?

A: Once the mound with this -- with this modification to this permit, it would be.

Q: And is there noise, to your knowledge, associated with those activities?

A: Yes.

(R.p. 0071, page 50, line 22-page 52, line 23).

Moreover, Mr. Lester offered expert testimony that the landfill expansion is "too large vertically and it's a very significant feature on the landscape" and that "[t]his will be seen for quite a distance away." (R.p. 0087, page 115, lines 18-21). Mr. Jack testified that his constituents would not welcome dramatic expansions of the neighboring landfill given the lights and other impacts it would cause. (R.p. 0098, page 157, line 24-page 158, line 11).

For these reasons, the ALC's finding of the materiality and pertinence of Section 10-22 is supported by substantial evidence. Therefore, given the import of Section 10-22, the ALC correctly concluded that "it is apparent in this instance that DHEC's consistency determination is materially incomplete and, therefore, facially invalid" under S.C. Code Ann. §44-96-290(F) and Southeast Resource Recovery. (R.p. 0013, ¶13).

Given the foregoing, the ALC's finding and conclusion that DHEC's failure to review Section 10-22, during its statutorily mandated consistency review, was "significant" is supported by substantial evidence and should be affirmed.

§9.5.4). The ALC found and concluded that “the Second Permit Modification constitutes a modification to a non-residential site, thereby triggering the County’s landscaping, screening, and buffering regulations contained in Article 9.5 of the ZLDR.” (R.p. 0015, ¶22). This finding is supported by substantial evidence because the expanded use is a landfill that is a non-residential use and the height expansion applies to and impacts the entire landfill site.

Having found Article 9.5 to be relevant for the purposes of S.C. Code Ann. §44-96-290(F), the ALC then found the Second Permit Modification to be inconsistent with Article 9.5 “because no landscaping plan or other documentation demonstrating compliance was made part of the permit application or the Second Permit Modification.” (R.p. 0015, ¶22). Specifically, the ALC found that “[i]n this instance, the County’s regulations require a one hundred (100) foot vegetative buffer between the Class II Landfill and Petitioner’s property, specifically containing nine (9) canopy trees, eleven (11) understory trees and fifty (50) shrubs per one hundred (100) feet of linear buffer along the property line.” (R.p. 0009, ¶43). Finally, the ALC found that “the approved Second Permit Modification drawings contain no reference to the County’s landscaping regulations, no description or requirement of the vegetation that would be required to be planted, and no planting or landscaping plan.” (R.p. 0009, ¶43).

B. Article 9.5 of the ZLDR is Not Rendered Inapplicable, for the Purposes of S.C. Code Ann. §44-96-290(F), Because the Planning Director Has Discretion under Section 9.5.1.

DHEC suggests that “determination of compliance with Article 9.5 of the ZLDR does not rest with DHEC.” (Initial Brief of DHEC, p. 17). However, as previously discussed, this statement conflicts with S.C. Code Ann. §44-96-290(F), as interpreted

by our Supreme Court. Southeast Resource Recovery at 408 ("Although Section 44-96-290(F) requires a proposed facility comply with local standards, **it does not designate the county as the final arbiter on whether the proposed facility complies with its local zoning, land use, and other ordinances.**") (emphasis added).

South Carolina law provides that DHEC may only issue permits that are consistent, in fact, with local land use ordinances, including applicable ordinances such as Section 9.5 of the ZLDR. The wording of the ZLDR, which may provide the Planning Director a measure of discretion in implementing the regulations, *as a matter of local law*, cannot be read so as to render moot S.C. Code Ann. §44-96-290(F) and Southeast Resource Recovery. Instead, DHEC was required to ensure that the landfill, as permitted, would comply with Section 9.5 of the ZLDR, but the record shows this did not occur.

DHEC also argues, in its Brief, that its responsibility in performing a consistency review is simply "to make sure there is nothing impeding the implementation of [Section 9.5] if required by the Planning Director." (Initial Brief of DHEC, p. 19). This argument suggests that DHEC's charge under S.C. Code Ann. §44-96-290(F) and Southeast Resource Recovery is simply to require that the permit has *the potential to be consistent* with local land use laws. However, this is not what the law requires.⁹ As stated above, DHEC, may only issue permits which are, *in fact*, consistent with local land use laws.

⁹ DHEC points to no authority supporting the contention that S.C. Code Ann. §44-96-290(F) and Southeast Resource Recovery applies only to non-discretionary local ordinances. The mere fact that there may be a discretionary exception to a requirement of a local land use ordinance does not, in and of itself, make it irrelevant for the purposes of DHEC's consistency review. S.C. Code Ann. §44-96-290(F) requires DHEC consider all "local zoning, land use, and other applicable local ordinances, if any." It is undisputed that Article 9.5, as an applicable local ordinance, is within the purview of S.C. Code Ann. §44-96-290(F).

Anything less would enable local government to become the final arbiter of landfill permitting decisions, by allowing local government staff to prevent landfills already permitted by DHEC. Such a result was expressly rejected in Southeast Resource Recovery.

As mentioned above, the ALC found that the Second Permit Modification conflicts with Section 9.5, and this decision is supported by substantial evidence. There is no evidence in the record that DHEC, during its mandatory consistency review, made any determinations regarding Article 9.5 whatsoever or that the Planning Director made a determination or granted a waiver to the County for its own landfill expansion. The Consistency Memorandum is silent both as to Article 9.5 specifically and the Planning Director's determination of applicability. (R.p. 0436). This is precisely because DHEC never considered the applicability of Article 9.5 during its consistency review as evidenced by the permit file, DHEC's Consistency Memorandum, and the Second Permit Modification. However, under Southeast Resource Recovery, DHEC was required to make a consistency determination regarding Article 9.5.

Given the foregoing, the ALC's conclusion that the Second Permit Modification violated S.C. Code Ann. §44-96-290(F), as a matter of fact, is supported by substantial evidence in the record and is not controlled by an error of law; therefore, it should be affirmed by this Court.

neither defined by S.C. Code Ann. Regs. 61-107.19, Part IV, nor elsewhere in the regulations." (R.p. 0016, ¶30).

The ALC then correctly set forth and applied the rules guiding the interpretation of regulations in its Order. (R.pp. 0016-0017, ¶¶32-34). The rules of statutory construction apply to regulations, Converse Power Corp. v. S.C. Dept. of Health and Env'tl. Control, 350 S.C. 39, 564 S.E.2d 341 (Ct. App. 2002), and the cardinal rule of statutory interpretation is to ascertain and effectuate the legislature's intent. Chem-Nuclear Sys., LLC v. S.C. Bd. of Health and Env'tl. Control, 374 S.C. 201, 205, 648 S.E.2d 601, 603 (2007). A statute must be read in a sense that harmonizes with its subject matter and accords with its general purpose. Mun. Ass'n of S.C. v. AT&T Communications of the Southern States, Inc., 361 S.C. 576, 580, 606 S.E.2d 468, 470 (2004). An ambiguity in a statute should be resolved in favor of a just, beneficial, and equitable operation of the law. State v. Hudson, 336 S.C. 237, 247, 519 S.E.2d 577, 582 (Ct. App. 1999). Finally, the goal of statutory construction is to harmonize statutes whenever possible and to prevent an interpretation that would lead to a result that is plainly absurd, Clemson Univ. v. Speth, 344 S.C. 310, 313, 543 S.E.2d 572, 573 (Ct. App. 2001), because courts will reject statutory interpretations that lead to absurd results clearly unintended. S.C. Coastal Conservation League v. S.C. Dept. of Health and Env'tl. Control, 380 S.C. 349, 369, 669 S.E.2d 899, 909 (Ct. App. 2008).

Examining legislative intent, the ALC found the purpose of S.C. Code Ann. Regs. 61-107.19, Part IV(B)(1)(a) to be as follows:

The purpose of the regulations relevant to this case is to establish a setback distance to protect residences . . . from the obvious adverse effects of landfills on surrounding property. Moreover, the purposes and findings of the [Solid Waste Policy and Management Act] express the

importance of, among other things, preserving and protecting public health and coordinating landfill planning between state and local government. These purposes would be considerably undermined if "residence" was interpreted in a way that effectively eliminates this basic protection for property next to landfills.

(R.p. 0017, ¶35). (citing S.C. Code Ann. §44-96-290(B) and S.C. Code Ann. Regs. 61-107.19, Part IV(A)). This finding is further supported by the purposes of the Act, which among other things, are as follows:

(1) protect the public health and safety, protect and preserve the environment of this State, and recover resources which have the potential for further usefulness by providing for, in the most environmentally safe, economically feasible and cost-effective manner, the storage, collection, transport, separation, treatment, processing, recycling, and disposal of solid waste;

...

(3) require local governments to adequately plan for and provide efficient, environmentally acceptable solid waste management services and programs;

..

(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)(1), (3), (5).

