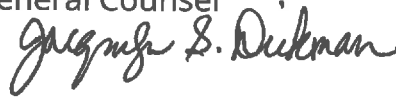


To: LOC Subcommittee

From: Jacquelyn S. Dickman, Deputy General Counsel

Re: Law Recommendation #2.3



Date: June 22, 2017

Attached are the cases which reference the Supreme Court's ruling that, under the current Solid Waste Policy and Management Act, SCDHEC must make the determinations of consistency, regarding, inter alia, local zoning and land-use ordinances.

1. In *Southeast Resource Recovery, Inc. v. S.C. Department of Health and Environmental Control*, 358 S.C. 402, 595 S.E. 2d 468 (2004), the appeal was brought by Southeast Resource Recovery, Inc.
2. In *York County v. S.C. Department of Health and Environmental Control*, 397 SC 217, 723 S.E. 2d 255 (SC App 2012) the appeal was by York County.
3. In *Grand Bees Dev., LLC v. S.C. Dept.*, 2015 WL 3409056 (Ct. App SC 2015) the appeal was by SCDHEC and the County of Charleston.

Southeast Res. Recovery, Inc. v. S.C. Dep't of Health & Env'tl. Control

Supreme Court of South Carolina

March 16, 2004, Heard ; April 19, 2004, Filed

Opinion No. 25806

Reporter

358 S.C. 402 *; 595 S.E.2d 468 **; 2004 S.C. LEXIS 93 ***

Southeast Resource Recovery, Inc., Appellant, v. South Carolina Department of Health and Environmental Control, Involved Citizens of the Helena Community, Rev. Nura Ray Matthews, Chairman, Little Beaver Dam Baptist Church, John L. Hunter, Paul Herbert, Eugene Maybin, Jr., John and Jessie Reeder, Lillie May Washington, William W. Parr, Sr., Eliza M. Parr and Bill Parr, Jr., Respondents.

Subsequent History: [***1]

Rehearing denied by *Southeast Res. Recovery v. SCDHEC*, 2004 S.C. LEXIS 121 (S.C., May 14, 2004)

Prior History: Appeal From Richland County. Thomas W. Cooper, Jr., Circuit Court Judge.

Disposition: REVERSED.

Core Terms

landfill, proposed facility, County's, circuit court, solid waste, requirements, consistency, industries, wetland, solid waste management, industrial waste, revocation, issuance

Case Summary

Procedural Posture

Appellant corporation sought review of a decision of respondent state health department which affirmed an order of an administrative law judge (ALJ) which held that the revocation by a county council of a previously issued letter of consistency precluded issuance of a permit to build and operate a waste landfill. The Richland County Circuit Court (South Carolina) affirmed the ALJ decision, but modified the holdings. The

corporation appealed.

Overview

The local county council initially determined that the proposed landfill was consistent with its solid waste management plan and issued a letter of consistency (LOC) to the corporation. The health department's practice had been to delegate to the counties the authority to determine consistency through the issuance of LOCs. The ALJ concluded that the local county council's later revocation of its LOC precluded the permits. The appellate court found this delegation of authority by the health department was impermissible. *S.C. Code Ann. § 44-96-290(F)* did not give a county veto authority over decisions made by the health department. There was no statutory authority providing that a county's consistency determination was determinative of the ultimate permitting decision. The health department withdrew its initial decision to issue the permit in error because it based its decision solely on the county's withdrawal of the LOC. The facility was not inconsistent with county's solid waste management plan or the health department's regulatory requirements. The permit should have been issued and effective.

Outcome

The judgment was reversed.

LexisNexis® Headnotes

Environmental Law > Solid Wastes > Disposal Planning

Environmental Law > Solid Wastes > Disposal Standards

Environmental Law > Solid Wastes > Permits > General Overview

Business & Corporate Compliance > ... > Environmental Law > Land Use & Zoning > Comprehensive & General

Plans

HN1 [↓] Pursuant to S.C. Code Ann. § 44-96-290(F) (2002), an applicant's proposed industrial waste landfill facility must be consistent with local land use ordinances.

Environmental Law > Solid Wastes > Permits > General Overview

HN2 [↓] In environmental permitting cases, the administrative law judge (ALJ) presides as the finder of fact. S.C. Code Ann. § 1-23-600(B) (Supp. 2003). The Board of the South Carolina Department of Health and Environmental Control (Board), on the other hand, sits as a quasi-judicial tribunal in reviewing the final decision of the ALJ. S.C. Code Ann. § 1-23-610(A) (Supp. 2003). As the reviewing tribunal, the Board is not entitled to make findings of fact. The Board's findings are based on the ALJ's findings.

Administrative Law > Judicial Review > Standards of Review > Substantial Evidence

Environmental Law > Solid Wastes > Permits > General Overview

HN3 [↓] On appeal in environmental permitting cases, the administrative law judge's findings must be affirmed if they are supported by substantial evidence in the record.

Administrative Law > Judicial Review > Standards of Review > Substantial Evidence

HN4 [↓] Substantial evidence is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached.

