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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2021-2022

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Bobby Lewis, Michael Del Vecchio, David Del Vecchio, Peggy R. Del Vecchio, William P. Novack, and Tara Novack

v.

Alabama Department of Environmental Management; Lance R. LeFleur, in his official capacity as director of the Alabama Department of Environmental Management; Alabama Environmental Management Commission; Samuel L. Miller, Kevin McKinstry, Thomas P. Walters, Ruby L. Perry, Mary J. Merritt, and John H. Masingill III, in their official capacities as members of the Alabama Environmental Management Commission; and the City of Dothan

**Appeal from Montgomery Circuit Court
(CV-20-900877)**

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MOORE, Judge.

Bobby Lewis, Michael Del Vecchio, David Del Vecchio, Peggy R. Del Vecchio, William P. Novack, and Tara Novack ("the landowners") appeal from a judgment entered by the Montgomery Circuit Court ("the trial court") in favor of the Alabama Department of Environmental Management ("ADEM"); Lance R. LeFleur ("the director"), in his official capacity as the director of ADEM; the Alabama Environmental Management Commission ("the EMC"); Samuel L. Miller, Kevin McKinstry, Thomas P. Walters, Ruby L. Perry, Mary J. Merritt, and John H. Masingill III, in their official capacities as members of the EMC ("the EMC commissioners"); and the City of Dothan ("the City"). We reverse the trial court's judgment.

Statutory Background

The Solid Wastes and Recyclable Materials Management Act ("the SWRMA"), Ala. Code 1975, § 22-27-1 et seq., regulates the disposal of solid waste in this state. In enacting the SWRMA, the legislature intended "[t]o develop an integrated system of planning for solid waste management in the state by local governments, regional planning commissions and the

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department." Ala. Code 1975, § 22-27-42(1). The "department" referred to in § 22-27-42(1) is ADEM. Ala. Code 1975, § 22-27-2(6). The SWRMA expressly recognizes

"the responsibilities of units of local government for the orderly management of solid wastes generated within their jurisdictions[] and ... require[s] that decisions about the management of solid wastes shall be based on comprehensive local, regional and state planning. The terms and obligations of [the SWRMA] shall be liberally construed to achieve remedies intended."

Ala. Code 1975, § 22-27-41. Accordingly, the SWRMA provides that each municipality in the state shall submit to ADEM and maintain and implement "a plan for the management of solid waste generated within its boundaries." Ala. Code 1975, § 22-27-47(a).

"In addition to any regulatory bodies, the governing body of a county or municipality has a responsibility for and the authority to assure the proper management of solid wastes generated within its jurisdiction in accord with its solid waste management plan. A governing body may assign territories and approve or disapprove disposal sites in its jurisdiction in accord with the plan approved for its jurisdiction. Such approval or disapproval of services or activities described in the local plan shall be in addition to any other approvals required from other regulatory authorities and shall be made prior to any other approvals necessary for the provision of such services, the development of a proposed facility or the modification of permits for existing facilities."

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Ala. Code 1975, § 22-27-48(a).

The SWRMA authorizes the state's various municipalities to dispose of solid wastes in local sanitary landfills, subject to the approval of ADEM. See Ala. Code 1975, §§ 22-27-3(a), 22-27-7, and 22-27-10(a). No sanitary landfill may be established and operated without a permit. § 22-27-10(a). Under Ala. Code 1975, § 22-27-9(a), ADEM bears "the regulatory authority over the permitting and operation of solid waste management facilities, such as sanitary landfills." However, § 22-27-48(b) provides:

"[ADEM] may not consider an application for a new facility unless the application has received approval pursuant to [Ala. Code 1975, §], 22-27-48.1[,] by the affected local governing body. [ADEM] may not consider an application for a modified permit for a facility unless such application has received approval pursuant to this section by the affected local governing body."

(Emphasis added.)

Before approving the modification of a permit for an existing sanitary landfill, the governing body of a municipality must notify the public of the proposed modification and conduct a public meeting to receive comments relating to the proposal. § 22-27-48(e).