Interpreting "residence" to mean, as DHEC suggests, only completed and final-permitted dwellings frustrates these purposes. Under DHEC's interpretation, an adjacent parcel next to a landfill could be previously planned and permitted for hundreds of residences, but DHEC could nonetheless ignore them completely. Under its proposed interpretation DHEC could also ignore *active* construction of houses or even *fully built* houses lacking certificates of occupancy within 1000 feet of the expansion of a landfill. As the ALC found, "since many of these ignored, planned developments are likely to ultimately be constructed and occupied after the permit has been granted, under [DHEC's] interpretation, they will end up being located within 1,000 feet of the Class II

Landfill – a result the regulations seek to avoid.” (R.pp. 0017-18, ¶36). This view succinctly summarizes why adopting DHEC’s narrow definition of “residence” would do violence to the stated policy and purposes of the Act as well as lead to absurd results.

DHEC suggests that the ALC should have interpreted “residence” based on the dictionary definition that, according to its Brief, includes only existing structures (Initial Brief of DHEC, p. 23), without any reference to the context of the regulation itself. However, a reviewing court “will reject the plain meaning of the words used in a statute if it would lead to an absurd result and will ‘construe the statute so as to escape the absurdity and carry the intention into effect.’” Ventures South Carolina, LLC v. South Carolina Dept. Rev. 378 S.C. 5, 9, 661 S.E.2d 339, 341 (2008) (citing Ray Bell Constr. Co. v. Sch. Dist. of Greenville County, 331 S.C. 19, 26, 501 S.E.2d 725, 729 (1998)). Adopting DHEC’s interpretation would lead to such absurdity and thwart the purpose of the regulation.

DHEC’s interpretation turns S.C. Code Ann. Regs. 61-107.19, Part IV(B)(1)(a) -- a buffering rule intended by the legislature to promote efficient and orderly planning -- into a race between a landfill owner/operator and its neighbors to see who can obtain its permits first. The ALC found as follows:

Under [DHEC’s] interpretation, the necessity of having a CO [“Certificate of Occupancy”] for there to be a “residence” under the regulation would mean that DHEC must continuously monitor (up to the minute before making its consistency determination) the activities of local building departments to determine when and if a CO has been issued. Additionally, should a CO be granted for a residence adjacent to the proposed landfill during the permitting process, this sort of “springing” residence could essentially stop a permit in its tracks.

(R.p. 0018, ¶37). From this, the ALC concluded that “[t]his narrow interpretation could not have been intended by the legislature because it creates extreme administrative

difficulty for DHEC and the potential for unforeseen, yet easily avoidable, expenses and problems for all parties."

The ALC properly concluded, as a matter of law, that DHEC's interpretation of "residence" produces absurd results and, instead, adopted a meaning of "residence" that considers the salutary purposes of the regulation, furthers these protective goals, and avoids absurd results. The ALC's construction of "residence" was, therefore, not controlled by an error of law and therefore should be affirmed.

B. DHEC Staff's Interpretation of "Residence" is Not Entitled to Deference Because the Interpretation is Unreasonable and Produces Absurd Results.

Regarding the above discussion of the proper definition of "residence," DHEC argues that DHEC's staff member's interpretation should have been given deference by the ALC, and the ALC exceeded its authority by interposing its own view of what "residence" means. (Initial Brief of DHEC, pp. 24-26). However, the ALC found that DHEC staff's interpretation, in this case, was not entitled to deference precisely because it was unreasonable.

The South Carolina Supreme Court recently commented that under certain circumstances DHEC staff's interpretation of an undefined term in its regulations may be entitled to deference. Murphy v. South Carolina Dept. of Env'tl. Control, 396 S.C. 633, 723 S.E.2d 191 (2012). Murphy makes clear, however, that this deference is due only when the interpretation is "both reasonable and consistent with the plain language of the regulation." Id. at 640-41, 723 S.E.2d at 195.¹⁰ To the extent Murphy applies to

¹⁰ As DHEC points out in its brief, another recently decided Supreme Court case holds that "courts defer to the relevant administrative agency's decisions with respect to its

this case, the ALC rightly dispensed with DHEC's interpretation of "residence" because it is not reasonable and leads to absurd results.

As set forth above, the ALC concluded DHEC's interpretation conflicts with the protective purposes of the overall regulatory framework and produces absurd results not intended by the General Assembly. For these reasons, the ALC did not commit legal error by not deferring to a DHEC staff member's interpretation of "residence" in S.C. Code Ann. Regs. 61-107.19, Part IV(B)(1)(a).

C. The ALC Correctly Concluded that the Permit Amendment Violates S.C. Code Ann. Regs. 61-107.19, Part IV(B)(1)(a).

According to a survey performed by Mr. Lester, an expert surveyor and landscape architect, approximately one hundred and thirty (130) approved and permitted residential lots on Respondent Grand Bees' Property are closer than one thousand (1,000) feet to the fill area boundary of the Mound. (R.p. 0010, ¶¶48; R.p. 0082, page 96, lines 1-10; R.p. 0514). In addition, based on the testimony of Mr. Bush, the ALC found that the planned residential development for the Grand Bees Property consists of various engineered phases, including Phase 7 adjacent to the Class II Landfill's common boundary. (R.p. 0010, ¶¶47; R.p. 0070, page 45, lines 21-24). Phase 7, for instance, has been both permitted for residential development by the City and

own regulations unless there is a compelling reason to differ." (Initial Brief of DHEC, p. 25). (citing Kiawah Development Partners, II v. South Carolina Dept. of Env'tl. Control, 2013 WL 696729 * 2). To this point, Kiawah Development Partners, II is not a final decision, binding on this Court, because the Supreme Court granted a petition for rehearing that case. An opinion of an appellate court is not final until the remittitur is filed in the lower court, and the timely filing of a petition for rehearing stays the sending of the remittitur, thereby depriving the decision of finality. See, e.g., Harleysville Mutual Ins. Co. v. State, 401 S.C. 15, 736 S.E.2d 651, n. 2 (2012).

engineered for water, sewer, storm system, and roadway infrastructure improvements. (R.p. 0010, ¶ 47; R.p. 0070, page 46, line 19-page 47, line 17; R.p. 0513).

Given the evidence in the record of approximately 130 planned and approved houses to be constructed within 1,000 feet of the boundary of the expanded Mound, the ALC properly concluded that the Second Permit Modification violated S.C. Code Ann. Regs. 61-107.19, Part IV(B)(1)(a).

Having found "residence" to encompass houses that are planned and shown on an approved site plan – not only fully constructed and occupied residential dwellings, as suggested by DHEC – the ALC concluded that the Second Permit Modification violated S.C. Code Ann. Regs. 61-107.19, Part IV(B)(1)(a). This decision is supported by substantial evidence and should be affirmed as there is no error of law.

CONCLUSION

For the foregoing reasons, the ALC's Order should be affirmed in all respects and DHEC's appeal should be denied.

[SIGNATURE APPEARS ON NEXT PAGE]

Respectfully Submitted,

BY: *A. Trenholm Walker*
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
68 1/2 Queen Street
Charleston, SC 29401
Phone: 843-937-0400
jamie@mklawsc.com

Charleston, South Carolina
October 22, 2013

ATTORNEYS FOR RESPONDENT,
GRAND BEES DEVELOPMENT, LLC

Certificate of Counsel

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

October 23, 2013

BY: 

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

Jamie A. Khan
Ross A. Appel
McCULLOUGH KAHN, LLC
68 ½ Queen Street
Charleston, SC 29401
T: 843.937.0400
jamie@mklawsc.com
ross@mklawsc.com

ATTORNEYS FOR RESPONDENT
GRAND BEES DEVELOPMENT, LLC

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Shirley C. Robinson, Administrative Law Judge

Docket No. 2011-ALJ-07-0556-CC

Grand Bees Development, LLC, ... Respondent,

v.

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

**FINAL REPLY BRIEF OF
APPELLANT COUNTY OF CHARLESTON**

Joseph Dawson, III, County Attorney
Bernard E. Ferrara, Jr., Deputy County Attorney
Austin A. Bruner, Assistant County Attorney
Bradley A. Mitchell, Assistant County Attorney
Johanna S. Gardner, Assistant County Attorney
Charleston County Attorney's Office
Lonnie Hamilton, III Public Services Building
4045 Bridge View Drive
North Charleston, South Carolina 29405
(843) 958-4010

Attorneys for Appellant County of Charleston

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
INTRODUCTION	1
ARGUMENT	1
I. RESPONDENT MISCHARACTERIZES THE COUNTY'S BASIS FOR CHALLENGING THE ALC'S ORDER BY SUGGESTING THAT IT IS BASED ON "A SUBSTANTIAL EVIDENCE IN THE RECORD" TEST, RATHER THAN THE COUNTY'S ACTUAL POSITION THAT THE ALC'S ORDER IS BASED ON AN ERROR OF LAW AND IS ARBITRARY AND CAPRICIOUS	1
II. RESPONDENT MISUNDERSTANDS THE APPLICABILITY OF ARTICLE 9.5 ...	5
III. RESPONDENT MISCONSTRUES THE LEGISLATIVE INTENT OF THE S.C. REGULATIONS IN DEFINING THE TERM "RESIDENCE" AND UNREASONABLY IGNORES DHEC STAFF'S INTERPRETATION OF "RESIDENCE"	8
CONCLUSION	12

