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I. PERSON AGGRIEVED BY EXISTING REGULATION NOT REQUIRED TO EXHAUST ADMINISTRATIVE REMEDY BY PETITIONING FOR PROMULGATION OF NEW REGULATION BEFORE PURSUING JUDICIAL REMEDY

In *Charleston Television, Inc. v. South Carolina Budget & Control Board*[1] the South Carolina Supreme Court held that a person affected by an existing administrative regulation need not participate in available rulemaking procedures before challenging the regulation in a declaratory judgment action. This holding clarifies a point of state administrative law and brings South Carolina in line with other states[2] and the Model State Administrative Procedure Act.[3]

The dispute arose in the context of a state procurement proceeding. For many years South Carolina Educational Television (ETV) had been interested in having its Charleston station broadcast from a 2000 foot tower, the maximum height allowed under federal regulations. In 1985-86 the General Assembly allocated funds for the project. Two local television stations, WCBD (Charleston Television) and WCSC (Tall Tower), planned to construct separate 2000 foot towers, and ETV solicited lease proposals from both stations.[4]

1. 301 S.C. 468, 392 S.E.2d 671 (1990), *rev'g* 296 S.C. 444, 373 S.E.2d 892 (Ct. App. 1988).

2. *See Annual Survey of South Carolina Law, Court Holds Administrative Remedies Not Exhausted Until Person Aggrieved by Existing Regulation Petitions for Promulgation of New Regulation*, 41 S.C.L. REV. 1 (1989). This analysis of the court of appeals treatment of the controversy collects and discusses cases from other jurisdictions.

3. UNIF. ADMIN. PROCEDURE ACT, 15 U.L.A. 1 (1981). *See infra* note 24 and accompanying text.

4. For a detailed discussion of the factual background to this controversy, see

The South Carolina Consolidated Procurement Code[5] exempts the leasing of real property for governmental bodies from the general requirement of competitive sealed bidding.[6] The procurement section governing these leases contains, however, a provision which states that the South Carolina Budget and Control Board (the Board) "shall promulgate regulations to implement the provisions of this Section which shall include . . . [p]rocedures for competitive bidding *where feasible*."[7] The Board failed to promulgate the required regulation, but did promulgate regulation 19-445.2120,[8] which provides procedures for the negotiation of leases when competitive bidding is not feasible.[9] In this case the Board determined that competitive bidding was not feasible and awarded the lease to Tall Tower.[10] Although Charleston Television's bid was lower, ETV cited technical differences to explain its preference for the Tall Tower proposal.[11]

Charleston Television challenged the lease award in two ways. First, it petitioned the Chief Procurement Officer to set aside the lease award.[12] The Chief Procurement Officer upheld the lease. On appeal the Procurement Review Panel ordered the lease rebid because ETV did not make certain technical information available to Charleston Television. The circuit court affirmed, but the supreme court reversed in *Tall Tower, Inc. v. South Carolina Procurement Review Panel*.[13] The *Tall Tower* court held that ETV was not required to provide tech-

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Charleston Television, Inc. v. South Carolina Budget & Control Bd., 296 S.C. 444, 450-54, 373 S.E.2d 892, 895-98 (Ct. App. 1988), *rev'd*, 301 S.C. 468, 392 S.E.2d 671 (1990).

5. S.C. CODE ANN. §§ 11-35-10 to -5270 (Law. Co-op. 1986 & Supp. 1990).

6. *See id.* § 11-35-1510 (Law. Co-op. 1986).

7. *Id.* § 11-35-1590(3) (emphasis added).

8. S.C. CODE REGS. 19-445.2120 (1976). The regulation provides in part:

> No governmental body shall contract for the lease, rental, or use of non-State-owned real property without approval of the Division of General Services, except as specified in Subsection C. Requests shall be directed to the Division of General Services, Real Property Management Section. The Division of General Services shall negotiate all leases of non-State-owned real property unless the governmental body has been certified by the Materials Management Office.

Id.

9. *See* Charleston Television, Inc. v. South Carolina Budget & Control Bd., 301 S.C. 468, 475, 392 S.E.2d 671, 675 (1990).

10. Charleston Television, Inc. v. South Carolina Budget & Control Bd., 296 S.C. 444, 453, 373 S.E.2d 892, 897 (Ct. App. 1988), *rev'd*, 301 S.C. 468, 392 S.E.2d 671 (1990).

11. *Id.* at 452, 373 S.E.2d at 897.