"In determining whether to recommend approval of the proposed issuance of or modification of a new or existing solid waste management site, the governing body shall consider each of the following criteria:

"(1) The consistency of the proposal with the jurisdiction's solid waste management need as identified in its plan.

"(2) The relationship of the proposal to local planned or existing development or the absence thereof, to major transportation arteries and to existing state primary and secondary roads.

"(3) The location of a proposed facility in relationship to existing industries in the state that generate large volumes of solid waste, or the relationship to the areas projected for development of industries that will generate solid waste.

"(4) Costs and availability of public services, facilities and improvements required to support a proposed facility and protect public health, safety, and the environment.

"(5) The impact of a proposed facility on public safety and provisions made to minimize the impact on public health and safety.

"(6) The social and economic impacts of a proposed facility on the affected community, including changes in property values, and social or community perception."

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§ 22-27-48(c). The local governing body shall either approve or disapprove the proposed modification within 90 days. § 22-27-48(f).

Factual and Procedural Background

The City disposes of its solid waste in the City of Dothan Sanitary Landfill ("the landfill"). On October 21, 2013, ADEM issued a renewal of Solid Waste Disposal Facility Permit No. 35-06 ("the permit") for the landfill, indicating that the landfill consisted of approximately 78 acres, with 55 of those acres being designated for disposal operations at that time.

On April 1, 2014, the Board of Commissioners of the City ("the Board") adopted Resolution No. 2014-74 authorizing the City to enter into an agreement with CDG Engineers & Associates ("CDG") to design an expansion of the landfill and to assist in obtaining a modification of the permit for that expansion. On August 2, 2014, the City published in the Dothan Eagle, a local newspaper of general circulation, a "NOTICE OF HEARING TO ACCEPT PUBLIC COMMENT CONCERNING APPROVAL OF A MODIFICATION TO THE CITY OF DOTHAN LANDFILL." (Capitalization in original.) That notice provided, in

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pertinent part, that the City would be holding a hearing on September 2, 2014, to accept public comments regarding local approval of the expansion of the landfill. The notice also indicated that, in determining whether to recommend approval of the proposed expansion of the landfill, the Board would be considering each of the six criteria prescribed by § 22-27-48(c).

According to the minutes of the September 2, 2014, meeting, Daniel Wells, a CDG representative, indicated that CDG was still in the process of designing the proposed expansion to the landfill and that the "permitting plans [for the expansion of the landfill] should be completed by the end of 2014." Ernie Stokes, the City's chief civil engineer, estimated that the plans for the expansion would be submitted to ADEM in January 2015. The minutes further indicated that the City's "[Public Works Director, Jerry] Corbin[,] advised that there will be one more public hearing regarding the expansion of the ... landfill and a comment period will follow." Following the hearing, on September 16, 2014, the Board adopted Resolution No. 2014-246, which provided, in pertinent part, that "the City ... approve[d] the proposed expansion to the [landfill's] boundary ... to approximately 536 acres."

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Several times between 2015 and 2018, the City applied to ADEM to modify the permit to allow for the expansion of the landfill to 522.19 acres, with a disposal area of 69.9 acres, with the last application for modification being filed on May 15, 2018. The City submitted Resolution No. 2014-246 with each application. In a final determination, dated May 6, 2019, ADEM approved the City's application for the modification of the permit to allow an expansion of the landfill.

On June 6, 2019, the landowners, among others, filed a request for a hearing before the EMC to contest ADEM's modification of the permit. The landowners, all of whom live on properties adjacent to the landfill, asserted a number of challenges to the modification of the permit and sought an order from the EMC disapproving the permit in its entirety. On June 13, 2019, the EMC assigned the matter to a hearing officer for administrative review. On July 10, 2019, the City filed a motion for leave to intervene in the proceedings pursuant to Ala. Admin. Code (ADEM), r. 335-2-1-.08(6). After an eight-day hearing, beginning on August 19, 2019, and ending on September 19, 2019, the hearing officer entered a report recommending that the EMC disapprove the modification of the permit

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due to ADEM's lack of compliance with § 22-27-48(b), among other reasons not pertinent to this appeal.