TABLE OF AUTHORITIES

CASES	PAGE
<u>Eagle Container Co., LLC v. County of Newberry</u> , 366 S.C. 611, 622 S.E.2d 733 (2005)	2
<u>Hainer v. American Med. Int'l Inc.</u> , 328 S.C. 128, 492 S.E.2d 103 (1997).....	9
<u>Murphy v. S.C. Dep't of Health & Env'tl. Control</u> , 396 S.C. 633, 723 S.E.2d 191 (2012)	11
<u>Southeast Resource Recovery, Inc. v. S.C. Dep't of Health & Env'tl. Control</u> , 358 S.C. 402, 595 S.E.2d 468 (2004)	7
 STATUTES	
S.C. Solid Waste Policy and Management Act	2, 4
S.C. Code Ann. § 44-96-290(F)	2, 3, 5
 S.C. REGULATIONS	
Solid Waste Management Regulations	10
S.C. Regulation § 61-107.18(B)(29).....	9
S.C. Regulation § 61-107.19, Part IV(B)(1)(a)	8, 9
 ORDINANCES	
Charleston County Code of Ordinances Section 10-22	1, 2, 3, 4, 5
Charleston County Zoning and Land Development Regulations Ordinance Article 9.5.	5, 6, 7, 8

INTRODUCTION

Respondent Grand Bees Development, LLC owns a 310-acre tract of land located in the City of Charleston adjacent to Appellant County of Charleston's Bees Ferry Landfill. Grand Bees purchased the property in 2004, twenty-seven years after the Bees Ferry Landfill was established, with an eye for developing residential lots sometime in the future. Approximately 110-130 lots would eventually sit within 150 feet of the unmodified construction and demolition cell based on the conceptual plan for the development. Grand Bees believes continued modifications and use of the Bees Ferry Landfill will adversely affect its ability to market and sell lots in the future. Grand Bees sought and obtained zoning approval to build residential units adjacent to the Landfill, and now Grand Bees claims there are local ordinances that make the County's Second Permit Modification inconsistent with what Grand Bees sought approval to do.

ARGUMENT

Appellant County of Charleston submits this Final Reply to the Final Brief of Respondent (In Response to Appellant County of Charleston's Initial Brief) pursuant to Rule 208(a)(3). In that regard, Appellant would respectfully show as follows:

I. RESPONDENT MISCHARACTERIZES THE COUNTY'S BASIS FOR CHALLENGING THE ALC'S ORDER BY SUGGESTING THAT IT IS BASED ON A "SUBSTANTIAL EVIDENCE IN THE RECORD" TEST, RATHER THAN THE COUNTY'S ACTUAL POSITION THAT THE ALC'S ORDER IS BASED ON AN ERROR OF LAW AND IS ARBITRARY AND CAPRICIOUS.

A. Charleston County Solid Waste Disposal Ordinance Section 10-22.

The County does not argue that the Charleston County Solid Waste Disposal Ordinance, Section 10-22 (hereinafter "Charleston County Code of Ordinances Section 10-

22”) is not an applicable local land use ordinance under S.C. Code Ann. § 44-96-290(F). Instead, the County argues that the ALC failed to make a finding that the Charleston County Code Ordinances, Section 10-22’s requirements, i.e., “(d) conform with the surrounding environment; and (e) Conform with future development of the area,” are inconsistent with the Second Permit Modification; and therefore, the permit application must be disapproved pursuant to S.C. Code Ann. § 44-96-290(F). (R. at 0012). Since the ALC did not make a finding of inconsistency pursuant to the Solid Waste Policy and Management Act regarding Charleston County Code of Ordinances, Section 10-22, the ALC erred as a matter of law when it reversed DHEC’s Second Permit Modification approval.

The premise of Respondent’s “failure to review Charleston County Code of Ordinances, Section 10-22” argument is based on a misreading of S.C. Code Ann. § 44-96-290(F). Respondent claims that the “statute requires DHEC to perform a consistency review with all local laws” (Resp’t Br. 13). To the contrary, S.C. Code Ann. § 44-96-290(F) reads, in part:

[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.

Nowhere does the statute require DHEC to review all local laws before it can make a consistency determination, and much less, it offers no substantive criteria for DHEC to consider. “The cardinal rule of statutory interpretation is to ascertain and effectuate the intent of the Legislature.” Eagle Container Co. v. County of Newberry, 366 S.C. 611, 621, 622 S.E.2d 733, 738 (Ct.App.2005) (citations omitted). “What a legislature says in the text

of a statute is considered the best evidence of the legislative intent or will.” Id. at 621-22, 738 (citations omitted). Here, the legislature does not utilize the word “all” to modify “local zoning, land use, and other applicable local ordinances.” It merely requires that DHEC’s issuance of a permit to expand an existing solid waste management facility be consistent. Consistent does not mean each and every ordinance must be reviewed. The fact that DHEC did not review Charleston County Code of Ordinances Section 10-22 prior to issuing the County’s permit does not make the Second Permit Modification inconsistent on its face.

Respondent admits that the ALC did not find the Second Permit Modification was inconsistent with Charleston County Code of Ordinances Section 10-22 per se, but rather the ALC found Charleston County Code of Ordinances Section 10-22 is an applicable ordinance for purposes of consistency review and that DHEC failed to identify and review it. (Resp’t Br. 16). Respondent agrees with Appellant that the ALC only found Charleston County Code of Ordinances Section 10-22 was an applicable ordinance and did not determine whether the expansion of the landfill was consistent with the ordinance.

Again, the standard outlined in S.C. Code Ann. § 44-96-290(F) is one of consistency and Respondent freely admits that the ALC did not find the County’s Second Permit Modification inconsistent. Further, Respondent again admits that the ALC correctly concluded that it is apparent in this instance that DHEC’s consistency determination is materially incomplete. (Resp’t Br. 23). The standard as outlined in the text of the statutes is clear; it is whether or not the permit is consistent with local ordinances. A claim that something is “materially incomplete” is not the same as the standard for determining consistency. Since the ALC made no finding of inconsistency, then it cannot invalidate the permit.

B. Consistency Determination.

Contrary to Respondent's argument in section B of its brief on page 17, the County does challenge the ALC's finding that DHEC never considered Charleston County Code of Ordinances Section 10-22 in its consistency review. The life line of Respondent's "failure to review argument" is predicated on the fact that it believes the Second Permit Modification cannot be consistent with Charleston County Code of Ordinances Section 10-22, because Respondent believes the construction and demolition debris ("C&D") height modification makes its residential lots adjacent to the landfill less marketable. However, nowhere in Charleston County Code of Ordinances Section 10-22, the S.C. Solid Waste Policy and Management Act ("Act"), the S.C. Code of Regulations ("Regulations"), or the Charleston County's Zoning and Land Use Regulations Ordinance ("ZLDR") does it state that landfills are prohibited to be located adjacent to residential developments because the development may be less valuable. DHEC is mandated by State law to consider the environmental impact of a new landfill or landfill expansion permit on adjacent communities from a health, safety, and welfare prospective, and DHEC did so:

Section 44-96-20(B) of the Act states:

It 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.

If DHEC or the ALC believed that the Second Permit Modification was inconsistent with these concepts or principals, either agency would have said so. Charleston County Code

of Ordinances Section 10-22, embodies these concepts and offers no new standard to measure consistency. The standard to determine consistency is a results-based standard, i.e., is it consistent? It is not a procedural-based standard, i.e., did DHEC review the ordinance?

II. RESPONDENT MISUNDERSTANDS THE APPLICABILITY OF ARTICLE 9.5.

A. Article 9.5.

Respondent's reliance on the ALC's finding that the Second Permit Modification was inconsistent with Article 9.5 and violated S.C. Code Ann. 44-96-290(F) is based on an error of law and is arbitrary and capricious because Charleston County Zoning Ordinance Section 9.5 is not applicable. Section 9.5.1 of the ZLDR states in pertinent part:

When modifications or additions are being made to an existing non-residential building or site, the standards of this Article shall apply to those portions of the subject parcel that are directly affected by the proposed improvements, as determined by the Planning Director, provided that when modifications or additions are proposed that would increase the number of parking spaces, the area of vehicular use areas or gross floor area of buildings by more than 25 percent (above existing), then the entire parcel shall be brought into compliance with all applicable standards of this Article.

Respondent claims that because the modification is to a non-residential site, the provisions of Article 9.5 are automatically triggered and that the landscaping, screening, and buffering requirements must be implemented. Article 9.5 clearly defines three prerequisites for triggering its application: (1) modifications being made to an existing non-residential building or site; (2) applies to those portions of the subject parcel that are directly affected by the proposed improvements; and (3) as determined by the Planning Director. The County's Second Permit Modification is a 5.5 acre lateral expansion on the interior of the County's property and a vertical increase to 168 feet. The Second Permit Modification

does not encroach into the existing 100 foot buffer that separates the C&D cell from Respondent's property line.