Administrative Law > Judicial Review > Standards of Review > General Overview

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

Environmental Law > Administrative Proceedings & Litigation > Judicial Review

HN5 [↓] A reviewing court may reverse or modify the decision of any agency if substantial rights of the appellant have been prejudiced because the findings or decisions of the agency are: (a) in violation of the 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(D) (Supp. 2003).

Environmental Law > Solid Wastes > Disposal Standards

Environmental Law > Solid Wastes > Permits > General Overview

Governments > Local Governments > Licenses

Governments > State & Territorial Governments > Licenses

Business & Corporate Compliance > ... > Real Property Law > Zoning > Ordinances

HN6 [↓] The South Carolina Solid Waste Policy and Management Act, S.C. Code Ann. § 44-96-10, et seq. (2002) (SWPMA), requires a person obtain a permit from the South Carolina Department of Health and Environmental Control (DHEC) before operating a solid waste management facility. S.C. Code Ann. § 44-96-290(A). Permits are issued based upon local need for the requested facility and the consistency of the proposed facility with local ordinances. S.C. Code Ann. § 44-96-290(E). DHEC cannot issue a permit unless the proposed facility is consistent with local zoning, land use, and other applicable ordinances. The SWPMA does not specify procedures for DHEC to follow in making need and consistency determinations.

Environmental Law > Solid Wastes > Permits > General Overview

Governments > Local Governments > Licenses

Business & Corporate Compliance > ... > Real Property Law > Zoning > Ordinances

HN7 [↓] The delegation by the South Carolina Department of Health and Environmental Control (DHEC) to the counties of the authority to determine consistency in environmental permitting cases through the counties' issuance of letters of consistency is

358 S.C. 402, *402; 595 S.E.2d 468, **468; 2004 S.C. LEXIS 93, ***1

impermissible. S.C. Code Ann. § 44-96-290(F) does not give a county veto authority over decisions made by DHEC. There is no statutory authority providing a county's consistency determination is determinative of the ultimate permitting decision. Although S.C. Code Ann. § 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.

Environmental Law > Solid Wastes > Disposal Planning
 Environmental Law > Solid Wastes > Disposal Standards
 Environmental Law > Solid Wastes > Permits > General Overview

HN8 [↓] The South Carolina Solid Waste Policy and Management Act, S.C. Code Ann. § 44-96-10, et seq. (2002), authorizes the South Carolina Department of Health and Environmental Control (DHEC) to issue, deny, revoke, or modify permits, registrations, or orders under such conditions as the department may prescribe for the operation of solid waste management facilities. S.C. Code Ann. § 44-96-260(2) (2002). DHEC, not the county, is charged with ensuring such facilities meet the requirements for permitting.

Environmental Law > Solid Wastes > Disposal Planning
 Environmental Law > Solid Wastes > Disposal Standards
 Environmental Law > Solid Wastes > Permits > General Overview
 Governments > Local Governments > Ordinances & Regulations

HN9 [↓] See Newberry County, S.C., Solid Waste Management Plan § 4.1.3.

Environmental Law > Solid Wastes > Disposal Planning
 Environmental Law > Solid Wastes > Disposal Standards
 Environmental Law > Solid Wastes > Permits > General Overview

HN10 [↓] Newberry County, S.C., Solid Waste Management Plan § 4.1.3. refers only to private haulers who are operating in the county under contracts with

different industries. Therefore, this provision has no application to the prohibition of the establishment of an industrial waste landfill.

Environmental Law > Solid Wastes > Disposal Planning
 Environmental Law > Solid Wastes > Disposal Standards
 Environmental Law > Solid Wastes > Permits > General Overview

HN11 [↓] Newberry County, S.C., Solid Waste Management Plan § 10.2 discusses the goals associated with Newberry County's solid waste disposal. Newberry County, S.C., Solid Waste Management Plan § 10.2 states, in relevant part, that one of the goals is to preserve, protect, and enhance the environmental quality of Newberry County.

Counsel: W. Thomas Lavender, Jr., of Nexsen, Pruet, Jacobs, & Pollard, of Columbia, for appellant.

Samuel Leon Finklea, of South Carolina Department of Health and Environmental Control; and Robert Guild, both of Columbia, for respondents.

Judges: TOAL, C.J., MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

Opinion

[*404] [469] PER CURIAM:** This appeal concerns an industrial solid waste permit sought by Appellant, Southeast Resource Recovery, Inc. (SRRI). Respondent, South Carolina Department of Health and Environmental Control (DHEC), initially issued and later withdrew Solid Waste Landfill Permit No. 362624-1601 (the "permit"), thereby preventing SRRI's construction and operation of an industrial waste landfill in the Helena Community of Newberry County. The Involved Citizens of the Helena Community and others (Citizens), are also respondents in this proceeding.