All the parties filed objections to the hearing officer's recommendation. On June 12, 2020, the EMC entered a final order disagreeing with the hearing officer. The EMC's final order approved the modification of the permit, concluding, among other things, that ADEM had complied with § 22-27-48(b). On July 10, 2020, the landowners filed a notice of appeal to the trial court from the decision of the EMC, naming as appellees ADEM, the director, the EMC, the EMC commissioners, and the City. After receiving briefs from the parties, on February 2, 2021, the trial court entered a final judgment affirming the EMC's final order, concluding, among other things, that "substantial evidence exists to support the [EMC's] decision to approve the permit and that the decision is not arbitrary or affected by error of law." The landowners timely filed their notice of appeal to this court on March 15, 2021.

Standard of Review

"This court reviews a circuit court's judgment as to an agency's decision without a presumption of correctness because the circuit court is

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in no better position to review the agency's decision than is this court."

Affinity Hosp., LLC v. St. Vincent's Health System, 129 So. 3d 1022, 1025

(Ala. Civ. App. 2012).

" 'In reviewing the determination of the [Environmental Management] Commission, this court's standard of review is the same as that of the trial court.' Plumbers & Steamfitters, Local 52 v. Alabama Dep't of Env'tl. Mgmt., 647 So. 2d 793, 795 (Ala. Civ. App. 1994). Because this case does not involve issues related to perfecting an appeal under § 22-22A-7(c)(6), Ala. Code 1975, our standard of review of the [Environmental Management Commission's] decision is governed by the Alabama Administrative Procedure Act ('AAPA'), § 41-22-20, Ala. Code 1975. Under the AAPA, this court may reverse administrative decisions only under limited circumstances:

" '(k) Except where judicial review is by trial de novo, the agency order shall be taken as prima facie just and reasonable and the court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.... The court may reverse or modify the decision or grant other appropriate relief from the agency action ... if the court finds that the agency action is due to be set aside or modified under standards set forth in appeal or review statutes applicable to that agency or if substantial rights of the petitioner have been prejudiced because the agency action is any one or more of the following:

" '(1) In violation of constitutional or statutory provisions;

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" '(2) In excess of the statutory authority of the agency;

" '(3) In violation of any pertinent agency rule;

" '(4) Made upon unlawful procedure;

" '(5) Affected by other error of law;

" '(6) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

" '(7) Unreasonable, arbitrary, or capricious, or characterized by an abuse of discretion or a clearly unwarranted exercise of discretion.'

"§ 41-22-20(k), Ala. Code 1975. There 'is no presumption of correctness afforded to the [Environmental Management Commission's] legal conclusions or its application of the law to the facts.' Medical Licensure Comm'n of Alabama v. Herrera, 918 So. 2d 918, 926 (Ala. Civ. App. 2005)."

Alabama Dep't of Env't Mgmt. v. Legal Env't Assistance Found., Inc., 973 So. 2d 369, 375-76 (Ala. Civ. App. 2007).

Issue

The dispositive issue on appeal concerns whether the City and ADEM complied with § 22-27-48. The landowners maintain that § 22-27-

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48(b) required ADEM to withhold consideration of any proposed modification of the permit until it had obtained the City's approval of the application for the modification; that the Board, the City's governing body, did not properly approve the application for the modification in accordance with the procedure set forth in § 22-27-48; and that ADEM improperly approved the application for the modification of the permit without the statutorily required approval of the local governing body.

Analysis

We begin by agreeing with the landowners that § 22-27-48(b) unambiguously provides that ADEM may not consider an application for modification of a permit for an existing sanitary landfill unless it first obtains the approval of the permit application by the affected local governing body.

In Fitzjarrald v. City of Huntsville, 597 So. 2d 1378 (Ala. Civ. App. 1992), this court considered a challenge to the City of Huntsville's approval of the location of a new landfill in Limestone County. In reversing a judgment that dismissed the plaintiffs' action for injunctive

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relief, this court explained the process for obtaining a permit for a new landfill as follows:

"Section 22-27-48, [Ala.] Code 1975, describes the process through which a city assures proper management of its solid wastes in accordance with its waste management plan. The statute is clear that '[a] governing body may ... approve disposal sites in its jurisdiction in accord with the plan approved for its jurisdiction.' § 22-27-48(a). The statute is also clear that the local approval is 'in addition to any other approvals required from other regulatory authorities and shall be made prior to any other approvals necessary.' § 22-27-48(a) (emphasis added). Moreover, ADEM may not even consider a permit application unless it has already been approved by the local government unit. § 22-27-48(a)."