It is undisputed that a modification is being made to an existing non-residential site. However, Respondent and the ALC completely ignore the remaining prerequisites to determine applicability of the Article by acknowledging that the first element is met and bypassing the second and third elements. (Resp't Br. 24; R. at 0015). According to the Respondent's application of Article 9.5, every property owner in Charleston County would be required to place a vegetative buffer on his property every time the property is modified, regardless of the complexity, size, or location of the change, or be in violation of the County's Zoning Ordinance. Moreover, Respondent's interpretation of Article 9.5 would also mandate that the County place the 100 foot vegetative buffer completely around the C&D cell even on the interior of the property to separate the C&D cell from the other uses on the landfill like the composting facility or the municipal solid waste disposal cells. Clearly, Respondent's application of Article 9.5 would lead to an absurd result.

B. The Entire Mound.

Respondent claims that the ALC properly applied Article 9.5 to this case because "there is substantial evidence in the record to support the ALC's finding that Article 9.5 is triggered and that the current one hundred (100) foot buffer between the Grand Bees Property and the Class II Landfill is where the specific vegetative buffer requirement contained in Article 9.5 would have to be implemented." (Resp't Br. 27). Respondent cites to testimony in the record to support this position. However, Respondent's testimony cannot cure the ALC's error of law in applying Article 9.5 to the entire C&D cell. Article 9.5

has limited application. Article 9.5 provides that the standards of the Article:

shall apply to those portions of the subject parcel that are directly affected by the proposed improvements, as determined by the Planning Director, provided that when modifications or additions are proposed that would increase the number of parking spaces, the area of vehicular use areas or gross floor area of buildings by more than 25 percent (above existing), then the entire parcel shall be brought into compliance with all applicable standards of this Article.

Respondent wrongly concludes that because the height expansion applies to the entire C&D cell that the entire cell is directly affected by the proposed improvements, thus the buffer requirements of Article 9.5 apply to the entire Bees Ferry Landfill perimeter. The County's ZLDR does not require vegetative buffers as a matter of policy to any change or modification made on a parcel. Buffers are limited to the areas directly affected by the proposed improvements and only if determined by the Planning Director. Therefore, it was arbitrary and capricious for the ALC to determine that a 100 foot vegetative buffer is needed for the entire Bees Ferry landfill parcel, the C&D cell, or between the Class II landfill and the Respondent's property.

C. Planning Director has discretion.

Respondent admits that Article 9.5, if applicable, is a discretionary requirement as determined by the Charleston County Planning Director. Nevertheless, Respondent claims that DHEC violated its non-delegable responsibility under Southeast Resource Recovery by not challenging the Planning Director's discretionary determination whether to apply the landscaping, screening and buffer standards of Article 9.5 to the expansion of the C&D cell of the landfill. Southeast Resource Recovery, Inc. v. S.C. Dep't of Health & Env'tl. Control, 358 S.C. 402, 595 S.E.2d 468 (2004) Respondent contends that DHEC failed to address

Article 9.5, and therefore, failed to make a consistency determination regarding it. The Planning Director nor DHEC can be in violation of an act that was discretionary to perform or do.

III. RESPONDENT MISCONSTRUES THE LEGISLATIVE INTENT OF THE S.C. REGULATIONS IN DEFINING THE TERM "RESIDENCE" AND UNREASONABLY IGNORES DHEC STAFF'S INTERPRETATION OF "RESIDENCE."

A. The term "residence."

Contrary to Respondent's third argument on page 29, S.C. Regulation 61.107.19, Part IV(B)(1)(a) does not impose a mandatory setback for solid waste facilities from adjoining properties. Again, Respondent fails to cite the relevant language of the Regulation. S.C Regulation 61-107.19, Part IV(B)(1) titled Location Restrictions provides:

Buffers. **Unless otherwise approved by the Department**, the site for a new landfill or expansion of an existing landfill shall meet the following standards:

- a. The boundary of the fill area shall not be located within 1,000 feet of any residence, school, day-care center, church, hospital, or publicly owned recreational park area. The Department will determine whether the new landfill or expansion of an existing landfill meets this requirement prior to publication of the Notice of Intent to File a Permit Application pursuant to Part I. Section D.1 of this Regulation.

The prefatory language of the Regulation is not mandatory. Instead, it provides that "unless otherwise approved by the Department" the site shall meet the standards. The Regulation provides unfettered discretion for DHEC to decide whether to require the landfill or expansion of the landfill to be located within 1,000 feet of any residence, school, day-care, etc. Respondent completely disregards the plain meaning of the Regulation.

The parties stipulated at trial that no residences exist within 1,000 feet of the C&D cell's boundary. (R. at 0081; 0082; 0085). Notwithstanding this fact, Respondent now

attempts to bootstrap its arguments on the ALC's erroneous ruling and is incorrect for the following reasons.

First, Respondent mistakenly states that the ALC's interpretation of "residence" is proper because it confirms with settled principles of statutory construction and honors the purpose of the solid waste regulations. (Resp't Br. 29). Respondent attempts to create its own rule for statutory construction and states that because "residence" is defined in Regulation 61-107.19, Part IV(B)(1)(a) but not in Regulation 61-107.18(B)(29), then there is clear legislative intent **not** to mirror the definition of "residence." In support of this proposition, Respondent cites Hainer v. American Med. Int'l Inc., 328 S.C. 128, 492 S.E.2d 103 (1997) (if legislature had intended a result in a statute, it would have said so). The plain reading of the parenthetical applies more appropriately to the County's position that the regulations would have stated a definition contrary to the one in Regulation 61-107.19 had it intended that specific result in the regulation. In fact, the preceding sentence in the cited case above captures the County's argument: "[One] cannot construe a statute without regard to its plain and ordinary meaning, and may not resort to subtle or forced construction in an attempt to limit or **expand** a statute's scope." Id. (emphasis added). Here, Respondent clearly attempts to expand the scope of the regulation by including the words "permitted" and "planned." The word "planned" is nebulous and places no definite timeframe for when the building or structure will actually be constructed. To read these words into a definition would seem to allow any testimony regarding a "planned" residence to automatically negate a permit approval in this context and as the ALC has incorrectly done here.

Respondent also contends that the County's interpretation of the term will produce absurd results. Respondent reaches this conclusion by rewriting and mischaracterizing the County's argument in a way that would produce absurd results. However, the County simply believes that the definition as defined in the context of minimum standards for the off-site treatment of contaminated soil, which is a part of the Solid Waste Management Regulations, also applies to the permitting of a landfill. Even more fundamentally, the County's definition also accords with the plain meaning of the definition – a building used as a home. This definition, however, directly contravenes the definition the ALC found, which includes a "planned or proposed" residence. It further contravenes the definition of the Respondent's version of the County's definition – "only completed and final-permitted dwellings." The County's plain reading of the definition is broader than that.

Respondent narrowly envisions a race between a landfill owner/operator and its neighbors to see who can obtain permits first; this is an extreme exaggeration. To demonstrate, the County has operated this landfill since 1977, and the County sought this particular permit in July 2007. Respondent purchased the adjacent property in November 2004. This matter has been the subject of litigation since 2009, and as late as 2012, testimony shows that the 130 proposed or planned residences that Respondent contends are within 1,000 feet of the landfill have yet to be built – approximately 8 years after the Respondent purchased the property. (R. at 0081; 0082; 0085). In this vein, any planned or proposed residence, without regard to the likelihood of actually being built or when it would be built—whether it be one, eight, or twenty years from now—would prohibit the County from effectively managing the landfill for the public benefit of all and without consideration of the fact that the landfill was located at the site long before Respondent was an adjacent

landowner.

Respondent attempts to veil legislative intent with the stated purpose of the regulations. In this context, Respondent limits the purpose of the regulations and places undue emphasis on establishing a setback distance to protect residences. Notwithstanding the fact that all “residences”—as defined in the regulations—are protected, Respondent still fails to balance the importance and public benefit of the permit, which is to provide a safe, efficient and effective way to dispose of the County residents’ and businesses’ solid waste. Without the ability to receive a permit due to the ALC adopting a much more restrictive definition of the term residence than applicable, the purposes of the regulations are undeniably frustrated.

B. DHEC’s Interpretation of the term “residence.”

Respondent also summarily concludes that DHEC’s interpretation of the term was unreasonable because the ALC found it to be unreasonable. Respondent does not cite any reasons why, other than to refer back to its discussion on legislative intent. Even the case Respondent cites acknowledges that “DHEC staff’s interpretation of regulatory, undefined terms and phrases are entitled to deference...when the interpretation is ‘both reasonable and consistent with the plain language of the regulation.’” Murphy v. S.C. Dep’t of Health & Envtl. Control, 396 S.C. 633, 723 S.E.2d 191 (2012). Without more, there appears to be no reason for the ALC’s finding that DHEC’s interpretation was unreasonable. Instead, it is more than reasonable for DHEC to utilize a specific definition found within the regulations applicable to solid waste management in a section lacking a definition for the same exact term.