FACTS

Before SRRI applied for an industrial waste landfill permit, SRRI submitted a written request to the Newberry County Council for a determination the **[***2]** proposed landfill was consistent with the Newberry County Solid Waste Management **[*405]** Plan (the Plan). **HN1** [↑] Pursuant to S.C. Code Ann. § 44-96-

290(F) (2002),¹ an applicant's proposed facility must be consistent with local land use ordinances. On August 17, 1995, the Newberry County Council determined that the proposed landfill was consistent with the Plan and issued a letter of consistency (LOC) to SRRI.

After receiving the LOC, SRRI began planning its proposed facility. During September and October 1995, SRRI performed a hydrogeologic characterization of the site at DHEC's request. In December 1995, SRRI submitted its permit application to DHEC's Bureau of Solid and Hazardous Waste. In **[**470]** 1996, SRRI conducted a wetlands delineation and in September of that year SRRI received a letter authorizing fill of the wetland. In June 1997, SRRI undertook another wetlands delineation after the **[***3]** U.S. Army Corps of Engineers changed the threshold for issuance of a permit to fill the wetlands. As a result of the 1997 delineation, SRRI decided to eliminate the portion of the landfill that would occupy wetland areas and voluntarily established a 200-foot buffer around the wetland.

During the 1997 legislative session, the General Assembly enacted Act No. 100, 1997 S.C. Acts 487 (Act 100), which prevents a commercial industrial solid waste landfill from being constructed within 1,000 feet of a residence. Act 100 does not define "residence."

Following the enactment of Act 100, Bill and Eliza Parr, named respondents in this action, placed a mobile home on their property, which is adjacent to SRRI's landfill site. SRRI redesigned the landfill to establish the 1,000-foot buffer from the mobile home prior to making a final permit decision.

After conducting a thorough analysis of the facility, DHEC issued the permit on September 5, 1997. DHEC applied the requirements of 25 S.C. Code Ann. Reg. 61-66 (1976) relating to Industrial Waste Landfills. One day prior to DHEC issuing SRRI its permit, a recreational camper was moved onto another area of the Parr property. DHEC did not require **[***4]** SRRI provide a 1,000-foot buffer from the camper.

[*406] Citizens requested a contested case hearing to challenge the issuance of the permit. SRRI also appealed DHEC's requirement that SRRI establish a 1,000-foot buffer to the mobile home. After the conclusion of the hearing, but before the issuance of a written order by the Administrative Law Judge (ALJ), the

Newberry County Council revoked its LOC. In June 1998, DHEC and Citizens filed separate motions requesting the ALJ re-open the record to consider additional evidence on the County's revocation. By order dated January 4, 1999, the ALJ concluded the revocation of the LOC precluded issuance of the permit.

SRRI sought review of the ALJ order and the Board of the South Carolina Department of Health and Environmental Control affirmed the ALJ decision in its order dated June 29, 1999. SRRI petitioned for judicial review of the Board's order. The circuit court upheld the ALJ decision, but modified the holdings. The court concluded (1) Act 100 did not apply to a recreational camper placed on the property and (2) the provision of the Newberry County Solid Waste Management Act relied upon by the ALJ did not support the finding. However, the **[***5]** court concluded Section 10.2 of the Plan supported the ALJ's finding. On appeal, SRRI requests this Court hold the permit be issued and effective.

ISSUES

- I. Did the circuit court err in holding that the revocation of the consistency determination compelled denial of the permit?
- II. Did the circuit court properly conclude the proposed facility is inconsistent with Newberry County's plan?

ANALYSIS

HN2^(↑) In environmental permitting cases, the ALJ presides as the finder of fact. *S.C. Code Ann. § 1-23-600(B)* (Supp. 2003). The Board, on the other hand, sits as a quasi-judicial tribunal in reviewing the final decision of the ALJ. *S.C. Code Ann. § 1-23-610(A)* (Supp. 2003). As the reviewing tribunal, **[*407]** the Board is not entitled to make findings of fact. *Id.* The Board's findings are based on the ALJ's findings.²

[*6]** **HN3**^(↑) On appeal, the ALJ's findings must be affirmed if they are supported by substantial evidence in the record. **HN4**^(↑) Substantial evidence is "evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached." *Lark v. Bi-Lo*, 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981). **HN5**^(↑) A

² *Marlboro Park Hosp. v. South Carolina Dep't of Health and Env'tl. Control*, 358 S.C. 573, 595 S.E.2d 851, 2004 S.C. App. LEXIS 104, Op. No. 3774 (S.C. Ct. App. filed April 12, 2004) (Shearouse Adv. Sh. No. __ at __).

¹ This section was formerly § 44-96-290(G) and was redesignated as § 44-96-290(F) with the 2000 amendment.


reviewing court may reverse or **[**471]** modify the decision of any agency if substantial rights of the appellant have been prejudiced because the findings or decisions of the agency are:


- (a) in violation of the 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(D) (Supp. 2003).


We reverse the decision of the circuit court because substantial rights of SRR1 have been prejudiced. The finding of the circuit court the revocation of the consistency **[***7]** determination compelled denial of the permit is affected by error of law.

I.