12. In pursuing this avenue, Charleston Television followed the protest resolution procedure established in the South Carolina Consolidated Procurement Code for "[a]ny actual . . . bidder . . . aggrieved in connection with the . . . award of a contract." S.C. CODE ANN. § 11-35-4210(1) (Law. Co-op. 1986).

13. 294 S.C. 225, 363 S.E.2d 683 (1987).

nical information to Charleston Television.[14]

Second, Charleston Television requested a declaratory ruling from the Board, pursuant to section 1-23-150(a),[15] that regulation 19-445.2120 was ineffective because the Board did not have the power to promulgate it. The Board found that competitive bidding was not feasible in the instant case, that it had the authority to promulgate regulation 19-445.2120, and that the regulation applied to the lease.[16] Charleston Television then sought a declaratory judgment and injunctive relief under section 1-23-150(b).[17]

The trial court held that the lease was void because of the Board's failure to promulgate a regulation, as mandated by section 11-35-1590, to provide procedures for competitive bidding when feasible.[18] The court of appeals reversed and held that Charleston Television was barred from seeking a judicial remedy.[19] Judge Gardner based his opinion on the grounds that Charleston Television had failed to exhaust its administrative remedy under section 1-23-126.[20] The supreme court reversed and held that it is not necessary for a party to exhaust its remedy under section 1-23-126 prior to seeking relief under section 1-23-150.[21] The supreme court concluded that competitive bidding was fea-

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14. *Id.* at 233-34, 363 S.E.2d at 687-88.

15. S.C. CODE ANN. § 1-23-150(a) (Law. Co-op. 1986). Section 1-23-150 governs appeals contesting the authority of a state agency to promulgate a regulation, and subsection (a) states: "Any person may petition an agency in writing for a declaratory ruling as to the applicability of any regulation of the agency or the authority of the agency to promulgate a particular regulation. The agency shall, within thirty days after receipt of such petition, issue a declaratory ruling thereon." *Id.*

16. Charleston Television, Inc. v. South Carolina Budget & Control Bd., 296 S.C. 444, 453, 373 S.E.2d 892, 897 (Ct. App. 1988), *rev'd*, 301 S.C. 468, 392 S.E.2d 671 (1990).

17. S.C. CODE ANN. § 1-23-150(b) (Law. Co-op. 1986). This section provides:

> After compliance with the provisions of paragraph (a) of this section, any person affected by the provisions of any regulation of an agency may petition the Circuit Court for a declaratory judgment and/or injunctive relief if it is alleged that the regulation or its threatened application interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the plaintiff or that the regulation exceeds the regulatory authority of the agency. The agency shall be made a party to the action.

Id.

18. *Charleston Television*, 296 S.C. at 454, 373 S.E.2d at 898.

19. *Id.* at 455-56, 373 S.E.2d at 898-99.

20. *Id.* Section 1-23-126 states: "An interested person may petition an agency in writing requesting the promulgation, amendment or repeal of a regulation. Within thirty days after submission of such petition, the agency shall either deny the petition in writing (stating its reasons for the denial) or shall initiate the action in such petition." S.C. CODE ANN. § 1-23-126 (Law. Co-op. 1986).

21. Charleston Television, Inc. v. South Carolina Budget & Control Bd., 301 S.C. 468, 472, 392 S.E.2d 671, 673 (1990).

sible in this case and ordered that the lease must be rebid.[22]

The supreme court noted that the comments to section 6 of the 1961 version of the Model State Administrative Procedure Act (the Model Act), from which the General Assembly fashioned section 1-23-126, "shed no light on the purpose of this section."[23] The court observed, however, that the comments to section 5-107 of the 1981 Model Act indicate that the drafters of the 1961 Model Act did not intend that a petitioner be required to exhaust this remedy before seeking judicial review.[24]

The supreme court's holding is not inconsistent with the administrative law principle that administrative remedies must be exhausted before a judicial remedy is pursued.[25] Administrative remedies may be unduly burdensome or provide inadequate relief for the affected person.[26] The supreme court simply recognized that this controversy presented a situation in which the exhaustion of administrative remedies was possible but not desirable.[27] A requirement that Charleston Television petition for a regulation establishing procedures for competitive bidding when feasible would have been burdensome and time-consuming. By the time Charleston Television could have pursued its

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22. *Id.* at 474-75, 392 S.E.2d at 674-75. The supreme court apparently reached this conclusion by equating competition with competitive bidding. The court reasoned that because competition existed, competitive bidding was clearly feasible. *Id.* at 474, 392 S.E.2d at 674. However, the record before the court contained a finding that competitive bidding was not feasible in this case. *Charleston Television*, 296 S.C. at 459, 373 S.E.2d at 901 (Bell, J., concurring). In his opinion concurring in the court of appeals decision, Judge Bell noted this unchallenged finding and argued that the lease should be upheld, not because Charleston Television failed to exhaust its remedy under section 1-23-126, but because Charleston Television lacked standing as an "affected person" under section 1-23-150(b) to challenge regulation 19-445.2120. *Id.* at 460, 373 S.E.2d at 901.