C. 130 Planned Residences.

Lastly, evidence in the record shows that the 130 planned and permitted residences cannot qualify as residences under the applicable regulations. (R. at 0010). There is no certainty in planned and permitted structures as future residences. Although the phrase "substantial evidence" was riddled throughout Respondent's Brief, no ounce of evidence is offered to demonstrate the certainty of when the structures will be built, if at all. And without actually existing, these hypothetical structures (whether they are residences, schools, day-care centers, churches, hospitals, or public owned recreational park areas) should not be considered residences as defined by the regulations. The fact remains that nothing prohibits Respondent from selling or otherwise amending, altering, or modifying the plans for these 130 structures. Therefore, these structures, planned or proposed, should not be considered residences until such time as they meet the plain, ordinary and specific meaning of the term as found in the regulations.

CONCLUSION

The Administrative Law Court erred when it found that the Second Permit Modification for the Bees Ferry Landfill construction and debris cell was inconsistent with the County's local ordinances because the Court based its decision on DHEC's failure to review the ordinance, not on whether the modification was inconsistent with the ordinance. The Court further erred when it expanded the application of the County's vegetative buffer regulations and ignored the County's legislative act intending to have its ordinance mean exactly what it already says.

The ALC disregarded the rules of statutory construction when it found that

"residence" includes a planned or proposed residence designated as a lot on site plan.
Therefore, this Honorable Court should reverse the ALC's Final Order and Decision and
affirm the Second Permit Modification.

Respectfully submitted,

COUNTY OF CHARLESTON



JOSEPH DAWSON, III, County Attorney
BERNARD E. FERRARA, JR., Deputy County Attorney
AUSTIN A. BRUNER, Assistant County Attorney
BRADLEY A. MITCHELL, Assistant County Attorney
JOHANNA S. GARDNER, Assistant County Attorney
CHARLESTON COUNTY ATTORNEY'S OFFICE
Lonnie Hamilton, III Public Services Building
4045 Bridge View Drive
North Charleston, South Carolina 29405
(843) 958-4010

ATTORNEYS FOR APPELLANT

Charleston, South Carolina
October 23, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Shirley C. Robinson, Administrative Law Judge

Docket No. 2011-ALJ-07-0556-CC

Grand Bees Development, LLC, ... Respondent,

v.

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

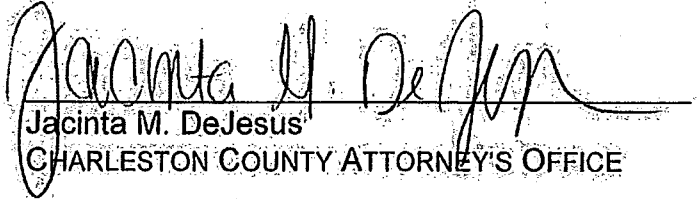
PROOF OF SERVICE

I certify that I have served the **Final Brief of Appellant County of Charleston** and **Reply Brief of Appellant of County of Charleston** on all counsel of record by depositing a copy of the same in the United States Mail, postage prepaid, on October 23, 2013, addressed as follows:

G. Trenholm Walker, Esquire
PRATT-THOMAS WALKER, PA
Post Office Drawer 22247
Charleston, South Carolina 29413-2247
Attorney for Respondent

Jamie A. Khan, Esquire
Ross A. Appel, Esquire
McCULLOUGH KHAN, LLC
68½ Queen Street
Charleston, South Carolina 29401
Attorneys for Respondent

Etta R. Williams Linen, Esquire
SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL
OFFICE OF GENERAL COUNSEL
2600 Bull Street
Columbia, South Carolina 29201
Attorney for Appellant SCDHEC



Jacinta M. DeJesus
CHARLESTON COUNTY ATTORNEY'S OFFICE

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Shirley C. Robinson, Administrative Law Judge

Appellate Case No. 2011-001141

Grand Bees Development, LLC,

Respondent,

v.

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

Appellants.

FINAL REPLY BRIEF OF APPELLANT SOUTH CAROLINA
DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

Jacquelyn S. Dickman (SC Bar No. 1681)
Deputy General Counsel

Etta R. Williams Linen (SC Bar No. 16663)
Assistant General Counsel

2600 Bull Street
Columbia, South Carolina 29201-1708
(803)898-3350
Attorneys for Appellant SC DHEC

TABLE OF CONTENTS

Table of Authorities	2
Statement of Issues on Appeal.....	3
Statement of the Case.....	3
Statement of Facts.....	5
Standard of Review.....	9
Arguments In Reply.....	9
I. THE ALC COMMITTED ERROR OF LAW BY CONCLUDING THAT DHEC IS REQUIRED TO REVIEW ALL LOCAL ORDINANCES EVEN IF THE LANDFILL PROJECT IS CONSISTENT WITH THE LOCAL ZONING, LAND USE, AND OTHER APPLICABLE ORDINANCES NEEDED TO MAKING A CONSISTENCY DETERMINATION	9
II. THE ALC COMMITTED ERROR OF LAW IN CONCLUDING THAT THE SECOND PERMIT MODIFICATION IS NOT COMPLIANT WITH LOCAL ZONING AND LAND USE REGULATIONS, AS IT RELATES TO THE COUNTY'S VEGETATIVE BUFFERING REGULATIONS BECAUSE NO LANDSCAPING PLAN OR OTHER DOCUMENTATION DEMONSTRATING COMPLIANCE WAS MADE PART OF THE PERMIT APPLICATION OR THE SECOND PERMIT MODIFICATION	14
Conclusion	17

TABLE OF AUTHORITIES

Statutes

S.C. Code Ann. § 1-23-610(B) (Supp. 2009)	9
---	---

Regulations

S.C. CODE ANN. REGS. § 61-107.11 (Supp. 2006).....	4
S.C. CODE ANN. REGS. § 61-107.19 (Supp. 2006).....	6

Other Authorities

Charleston County Ordinance 180.....	3, 12, 13
Webster's Third New International Dictionary 1931 (1966).....	8

STATEMENT OF ISSUES ON APPEAL

1. DID THE ADMINISTRATIVE LAW COURT ERR BY CONCLUDING THAT DHEC'S FAILURE TO REVIEW ORDINANCE 180, SECTION 10-22, IS SIGNIFICANT, AND IN CONCLUDING THAT THE SECTION IS AN APPLICABLE ORDINANCE?
2. DID THE ADMINISTRATIVE LAW COURT ERR AS A MATTER OF LAW BY CONCLUDING THAT DHEC IS REQUIRED TO CONSULT ALL APPLICABLE LAND USE ORDINANCES PURSUANT TO S.C. CODE ANN § 44-96-290(F) (REV. 2002)?
3. DID THE ADMINISTRATIVE LAW COURT ERR AS A MATTER OF LAW BY CONCLUDING THAT THE SECOND PERMIT MODIFICATION IS NOT COMPLIANT WITH LOCAL ZONING AND LAND USE REGULATIONS AS IT RELATES TO THE COUNTY'S VEGETATIVE BUFFERING REQUIREMENTS?
4. DID THE ADMINISTRATIVE LAW COURT ERR AS A MATTER OF LAW BY CONCLUDING THAT THERE IS NO EVIDENCE IN THE RECORD THAT DHEC EVER PERFORMED A REGULATORY COMPLIANCE DETERMINATION WITH RESPECT TO ITS OWN ONE THOUSAND FOOT SETBACK REQUIREMENT BECAUSE THERE IS NO WRITTEN DETERMINATION IN THE RECORD OF COMPLIANCE WITH THE APPLICABLE REGULATION?

STATEMENT OF THE CASE

On January 17, 2008, Appellant South Carolina Department of Health and Environmental Control ("DHEC" or "the Department") issued to Appellant Charleston County ("County") a modification to the construction, demolition, and land-clearing debris ("C&D") landfill permit ("Modified Permit") for the Bees Ferry Landfill ("Landfill")¹, Facility ID # 101001-1201, located at 1344 Bees Ferry Road in Charleston County, South Carolina. The initial permit was issued on October 17, 1997; however, the County has operated the Landfill in its current location since 1977. (R. p. 4). The Modified Permit allowed an increase in the annual disposal limit, and in the expansion

¹ Before a new landfill regulation went into effect in May 2008, the Landfill was referred to as a construction, demolition, and land-clearing debris ("C&D") landfill. After the promulgation of the regulation, R. 61-107.19, the Landfill became known as a Class II landfill. DHEC's Final Reply Brief;

of the footprint and height of the existing landfill. These modifications were approved pursuant to S.C. CODE ANN. REGS. § 61-107.11 (Supp. 2006).

Respondent Grand Bees Development, LLC ("Grand Bees") filed a Request for Review of the Modified Permit by the DHEC Board on February 1, 2008. The Department informed Respondent by Memorandum dated February 19, 2008, that the DHEC Board had decided not to conduct a Final Review Conference. On April 18, 2008, Respondent filed a Notice of Request for a Contested Case Hearing with the Administrative Law Court ("ALC" or "Court").

The ALC held a hearing in the above-captioned matter with the Honorable Ralph King Anderson, Jr. presiding. On June 2, 2009, the ALC issued its *Final Order and Decision* holding that "DHEC's decision to grant the Modified Permit is vacated and this case is remanded for review in accordance with the ZLDR." (R. p. 103, Tr. p. 180, lines 16-19). "ZLDR" is the acronym for County's Zoning Land Development Regulations.