HN6  The South Carolina Solid Waste Policy and Management Act, *S.C. Code Ann. § 44-96-10, et seq.* (2002) (the SWPMA), requires a person obtain a permit from DHEC before operating a solid waste management facility. *S.C. Code Ann. § 44-96-290(A)*. Permits are issued based upon local need for the requested facility and the consistency of the proposed facility with local ordinances. *S.C. Code Ann. § 44-96-290(E)*. DHEC cannot issue a permit unless the proposed facility is consistent with "local zoning, land use, and other applicable **[*408]** ordinances." The SWPMA does not specify procedures for DHEC to follow in making need and consistency determinations.


DHEC's practice has been to delegate to the counties the authority to determine consistency through the counties' issuance of LOCs. We conclude **HN7**  this delegation of authority is impermissible. *S.C. Code Ann. § 44-96-290(F)* does not give a county veto authority over decisions made by DHEC. There is no statutory authority providing a county's consistency **[***8]** determination is determinative of the ultimate permitting decision. 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.


In this case, DHEC withdrew its initial decision to issue the permit in error because it based its decision solely on Newberry County's withdrawal of the LOC. **HN8**  The SWPMA authorizes DHEC to "issue, deny, revoke or modify permits, registrations, or orders under such conditions as the department may prescribe...for the operation of solid waste management facilities." *S.C. Code Ann. § 44-96-260(2)* (2002). DHEC, not the county, is charged with ensuring such facilities meet the requirements for permitting.

II.

Under the facts of this case, there is no basis for concluding the proposed landfill is inconsistent with the Newberry County Solid Waste Management Plan. The ALJ relied on Section 4.1.3 of the Plan. Section 4.1.3 of the plan "Industrial Collection" provides:

HN9  In Newberry County, industries are responsible for their own solid waste collection **[***9]** and disposal. There are several private haulers operating in the County under separate contracts with different industries. This stream of solid waste is completely outside the operation, direct knowledge or control of Newberry County.

We agree with the circuit court that Section 4.1.3 **HN10**  of the Plan refers only to private haulers who are operating in the County under contracts with different industries. Therefore, this **[*409]** provision has no application to the prohibition of the establishment of an industrial waste landfill.

Instead of relying on Section 4.1.3 of the Plan, the circuit court relied on Section 10.2 in finding the proposed facility inconsistent with the Plan. ³ Section 10.2 **HN11**  discusses the **[**472]** 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

³ Section 10.2 of the Plan appears only once in the Record. In a letter from the Newberry County attorney to the County Administrator, the County's attorney indicated the proposed landfill would violate Section 10.2.

capricious basis, any proposed landfill facility falls [***10] 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.

Having determined the facility is not inconsistent with Newberry County's SWPMA, we conclude the permit should be issued and effective. Before issuing the initial permit in September 1997, DHEC experts determined the facility met all regulatory requirements based on a meticulous study of SRRI's proposed facility. DHEC properly applied the requirements of 25 S.C. Code Ann. Reg. 61-66 (1976) relating to Industrial Waste Landfills. A public hearing concerning the proposed facility was conducted in March 1997. DHEC received comments both during and after the hearing. These comments were addressed by DHEC in a document entitled "Responsiveness [***11] Summary." DHEC made specific findings including, but not limited to, groundwater protection, excavation procedures, and the design of disposal cells as related to the SRRI facility. Based on DHEC's thorough analysis of the proposed facility, they concluded, and we agree, the facility is not inconsistent with the County SWPMA or DHEC's regulatory requirements.

Our resolution of this matter makes unnecessary a consideration of the remaining issues presented by SRRI. The permit [*410] complies with Act 100 in that it imposes a 1,000-foot setback from the mobile home.

Because DHEC's revocation of the permit was based solely on Newberry County's withdrawal of its LOC and the proposed facility is not inconsistent with the Newberry County Plan, we reverse and order the permit issued and effective.

REVERSED .

TOAL, C.J., MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

York County v. S.C. Dep't of Health & Env'tl. Control

Court of Appeals of South Carolina

May 4, 2011, Heard; February 8, 2012, Filed

Opinion No. 4940

Reporter

397 S.C. 217 *; 723 S.E.2d 255 **; 2012 S.C. App. LEXIS 44 ***; 2012 WL 386588

York County, Appellant, v. South Carolina Department of Health and Environmental Control and C&D Management Company, LLC, Respondents.

Subsequent History: Rehearing denied by York County v. SCDHEC, 2012 S.C. App. LEXIS 100 (S.C. Ct. App., Mar. 29, 2012)

Writ of certiorari granted York County v. SCDHEC, 2013 S.C. LEXIS 271 (S.C., Sept. 9, 2013)

Writ of certiorari dismissed York County v. S.C. Dep't of Health & Env'tl. Control, 2014 S.C. LEXIS 139 (S.C., May 14, 2014)

Prior History: [***1] Appeal from the Administrative Law Court. Carolyn C. Matthews, Administrative Law Judge.

Disposition: AFFIRMED.