597 So. 2d at 1379 (final emphasis added). Fitzjarrald did not address the procedure for obtaining a modification of a permit for an existing solid-waste-disposal facility, but we conclude that the procedure is identical insofar as it requires prior approval of the application by the local governing body.

The second sentence of § 22-27-48(b) provides that "[ADEM] may not consider an application for a modified permit for a facility unless such application has received approval pursuant to this section by the affected local governing body." As this court explained in City of Brundidge v.

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Alabama Department of Environmental Management, 218 So. 3d 798, 812 (Ala. Civ. App. 2016), when construing § 22-27-48(a), " '[s]uch is properly used as an adjective when reference has previously been made to a category of persons or things.... [S]uch is a DEICTIC TERM that must refer to a clear antecedent.' Bryan A. Garner, Garner's Dictionary of Legal Usage 859 (3d ed. 2011)." In § 22-27-48(b), the clear antecedent to "such application" is the immediately preceding phrase "an application for a modified permit"; thus, the second sentence of § 22-27-48(b) directs that ADEM may not consider an application to modify a permit unless that same application has already been approved by the affected local governing body.

ADEM points out that modification applications contain technical analysis irrelevant to the factors enumerated in § 22-27-48(c) and argues that ADEM, and not a local governing body, has the specialized knowledge and expertise to assess that information when determining whether to approve the modification of a permit. This court understands the division of the responsibilities between ADEM and local governing bodies in regard to the permitting process, but we are not persuaded that that division of

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responsibilities trumps the clear and unambiguous language of § 22-27-48(b) requiring that the local governing body review and approve the same permit application as ADEM. Our reading of § 22-27-48(b) comports with the general legislative intent that local governing bodies shall assume responsibility for assuring that landfills operate according to their local plan for the disposal of solid waste, see §§ 22-27-41 and -42, and with the specific requirement in § 22-27-48(a) that local governing bodies approve the modifications of permits for existing disposal facilities "prior to any other approvals necessary for the provision of such services" and "in addition to any other approvals required from other regulatory authorities."

In this case, the Board did not approve the application for the modification of the permit submitted to ADEM when it adopted Resolution No. 2014-246. Mike Schmitz, the mayor of the City in 2014, testified that the City had not prepared an application for the expansion of the landfill for submission to ADEM as of September 16, 2014, the date the Board adopted Resolution No. 2014-246, because the proposed expansion was still in the design phase. In the resolution, the Board generally approved

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of the concept of expanding the landfill to approximately 536 acres, but it did not actually approve any application for a permit modification for that purpose, which application had not yet been formulated and which application would have revealed the exact design of the proposed expansion along with more specific information as to the impact of that particular design on the factors enumerated in § 22-27-48(c). Eric Sanderson, the chief of the Solid Waste Branch of the Land Division at ADEM, testified before the hearing officer that the Board had not passed any subsequent resolution to approve the application that was submitted to ADEM for the modification of the permit to allow an expansion of the landfill.

We conclude that the Board did not discharge its duty to examine and approve the application submitted to ADEM for the modification of the permit. As a result, ADEM did not receive the appropriate and necessary local governmental approval before considering and approving the application. The EMC acted beyond its statutory authority in approving the modification of the permit, and the trial court erred in concluding otherwise. We therefore reverse the judgment and remand the

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case for the trial court to conduct further proceedings consistent with this opinion. Because we are reversing on this basis, we pretermitt any discussion of the remaining issues raised by the landowners in this appeal.

REVERSED AND REMANDED WITH INSTRUCTIONS.

Thompson, P.J., and Edwards and Hanson, JJ., concur.

Fridy, J., recuses himself.