Pursuant to the ALC's Order, Appellant DHEC reviewed the Modified Permit application in accordance with the ZLDR, which had been revised and amended by County on December 16, 2010. Upon Appellant's review of the amended ZLDR, it determined that the Modified Permit was consistent with the County's local zoning and land use ordinances. After review, Appellant re-issued the Modified Permit ("Second Modified Permit") on September 1, 2011.

On September 12, 2011, Respondent Grand Bees filed a Request for Review by the DHEC Board of the Second Modified Permit. Respondent was notified by Memorandum on October 13, 2011, that the Board declined to conduct a Final Review

Conference. On November 2, 2011, Respondent requested a contested case hearing regarding Appellant DHEC's re-issuance of the Second Modified Permit.

This matter was assigned to the Honorable Shirley C. Robinson, ALC Judge, on November 7, 2011. On March 20, 2012, a hearing on the merits was held. On March 19, 2013, Judge Robinson issued the *Final Order and Decision* ("*Decision*") in this matter, ordering "that DHEC'S decision on the Second Modified Permit (DHEC #101001-1201) is REVERSED and the Second Modified Permit is hereby VACATED." (R. p. 19).

Both Appellants, DHEC and County, timely moved the Court for Reconsideration of the ALC's *Final Order and Decision* ("*Decision*"), but such Reconsideration was denied by formal Order on May 8, 2013.

On May 24, 2013, County, filed its Notice of Appeal with the South Carolina Court of Appeals ("Court of Appeals"), and on May 29, 2013, DHEC filed its Notice of Appeal with the Court of Appeals. Initial Briefs from Appellants, both the County and DHEC, were filed on June 24, 2013, and July 29, 2013, respectively. Respondent Grand Bees filed its Initial Brief of Respondent ("Response") in response to both County's and DHEC's Initial Briefs. County filed an Initial Reply Brief to Grand Bees' Response to County's Initial Brief of Appellant on September 3, 2013.

STATEMENT OF FACTS

County's initial request for a modification to the Landfill's original permit requested a five (5) acre expansion of the Class 2 Landfill within its three hundred and twelve (312) acre solid waste management facility on Bees Ferry Road in Charleston, South Carolina. The expansion request also included an increase of the Landfill's height to match the previously adjacent permitted Class 3 Landfill. A Modified Permit was

granted on January 17, 2008, but the ALC vacated the Modified Permit and remanded the case for review in accordance with the ZLDR. (R. p. 103, Tr. p. 180, lines 16-19).

After Appellant DHEC reviewed the proposed Landfill in accordance with the ZLDR, on September, 1, 2011, it issued a Second Modified Permit for the Bees Ferry Landfill, Facility ID # 101001-1201, which is located at 1344 Bees Ferry Road in Charleston County, South Carolina. The initial permit was issued on October 17, 1997. The Second Modified Permit allowed an increase in the annual disposal limit and the expansion of the footprint and height of the existing landfill. These modifications were approved pursuant to S.C. CODE ANN. REGS. § 61-107.19 (Supp. 2006).

The Department's review of County's Modified Permit request is the type of review the Department has performed numerous times. This review entails the Department reviewing the proposed Modified Permit in a manner that ensures that the issuance of the modification is pursuant to and in adherence with S.C. Code Ann. § 44-96-290(F), which states, in general, that no permit to expand an existing solid waste management facility within a county may be issued by the Department unless the proposed expansion is consistent with local zoning, land use, and other applicable local ordinances. Mr. Kent Coleman, DHEC Director of Solid Waste and Mining, testified at the ALC Hearing that Section 44-96-290(F) was adhered to by the Department during the consistency review of the proposed Second Modified Permit.

The record shows that the Second Modified Permit that DHEC granted to County was consistent with all applicable ordinances and that DHEC conducted a proper consistency review pursuant to the applicable statutes and regulations. Despite Grand

Bees' arguments, DHEC rightly found County's proposed Landfill to be consistent with County's applicable local ordinances, as required by Section 44-96-290(F).

One of Grand Bees arguments is that the Modified Permit does not conform to the surrounding environment and future development of the area. In support of that argument Grand Bees states that "at the time of the hearing before the ALC, Grand Oaks consisted of nine districts and completed neighborhood totaling approximately 1,500 homes, infrastructure, parks, and other amenities." (R. p. 2). However, the surrounding neighborhood expanded with the knowledge that the landfill was there (since 1997) and would be there for an indefinite period of time. The community's co-existence with the Landfill reflects County's zoning designation for each entity and the fact that the Modified Permit is consistent with County's local ordinances.

Another of Grand Bees' arguments is that landscaping plans are required to be obtained from the applicant before DHEC determines consistency with a county's buffer requirements. However, in making this argument, Grand Bees omits words from Mr. Lester's testimony, which could lead one to believe that this is a requirement of the State or DHEC. Grand Bees states that Mr. Lester testified that in practice, landscaping plans are submitted and required to prove compliance with buffer and landscaping regulations as a precondition to land development. (*Grand Bees Final Reply Brief*, p. 11). The actual testimony by Mr. Lester regarding landscaping plans was that he answered in the affirmative when asked the following: "And when you're submitting a proposed plan to that **local government**, are you required to actually show those, depict it on your plan?" (*Emphasis added*). (R. p. 85, Tr. p. 105, lines 21-24). According to Mr. Lester, landscaping plans are required by a local government. There is no statutory or regulatory

requirement for DHEC to obtain landscaping plans from a landfill applicant prior to it making a consistency determination.

Grand Bees' argument that DHEC should have considered "planned and proposed residences" in the definition for residence, is not supported by case law, and would have an absurd and negative impact to the implementation of this requirement. The regulatory requirement states that "the waste disposal boundary of the landfill shall not be located within one thousand feet of any residence, school, day-care center, hospital or publicly owned recreational park area." 8 S.C. Code Ann. Regs. 61-107.19, Part IV, (B)(1)(a). Since there is no definition of "residence" in the statute or regulation, DHEC looked at the plain meaning of "residence," which, as found in Webster's Third New International Dictionary 1931 (1966), is "the act or fact of abiding or dwelling in a place for some time; an act of making one's home in a place; the place where one actually lives or has his home as distinguished from his technical domicile; the place where something is permanently established; a building used as a home." There were no "residences," as defined by Webster's, which met this definition that were within 1000 feet of the proposed Landfill. DHEC interprets the requirement of the thousand feet setback requirement as implemented to serve as protection for actual residences with the boundary. Otherwise what purpose would such a setback serve if there were no people occupying or utilizing a "residence." DHEC made the correct determination that there were no "residences," per this definition, and therefore, the issuance of the Second Modified Permit should be upheld.

DHEC stands by all of its previous arguments in its Initial Brief regarding the "residence" issue and will not include any additional argument on this in this Reply Brief.

DHEC's assertion that it determined that the Modified Permit was consistent with the county's local zoning and land use ordinances should not be disregarded and the determination should be upheld.

STANDARD OF REVIEW

Appellate review of an ALC decision is governed by S.C. Code Ann. § 1-23-610, which states:

(B) The review of the administrative law judge's order must be confined to the record. The court may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact. The court of appeals may affirm the decision or remand the case for further proceedings; or, it may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable probative and substantial evidence on the whole record; or
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-610(B) (Supp. 2012).

ARGUMENTS

- I. THE ALC COMMITTED ERROR OF LAW BY CONCLUDING THAT DHEC IS REQUIRED TO REVIEW ALL LOCAL ORDINANCES EVEN IF THE LANDFILL PROJECT IS CONSISTENT WITH THE LOCAL ZONING, LAND USE, AND OTHER APPLICABLE ORDINANCES NEEDED TO MAKING A CONSISTENCY DETERMINATION. (R. p. 12)

The Department's argument is that the Administrative Law Court ("ALC") committed error of law by concluding that DHEC's failure to review Section 10-22 was grounds for rejecting DHEC's consistency determination (R. p. 13) and that DHEC is required to consult all applicable land use ordinances in the Code. (R. p. 12). The ALC

DHEC's Final Reply Brief,

Grand Bees Development, LLC; DHEC File No.: 21294

committed error of law because the applicable statute governing DHEC's consistency review process, is S.C. Code Ann. § 44-96-290(F) (Rev. 2002), which states that "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 . . .*" (*Emphasis added*). Since this statute has no requirement for DHEC to **consult or review** all ordinances, DHEC's failure to review Section 10-22 was not significant, as concluded by the ALC, or fatal to the issuance of the Second Modified Permit.