Core Terms

emergency ordinance, landfill, ordinances, solid waste management, consistency, moratorium, county's, solid waste, determinations, enact, issues, proposed facility, delegating, municipal, requires

Case Summary

Overview

The South Carolina Department of Health and Environmental Control (DHEC) issued an applicant a permit for a landfill in a county. The county argued that the DHEC impermissibly ignored an emergency ordinance, which the county enacted, purporting to

impose a moratorium on the construction of any new landfills. However, the DHEC properly disregarded the emergency ordinance in making its permitting decision because the emergency ordinance was not consistent with state law, in violation of S.C. Code Ann. § 44-96-80(K), and was therefore not applicable under S.C. Code Ann. § 44-96-290(F) (2002).

Outcome

Judgment affirmed.

LexisNexis® Headnotes

Environmental Law > Solid Wastes > Disposal Planning

Environmental Law > Solid Wastes > Permits > Disposal

Governments > Local Governments > Duties & Powers

HN1 [] The South Carolina Solid Waste Policy and Management Act provides that each county must adopt a solid waste management plan. S.C. Code Ann. § 44-96-80 (2002). Before the South Carolina Department of Health and Environmental Control (DHEC) may issue any permit for the construction and operation of a landfill in a particular county, the DHEC must determine that the proposed landfill is consistent with the county's solid waste management plan and other applicable local ordinances. S.C. Code Ann. § 44-96-290(F) (2002).

Environmental Law > Solid Wastes > Disposal Planning

Environmental Law > Solid Wastes > Municipal Landfills

Environmental Law > Solid Wastes > Permits > Disposal

HN2 [] The South Carolina Department of Health and Environmental Control (DHEC) alone has the authority

397 S.C. 217, *217; 723 S.E.2d 255, **255; 2012 S.C. App. LEXIS 44, ***1

to make consistency determinations regarding a proposed landfill. The DHEC may not delegate that authority to counties.

Environmental Law > Solid Wastes > Disposal Planning

Environmental Law > Solid Wastes > Permits > Disposal

HN3 [↓] There is no statutory authority providing a county's consistency determination is determinative of an ultimate permitting decision. Although *S.C. Code Ann. § 44-96-290(F)* (2002) 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. The South Carolina Department of Health and Environmental Control, not the county, is charged with ensuring solid waste management facilities meet the requirements for permitting.

Environmental Law > Solid Wastes > Disposal Planning

Environmental Law > Solid Wastes > Permits > Disposal

Governments > Local Governments > Ordinances & Regulations

HN4 [↓] *S.C. Code Ann. § 44-96-80(K)* prohibits a county from enacting an ordinance that is inconsistent with state law. It is inconsistent with state law for the South Carolina Department of Health and Environmental Control to follow a county's consistency determination.

Administrative Law > Judicial

Review > Reviewability > Factual Determinations

Administrative Law > Judicial Review > Standards of Review > Clearly Erroneous Standard of Review

Administrative Law > Judicial Review > Standards of Review > Substantial Evidence

HN5 [↓] *S.C. Code Ann. § 1-23-610(B)* (Supp. 2010) provides that an appellate court may reverse a decision of the South Carolina Administrative Law Court (ALC) that is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. A factual decision of the ALC should be upheld if it is supported by substantial evidence in the record.

Counsel: Amy E. Armstrong and James S. Chandler, Jr., both of Pawleys Island, for Appellant.

Susan A. Lake, of Columbia, for Respondent South Carolina Department of Health and Environmental Control.

W. Thomas Lavender, Jr., and Joan W. Hartley, both of Columbia, and Leon C. Harmon, of Greenville, for Respondent C&D Management Company, LLC.

Judges: FEW, C.J. PIEPER, J., concurs. LOCKEMY, J., dissents in a separate opinion.

Opinion by: FEW

Opinion

[*218] [255] FEW, C.J.:** The South Carolina Department of Health and Environmental Control (DHEC) issued C&D Management Company a permit for a construction, demolition, and land-clearing debris landfill in York County. The County challenged that decision before the Administrative Law Court (ALC), which ruled in favor of C&D Management. The County appeals the ALC's judgment, arguing DHEC impermissibly ignored a County ordinance purporting to impose a moratorium on the construction of any new landfills. We affirm.

I. Facts and Procedural History

HN1 [↑] The South Carolina Solid Waste Policy and Management Act provides that each county must adopt a solid waste management plan. *S.C. Code Ann. § 44-96-80* (2002). Before **[***2]** DHEC may issue any permit for the construction and operation of a landfill in a particular county, DHEC must determine that the proposed landfill is consistent with the county's solid **[*219]** waste management plan and other applicable local ordinances. *S.C. Code Ann. § 44-96-290(F)* (2002).

In August 2005, C&D Management submitted an application to DHEC for a permit for the landfill. At that time, York County managed its solid waste using the 1994 Catawba Regional Solid Waste Management Plan (1994 Plan). In September 2005, DHEC issued a letter to C&D Management stating it made a determination that the landfill was consistent with the 1994 Plan.

While DHEC continued to process C&D Management's application over the next year, the County moved

397 S.C. 217, *219; 723 S.E.2d 255, **255; 2012 S.C. App. LEXIS 44, ***2

towards adopting a new solid waste management plan. On January 9, 2007, York County Council passed what it [**256] called an "emergency ordinance," which stated "all proposed landfills and landfill expansions not yet permitted by DHEC are declared inconsistent with the 1994 Plan." The emergency ordinance described the declaration as a "moratorium" that would give the County more time to complete and adopt a new plan.

Initially, DHEC believed the emergency ordinance [***3] prevented it from issuing C&D Management a permit for the landfill. However, DHEC ultimately determined the emergency ordinance did not affect its determination that the proposed landfill was consistent with the 1994 Plan. On February 22, 2007, it issued C&D Management a permit.

The County asked the South Carolina Board of Health and Environmental Control to review DHEC's decision to issue the permit. The Board declined, and the County requested a contested case hearing before the ALC.

The ALC affirmed DHEC's decision to issue the permit. With regard to the emergency ordinance, the ALC determined that under *Southeast Resource Recovery, Inc. v. South Carolina Department of Health & Environmental Control*, 358 S.C. 402, 595 S.E.2d 468 (2004) (per curiam), DHEC could not defer to the County's declaration of inconsistency, as doing so would amount to an improper delegation of DHEC's exclusive authority over permitting decisions for solid waste management facilities. The ALC therefore concluded DHEC properly disregarded the emergency ordinance in making its permitting decision.

[*220] II. Effect of the Emergency Ordinance

We agree DHEC properly disregarded the emergency ordinance. Our supreme court [***4] has made clear that *HN2* [↑] DHEC alone has the authority to make consistency determinations. In *Southeast Resource Recovery*, the court held DHEC may not delegate that authority to counties. *358 S.C. at 408, 595 S.E.2d at 471*. Prior to the court's decision in that case, DHEC's practice was to leave consistency determinations to county governments, which issued their determinations in the form of letters of consistency. *Id.* The court held the practice was impermissible, stating:

HN3 [↑] There is no statutory authority providing a county's consistency determination is determinative of the ultimate permitting decision. 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.

. . . DHEC, not the county, is charged with ensuring [solid waste management] facilities meet the requirements for permitting.

Id.; see also *Sandlands C & D, LLC v. Cnty. of Horry*, 394 S.C. 451, 463, 716 S.E.2d 280, 286 (2011) (stating "there is no doubt the express language of the [Solid Waste Policy and Management Act] provides for DHEC's exclusive authority [***5] in the area of permitting" (emphasis in original omitted)).

We view the emergency ordinance as an effort by the County to control DHEC's permitting decision. The only effect the emergency ordinance purports to have is to impose a "moratorium" on new and expanded landfills in York County. The section entitled "Scope of Moratorium" states in its entirety: "During the time that the emergency moratorium is in effect, all proposed landfills and landfill expansions not yet permitted by DHEC are declared inconsistent with the 1994 Plan." No other language in the emergency ordinance explains the scope or the effect of the moratorium. Therefore, by its own terms, the emergency ordinance merely makes a blanket determination that all new landfills are inconsistent with the 1994 Plan.

[*221] Looking past the emergency ordinance's "moratorium" label and focusing instead on its content and actual effect, we find no meaningful distinction between the emergency ordinance and the letters of consistency that *Southeast Resource Recovery* prohibits DHEC from following. In both situations, a county makes a consistency determination regarding a proposed landfill—a power only DHEC may exercise. The only difference [***6] here is that instead of DHEC willingly delegating its authority to local government, as it did in *Southeast Resource Recovery*, local government has attempted to usurp that authority.

[**257] Because DHEC could not follow the emergency ordinance without delegating its authority in violation of *Southeast Resource Recovery*, DHEC was required to disregard it.

The County argues it had the authority to enact the emergency ordinance, and because *subsection 44-96-290(F)* requires DHEC to consider "applicable local ordinances" when it makes a consistency determination, DHEC was required to consider whether the proposed landfill was consistent with the emergency ordinance.

397 S.C. 217, *221; 723 S.E.2d 255, **257; 2012 S.C. App. LEXIS 44, ***6

We disagree. HN4 Subsection 44-96-80(K), on which the County relies for its authority, prohibits a county from enacting an ordinance that is inconsistent with state law. As Southeast Resource Recovery explains, it is inconsistent with state law for DHEC to follow a county's consistency determination. See 358 S.C. at 408, 595 S.E.2d at 471. In this respect, the emergency ordinance is not consistent with state law, and is therefore not "applicable" under subsection 44-96-290(F). DHEC properly disregarded the emergency ordinance.