DHEC admitted on the record regarding Section 10-22 that it did not "see" or "did not recall seeing it," the ordinance, during the consistency review process. (**R. p. 108, Tr. p. 199, lines 4-11**). However, the fact that DHEC did not review Section 10-22 does not mean that it failed to adhere to the requirement of Section 44-96-290(F), which is to issue a permit that it consistent with local ordinances. DHEC did not violate the governing statute because the Modified Permit issued to County for its Landfill was consistent with all applicable local ordinances, as testified to by Mr. Kent Coleman, DHEC Director of Solid Waste and Mining. (**R. p. 109, Tr. p. 201, lines 1-6**). Even though DHEC staff did not specifically consult/review Section 10-22, its overall review took into account the criteria in Section 10-22, as per the testimony of Kent Coleman. Mr. Coleman testified that the Department did consider whether the significant expansion of the landfill conformed with the surrounding environment. (**R. p. 112, Tr. p. 213, lines 6-10**). He also testified that included in the review of the surrounding environment that was considered were "the zoning ordinances and adjacent uses per the local zoning" (**R.**

p. 112, Tr., p. 213, lines 13-14) and that a review was done of "all the siting criteria in the DHEC solid waste management regulation as it relates to adjacent properties in terms of groundwater protection, protection of the public and et cetera." (R. p. 112, Tr., p. 213, lines 15-19). Mr. Coleman further testified that DHEC also considered whether the significant expansion of the landfill conformed with future development of the area. (R. p. 112, Tr., p. 214, lines 1-4). Mr. Coleman testified that, in considering whether the landfill conformed with future development of the area, the Charleston County ZLDR was reviewed to ensure that the Landfill was properly zoned under the Charleston County zoning ordinance in terms of what activities could be undertaken on that property. (R. p. 112, Tr. p. 214, lines 10-14). Mr. Coleman said the Department found that the proposed Landfill was in compliance with the stated criteria. (R. p. 112, Tr., p. 214, lines 14-15).

Mr. Coleman also testified that "DHEC doesn't make decisions for local governments on what conforms and what does not conform. Local governments do that through zoning and . . . they have made decisions of what types of uses can be next to other types of land uses . . . through their zoning . . . on . . . what is conforming, what conforms." (R. p. 108, Tr. p. 200, lines 2-12). Mr. Coleman also testified that "Charleston County . . . have a very detailed zoning ordinance that talks about all the various uses, how those uses are to be applied. So by reviewing that — that document and making a decision, DHEC has determined that the permit that we issued is consistent with local zoning." (R. p. 108, Tr. p. 200, lines 13-20). Mr. Coleman further testified that the generalized language in Section 10-22 did not change or specify anything about the requirements that the local zoning did not already cover. (R. p. 108, Tr. p. 200, lines 20-25).

Therefore, pursuant to Mr. Coleman's testimony, even though Section 10-22 was not consulted or reviewed, the criteria listed in that ordinance was considered, and the proposed Landfill was found to be consistent with the ordinances' stated criteria. Thus, since the Department found the proposed Landfill to be consistent with the criteria set forth in Section 10-22, the ALC committed error of law in concluding that DHEC is required to review all local ordinances because there is no such requirement in the governing statute, Section 44-96-290(F).

A. A review of Section 10-22 was encompassed in DHEC's review of the ZLDR and even if DHEC had reviewed Section 10-22 DHEC's ultimate consistency determination would not have changed.

Mr. Coleman stated on the record that "it was very clear and very specific, that we were to reconsider the permit in regard to Charleston County zoning." (R. p. 103, Tr. p. 180, lines 23-25) and that DHEC reviewed the Second Modified Permit request against the Charleston County ZLDR. (R. p. 110, Tr. p. 1-9). A review of Section 10-22 was encompassed in DHEC's review of the ZLDR and the ultimate result is that the Second Modified Permit was consistent with all applicable local ordinances.

The issue is not whether DHEC ever reviewed Section 10-22, but that in not reviewing Section 10-22, did DHEC issue a Second Modified Permit that was not consistent with applicable local ordinances. There is no substantial evidence in the record to refute that the Second Modified Permit issued to the County was consistent with all applicable local ordinances, and thus the issuance of the Second Modified Permit should be upheld. Moreover, Section 10-22's vagueness renders it inapplicable as an ordinance upon which the Department could have based a consistency determination.

The fact that there is no definition of “conform” in the ordinance is a prime example of the ordinance being too vague to use as a basis for a consistency determination.

Also, Grand Bees’ argument that DHEC is required to review all local ordinances even if a landfill project is consistent with a County’s local zoning, land use, and other applicable ordinances needed to make a consistency determination leads to an absurd result. Their argument suggests that even if the oldest (Section 10-22 was adopted by County in 1974) and most obscure ordinance is not reviewed during the consistency review process, and even if the permit issued is consistent with all applicable local ordinances, the review process should be re-opened and re-done. The requirement of S.C. Code Ann. 44-96-290(F) is that no permit be issued that is not consistent with all applicable local ordinances, not that all applicable local ordinances must be reviewed before a permit or permit modification can be issued. This was not the Legislature’s intent, and there is no evidence on the record supporting Grand Bees’ argument. The testimony on the record from Mr. Kent Coleman is that even if DHEC had known about and reviewed County’s local ordinance, Section 10-22, before issuing the Second Modified Permit for the Landfill, the Department still would have found that the Second Modified Permit was consistent with all local ordinances. (R. p. 105, Tr. p. 186, lines 2-9). Mr. Coleman expounded upon his testimony by stating:

“as we have proceeded through our normal job activities related to this landfill, as in any other landfill, we have remained aware of the situations around the landfill. We’ve been out and visited the site and . . . there are no new residences. The demonstration of need has not changed . . . and the only thing that’s changes . . . would be the County’s change in the zoning, which is what we did reconsider based on the Judge’s order.”

(R. p. 105, Tr. p. 186, line 14- p. 187, line 6).

Pursuant to the foregoing, DHEC's issuance of the Second Modified Permit should be upheld.

- II. THE ALC COMMITTED ERROR OF LAW IN CONCLUDING THAT THE SECOND PERMIT MODIFICATION IS NOT COMPLIANT WITH LOCAL ZONING AND LAND USE REGULATIONS, AS IT RELATES TO THE COUNTY'S VEGETATIVE BUFFERING REGULATIONS BECAUSE NO LANDSCAPING PLAN OR OTHER DOCUMENTATION DEMONSTRATING COMPLIANCE WAS MADE PART OF THE PERMIT APPLICATION OR THE SECOND PERMIT MODIFICATION. (R. p. 15)

The ALC committed error of law in concluding that DHEC's granting of the Second Permit Modification was not compliant with local zoning and land use regulations, as it relates to Article 9.5 of the ZLDR, the County's vegetative buffering regulations. The ALC committed error of law because there is no requirement, in either applicable statute or regulation, that requires the Department to obtain from a landfill applicant a landscaping plan or other documentation to demonstrate compliance with Section 44-96-290(F).

Mr. Coleman's hearing testimony regarding Article 9.5 of the ZLDR was as follows:

" . . . to have a buffer or a vegetative buffer is . . . very common and the way we handle that is in our . . . plan – the plan that's submitted to DHEC, . . . there is a 100-foot buffer designated, which is consistent with DHEC's buffer requirements. Also, it is consistent with the County's buffer requirements in terms of the distance. . . . when we make our review . . . " (R. p. 109, Tr. p. 203, lines 17-25; Tr. p. 204, lines 1-2).

Mr. Coleman further testified that:

" . . . we make sure there's nothing in the . . . way the structures are placed and that type of thing within the DHEC application that would prohibit someone or make . . . them unable to comply with the vegetation requirements. But the vegetative requirements such as this are common and . . . that's not something that is required to be done prior to the permitting." (R. p. 109, Tr. p. 204, lines 2-10).

Mr. Coleman's testimony continued:

"... a good example of how to think about that is if ... you're building a house and someone – there may be an ordinance requiring you to grass the front yard and put in shrubbery ... but they don't make you do that before you get your building permit and ... before you build the house, because that doesn't make any sense." (R. p. 109, Tr. p. 204, lines 11-19).

Mr. Coleman also testified that:

"... you realize those requirements are there. There's nothing impeding you from doing those requirements. And then it's up to the County to enforce their own zoning, which includes these buffer and shrubbery requirements ... as long as ... it can be complied with in the scope of the project, then it's really up to the County to enforce that beyond that point." (R. p. 109, Tr. p. 204, lines 20-25, R. p. 110, Tr. p. 205, lines 1-4).

The foregoing testimony by Mr. Coleman outlines the Department's policy for reviewing county requirements regarding vegetative buffers for a proposed landfill. The essence of Mr. Coleman's testimony is that if the Department determines that a landfill applicant has included a buffer in its plans for its proposed landfill that meets the size of a county's required buffer, then a proposed landfill is considered capable to meet the county's buffer requirement, including a vegetative or shrubbery buffer requirement, and the buffer is also determined to be consistent with the county's vegetative or shrubbery buffer requirement. Once this determination is made, and if the landfill applicant is issued a landfill permit, the Department leaves it to the county to enforce its vegetative or shrubbery buffer requirement.

There is nothing in the process that Mr. Coleman testified about, or anything in applicable statutes or regulations, which prohibits the Department from finding a proposed buffer consistent through this type of process. Additionally, there is no evidence on the record to show that DHEC is prohibited from employing this process to make consistency determinations regarding county buffer requirements. In fact, if the

Department were to list in its Consistency Memorandum each and every ordinance, criteria, issue, or concern that it took into consideration during its consistency review, and also give a detailed description of how it came to its consistency determination on each and every item considered, the document would take a very long time to write and would be quite lengthy, not to mention the fact that there is no indication from any applicable statute or regulation that this is what the Legislature intended.