III. Other [***7] Issues

The remaining issues the County raises relate to factual determinations. As to those issues, we affirm pursuant to Rule 220(b)(1), SCACR, and the following authorities: HN5 S.C. Code Ann. § 1-23-610(B) (Supp. 2010) (providing this court may reverse a decision of the ALC that is "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record"); Risher v. S.C. Dep't of Health & Envtl. Control, 393 S.C. 198, 204, 712 S.E.2d 428, 431 (2011) (stating a factual decision of the ALC should be upheld if it is supported by substantial evidence in the record).

[*222] The judgment of the Administrative Law Court is

AFFIRMED.

PIEPER, J., concurs.

LOCKEMY, J., dissents in a separate opinion.

Dissent by: LOCKEMY

Dissent

LOCKEMY, J. dissenting: I respectfully dissent. Although I agree with the majority decision to affirm the other issues, I would reverse the ALC's determination that the proposed landfill was consistent with the 1994 Plan, and revoke C&D's permit for the proposed landfill based on the County Council's enactment of the emergency ordinance.

The ALC determined the County Council enacted the emergency ordinance in an attempt to affect DHEC's permitting decision, and therefore, it was [***8] impermissible under Southeast Resource Recovery. The ALC also found, under Simpkins v. City of Gaffney, 315 S.C. 26, 431 S.E.2d 592 (Ct. App. 1993), that the County Council lacked the authority to

enact an ordinance imposing a moratorium on DHEC's permitting authority. According to the ALC, the emergency ordinance was an attempt by the County Council to affect DHEC's permitting decisions, and therefore, it was inconsistent with sections 44-96-260(2) and 44-96-290(A) of the Solid Waste Act, which give DHEC the exclusive authority to issue permits for the construction of solid waste management facilities. I disagree.

I would find the ALC erred in determining the emergency ordinance was inconsistent with the Solid Waste Act. Pursuant to section 44-96-80(K),

[t]he governing body of a county is authorized to enact such ordinances as may be necessary to carry out its responsibilities under this chapter; provided, however, that the governing body of a county may not enact an ordinance inconsistent with the state solid waste management plan, with any provision of this chapter, with any other applicable provision of state law, or with any regulation promulgated by the department providing for [***9] the protection of public health and safety or for protection of the environment.

[*223] S.C. Code Ann. § 44-96-80(K) (2002). While DHEC has the sole authority to issue landfill permits and make consistency determinations, the governing body of each county has the authority, pursuant to section 44-96-80(A), to determine the content of the county's solid waste management plan. In addition, [***258] counties have the authority to enact ordinances to carry out their responsibilities under their plans. Here, the County Council adopted the emergency ordinance to preserve the status quo while it reviewed and modified its solid waste plan. The County began efforts to revise its solid waste management plan in 2003. In August 2006, the County Council gave first reading to Ordinance 207 which authorized the County to withdraw from the 1994 Plan and adopt a new County solid waste management plan. Thereafter, in October 2006, the County Council gave second reading to Ordinance 207. On January 8, 2007, the County Council adopted the emergency ordinance. On January 30, 2007, DHEC notified C&D it was holding C&D's landfill permit in abeyance while it considered the effect and validity of the emergency ordinance. Thereafter, [***10] on February 22, 2007, DHEC determined the emergency ordinance did not amend the 1994 Plan and issued C&D a permit for the proposed landfill. On February 28, 2007, the County Council gave third reading and adopted Ordinance 207 which created a separate York County Solid Waste

397 S.C. 217, *223; 723 S.E.2d 255, **258; 2012 S.C. App. LEXIS 44, ***10

Management Plan.

The emergency ordinance stated that "an imminent peril to the public health, safety, welfare and property rights require[d] the adoption of an emergency ordinance and moratorium." The emergency ordinance further provided that its adoption was necessary to give the County sufficient time to study and review issues concerning the impact of unprecedented growth and development, and to evaluate the need for additional waste disposal sites. I would find the County Council acted within its authority under section 44-96-80(K) in enacting the emergency ordinance. See Sandlands, 394 S.C. at 463-64, 716 S.E.2d at 286 (holding neither the Solid Waste Act nor the DON Regulation contain express provisions prohibiting county regulation of the flow of waste) (citing S.C. Code Ann. § 44-96-80 (A), (J), (K); S.C. Code Ann. § 44-96-290(F) (Supp. 2010) ("[N]o permit to construct a new solid waste management facility [***11] or to expand an existing solid [***224] 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); S.C. Code Ann. Regs. § 61-107.B.5.c (Supp. 2010) (requiring consistency determinations account for any local ordinances)).

I would also find neither Southeast Resource Recovery nor Simpkins are applicable in this case. In Southeast Resource Recovery, our supreme court found DHEC's practice of delegating to the counties the authority to determine consistency through the counties' issuance of letters of consistency was impermissible. 358 S.C. at 408, 595 S.E.2d at 471. The court determined that 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." Id. Southeast Resource Recovery is not applicable to this case because the emergency ordinance is not a consistency determination. The emergency ordinance was adopted by the County Council [***12] to carry out the County's solid waste plan as authorized by section 44-96-80(K).

I would also find the ALC erred in relying on Simpkins in determining the County Council lacked the authority to impose a moratorium on DHEC's permitting decisions. In Simpkins, this court found a city council did not have the authority to put a moratorium in place by merely passing a motion to that effect. 315 S.C. at 29, 431 S.E.2d at 594. The Simpkins court found neither

sections 5-23-40 and 5-23-50, which grant municipal corporations the authority to provide for the manner in which zoning regulations are established and amended, nor any other statute supplies authority for a municipal corporation to suspend an ordinance by merely passing a motion creating a moratorium. Id. The court noted our supreme court has held municipal ordinances cannot ordinarily be amended or repealed by a mere resolution, and instead, a new ordinance must be passed. Id. Here, unlike in Simpkins, the County Council enacted a new ordinance to modify and amend the 1994 Plan, and did not merely pass a motion that called for a moratorium.

[**259] [***225] Finally, the effect of the majority decision permits an agency of this state to ignore legislation [***13] adopted and duly passed by representatives of the people of a local government. The emergency ordinance was neither a consistency determination nor a motion, but was an ordinance duly adopted by the required *super majority vote* of the County Council members present pursuant to section 4-9-130 of the South Carolina Code of Laws (1986). If there was concern about the legality or constitutionality of the legislation, then a challenge, including injunctive relief, should have been instituted in circuit court. The County Council complied with the long legal process to adopt a new solid waste management plan. It was only after the County was at the precipice of this process that the emergency ordinance was adopted, not as a consistency determination, but to preserve the status quo while the new plan was completed. Indeed, DHEC took no action for three weeks after its adoption and then decided to suspend the permitting process for another three weeks. Six weeks was more than enough time to seek temporary and immediate injunctive relief from a judicial body if there was a question about the effect and validity of the duly adopted legislation. Instead, on the virtual eve of third reading and [***14] with time running out before the effective date of the new solid waste management plan, DHEC chose to issue the permit just ahead of the pending legislation.

Even assuming my colleagues are correct, in hindsight, that "DHEC properly disregarded the emergency ordinance," are we to permit an agency of the executive branch of government to just disregard such laws of a legislative body on its own determination prior to any judicial review? If agencies are permitted to unilaterally decide to ignore county legislation prior to judicial review can they also do so for state legislation they deem improperly passed? Just to say that the emergency ordinance was reviewed by this court and eventually found to be improper overlooks the effect had no appeal

397 S.C. 217, *225; 723 S.E.2d 255, **259; 2012 S.C. App. LEXIS 44, ***14

been taken from the ALC determination. There are many small municipalities in South Carolina that are too financially strained to challenge big state agencies wielding executive, legislative, and judicial power.

Accordingly, I would find the ALC erred in determining the emergency ordinance was inconsistent with the Solid Waste [*226] Act. I would reverse the ALC's determination that the proposed landfill was consistent with the County's solid waste management [***15] plan and revoke C&D's permit for the proposed landfill.

End of Document

Grand Bees Dev., LLC v. S.C. Dep't of Health & Env'tl. Control

Court of Appeals of South Carolina

October 9, 2014, Heard; May 27, 2015, Filed

Unpublished Opinion No. 2015-UP-269

Reporter

2015 S.C. App. Unpub. LEXIS 322 *; 2015 WL 3409056

Grand Bees Development, LLC, Respondent, v. South Carolina Department of Health and Environmental Control and County of Charleston, Appellants.

Notice: 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.

Subsequent History: Rehearing denied by *Grand Bees Dev. v. SCDHEC*, 2015 S.C. App. Unpub. LEXIS 535 (S.C. Ct. App., July 17, 2015)

Writ of certiorari denied *Grand Bees Dev. v. S.C. Dep't of Health & Env'tl. Control*, 2016 S.C. LEXIS 132 (S.C., May 19, 2016)

Prior History: [*1] Appellate Case No. 2013-001141. Appeal From The Administrative Law Court. Shirley C. Robinson, Administrative Law Judge.

Disposition: AFFIRMED.

Core Terms

modification, ordinances, landfill, zoning, consistency, requirements, vacated, mound

Counsel: 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.

Judges: FEW, C.J., and THOMAS and LOCKEMY, JJ., concur.

Opinion

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 [*2] 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 [*3] 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. [*4] 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. [*5] 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 [*6] 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

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

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.

End of Document

address the arguments in its final order).



Neutral

As of: June 21, 2017 7:38 PM Z

Grand Bees Dev. v. S.C. Dep't of Health & Env'tl. Control

Supreme Court of South Carolina

May 19, 2016, Decided

No Number in Original

Reporter

2016 S.C. LEXIS 132 *

Grand Bees Development v. SCDHEC

Notice: DECISION WITHOUT PUBLISHED OPINION

Prior History: [*1] 2015-UP-269

Grand Bees Dev., LLC v. S.C. Dep't of Health & Env'tl. Control, 2015 S.C. App. Unpub. LEXIS 322 (S.C. Ct. App., May 27, 2015)

Opinion

Petition for Writ of Certiorari Denied.

End of Document