Therefore, pursuant to the foregoing, the ALC's conclusion that DHEC erred in granting the Second Modified Permit because there is no landscaping plan or other documentation demonstrating compliance in the permit application, is error of law and should be overturned.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the Administrative Law Court.

Respectfully submitted,

November 18, 2013

Etta R. Williams Linen
Etta R. Williams Linen (SC Bar No. 16663)
Assistant General Counsel

Jacquelyn S. Dickman (SC Bar No. 1681)
Chief Deputy General Counsel

Office of General Counsel
South Carolina Department of Health
and Environmental Control
2600 Bull Street
Columbia, South Carolina 29201-1708
(803)898-3350
Attorney for Appellant SCDHEC

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Shirley C. Robinson, Administrative Law Judge

Appellate Case No. 2011-001141

Grand Bees Development, LLC,

Respondent,

v.

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

Appellants.

CERTIFICATE OF COUNSEL

The undersigned counsel hereby certifies that this Final Reply Brief complies with Rule 211(b), SCACR.

Etta R. Williams Linen
Etta R. Williams Linen (SC Bar No. 16663)
Assistant General Counsel
2600 Bull Street
Columbia, South Carolina 29201-1708
(803)898-3350
Attorney for Appellant

Nov. 18, 2013
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Shirley C. Robinson, Administrative Law Judge

Appellate Case No. 2011-001141

Grand Bees Development, LLC,

Respondent,

v.

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

Appellants.

CERTIFICATE OF SERVICE

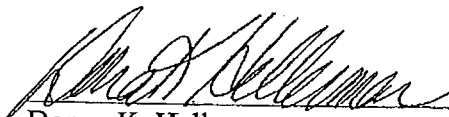
I, Donna K. Hellerman, for the South Carolina Department of Health and Environmental Control, hereby certify that I have on this 18th day of Nov., 2013, served a copy of the *Final Reply Brief of Appellant South Carolina Department of Health and Environmental Control* upon all parties and counsel of record in the above-captioned case, via United States Mail, First Class, postage prepaid, addressed as follows:

Jamie Khan, Esquire
McCullough Kahn, LLC
68½ Queen Street
Charleston, South Carolina 29401

G. Trenholm Walker, Esquire
Pratt-Thomas Walker, PA
Post Office Drawer 22247
Charleston, South Carolina 29413-2247

Joseph Dawson, III, Esquire
Bernard E. Ferrara, Jr., Esquire
Charleston County Attorney's Office
4045 Bridge View Drive
North Charleston, South Carolina 29405

Nov. 18th 2013
Columbia, South Carolina


Donna K. Hellerman

**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

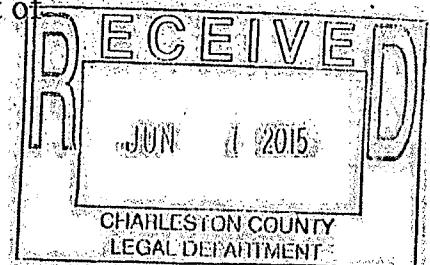
Appeal From The Administrative Law Court
Shirley C. Robinson, Administrative Law Judge

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

AFFIRMED

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.

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 10-22.¹ 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.

¹ 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).

THE 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

Grand Bees Development, LLC, ... Respondent,

v.

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

APPELLANT'S PETITION FOR REHEARING

Joseph Dawson, III, County Attorney
Bernard E. Ferrara, Jr., Deputy County Attorney
Austin A. Bruner, Assistant County Attorney
Bradley A. Mitchell, Assistant County Attorney
Johanna S. Gardner, Assistant County Attorney
Charleston County Attorney's Office
Lonnie Hamilton, III Public Services Building
4045 Bridge View Drive
North Charleston, South Carolina 29405
(843) 958-4010

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")¹ 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.

¹ 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

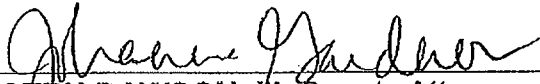
ZLDR **alone** constituted a complete consistency determination regarding the Ordinance. Instead, the County contends DHEC's determination that the permit modification is consistent with the County's ordinances fully incorporates review, consideration, and application of, and is consistent with, the 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



JOSEPH DAWSON, III, County Attorney
BERNARD E. FERRARA, JR., Deputy County Attorney
AUSTIN A. BRUNER, Assistant County Attorney
BRADLEY A. MITCHELL, Assistant County Attorney
JOHANNA S. GARDNER, Assistant County Attorney
CHARLESTON COUNTY ATTORNEY'S OFFICE
Lonnie Hamilton, III Public Services Building
4045 Bridge View Drive
North Charleston, South Carolina 29405
(843) 958-4010

ATTORNEYS FOR APPELLANT

Charleston, South Carolina
June 8, 2015

THE 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

Grand Bees Development, LLC, ... Respondent,

v.

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

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

Etta R. Williams Linen (SC Bar No. 16663)
Assistant General Counsel

Jacquelyn S. Dickman (SC Bar No. 1681)
Chief Deputy General Counsel

Office of General Counsel
South Carolina Department of Health
and Environmental Control
2600 Bull Street
Columbia, South Carolina 29201-1708
Phone: 803-898-3350
Attorneys for Appellant SCDHEC

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."¹ 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.

¹ 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)

THE 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

Grand Bees Development, LLC, ... Respondent,

v.

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

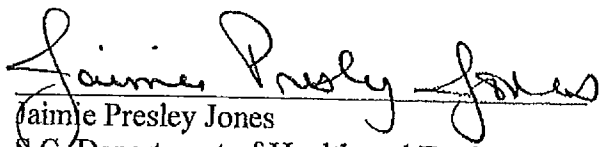
CERTIFICATE OF SERVICE

I, Jaimie Presley Jones, with the South Carolina Department of Health and Environmental Control, hereby certify that I have this 19th 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:

G. Trenholm Walker, Esquire
Pratt-Thomas Walker, PA
Post Office Drawer 22247
Charleston, South Carolina 29413-2247
Attorneys for Respondent

Jamie A. Khan, Esquire
Ross A. Appel, Esquire
McCullough Kahn, LLC
68½ Queen Street
Charleston, South Carolina 29401
Attorneys for Respondent

Joseph Dawson, III, Esquire
Bernard E. Ferrara, Jr., Esquire
Austin A. Bruner, Esquire
Bradley A. Mitchell, Esquire
Johanna S. Gardner, Esquire
Charleston County Attorney's Office
Lonnie Hamilton, III Public Services Building
4045 Bridge View Drive
North Charleston, South Carolina 29405
Attorneys for Appellant County of Charleston


Jaimie Presley Jones
S.C. Department of Health and Environmental
Control

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

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).

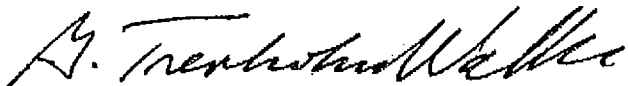
CONCLUSION

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

The South Carolina Court of Appeals

Grand Bees Development, LLC, Respondent,

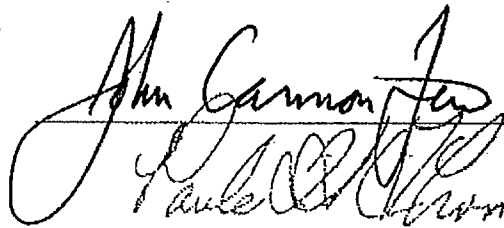
v.

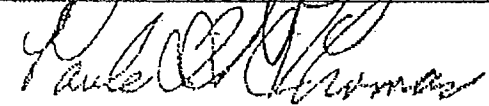
South Carolina Department of Health and Environmental
Control and County of Charleston, Appellants.

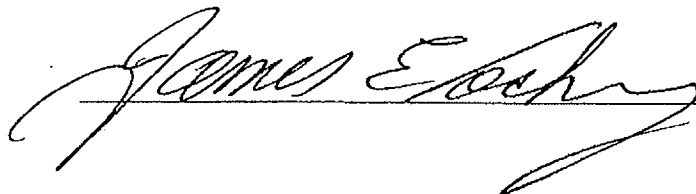
Appellate Case No. 2013-001141

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.


C.J.


J.

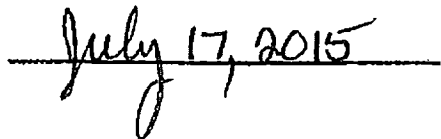

J.

Columbia, South Carolina

cc:

Joseph Dawson, III, Esquire
George Trenholm Walker, Esquire
Bernard E. Ferrara, Jr., Esquire
Jamie A. Khan, Esquire

FILED



Ross A. Appel, Esquire
Etta R. Linen, Esquire
Austin Adams Bruner, Esquire
Bradley Allen Mitchell, Esquire
Johanna Serrano Gardner, Esquire
Jacquelyn Sue Dickman, Esquire
The Honorable Shirley C. Robinson