23. *Charleston Television*, 301 S.C. at 472, 392 S.E.2d at 673.

24. *Id.* Section 5-107 provides in part that:

> A person may file a petition for judicial review under this Act only after exhausting all administrative remedies available within the agency whose action is being challenged and within any other agency authorized to exercise administrative review, but:
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> (1) a petitioner for judicial review of a rule need not have participated in the rule-making proceeding upon which that rule is based, or have petitioned for its amendment or repeal.

UNIF. ADMIN. PROCEDURE ACT § 5-107, 15 U.L.A. 116 (1981). The comment to the section states, "Paragraph (1), like the 1961 Revised Model Act, imposes no exhaustion requirement on the petitioner for judicial review of a rule." *Id.* comment.

25. *See* K. DAVIS, ADMINISTRATIVE LAW TEXT § 20.01 (3d ed. 1972) ("The statement the courts so often repeat in their opinions—that judicial relief must be denied until administrative remedies have been exhausted—is seriously at variance with the holdings.").

26. *See id.* § 20.07.

27. *Charleston Television*, 301 S.C. at 472, 392 S.E.2d at 673.

remedy under section 1-23-150(b), a declaratory ruling would have been too late and injunctive relief would have been meaningless.

Margaret M. Fox

II. ISSUANCE OF SANITARY LANDFILL PERMIT REQUIRES FINDINGS CONCERNING FUTURE DEVELOPMENT OF AREA

In *Adams v. South Carolina Department of Health & Environmental Control*[28] the South Carolina Court of Appeals reversed the Department of Health and Environmental Control's (DHEC) decision to issue a permit for the operation of a sanitary landfill in Greenwood County. The court based its reversal on DHEC's failure to make findings regarding "what the future development of the area will be and whether the proposed landfill will conform with that development."[29]

DHEC issued Greenwood County a permit to operate a sanitary landfill off McKenzie Road. Twelve residents of the surrounding area appealed the decision to the circuit court. The circuit court affirmed DHEC's decision, and the residents appealed. The residents alleged that the proposed site failed to satisfy certain location requirements for sanitary landfills. Regulation 61-70(V)(A),[30] promulgated by DHEC, establishes the minimum site location requirements for sanitary landfills and states: "The disposal location site shall: 1. be easily accessible to collection vehicles, private autos, and where applicable, transfer vehicles; . . . 4. conform with the surrounding environment; [and] 5. conform with future development of the area."[31]

The residents argued that the proposed site failed to satisfy any of these requirements. The court of appeals found no merit in the residents' assertion that the site would not be easily accessible.[32] The court similarly found no merit in the residents' allegation that the proposed landfill would not conform to the surrounding environment.[33] As to the residents' third argument that the proposed cite did not "conform with the future development of the area," the court concluded that because DHEC made no findings on the future development of the area, DHEC's decision to issue the permit could not stand.[34]

The court's reversal was proper because DHEC failed to follow its

28. 399 S.E.2d 788 (S.C. Ct. App. 1990).
29. *Id.* at 790.
30. S.C. CODE REGS. 61-70(V)(A) (1976).
31. *Id.*
32. *Adams*, 399 S.E.2d at 789.
33. *Id.* at 789-90.
34. *Id.* at 790.

own regulation in issuing the permit.[35] DHEC promulgated this regulation to protect public health, safety, and welfare. DHEC must meet all requirements for the issuance of a sanitary landfill permit before it may issue the permit. These requirements include making findings on the future development of the area and determining whether the proposed site conforms with that development.

Significantly, the court remanded the case and limited DHEC to the existing record in determining whether the site would conform with future development of the area.[36] In order to make an informed prediction about the future development of the area and, therefore, an informed decision about whether to issue the permit, DHEC may need to gather additional evidence not available in the record. For the benefit of the county and the nearby residents, the court should permit DHEC to study the area thoroughly before DHEC decides whether it should issue a permit for a sanitary landfill.

Julia C. Archer

III. Great Deference Given to Decision of Administrative Agency

In *Hampton Nursing Center v. State Health & Human Services Finance Commission*[37] the South Carolina Court of Appeals upheld a consolidated final administrative decision by the South Carolina Health and Human Services Finance Commission (the Commission) that imputed available interest income to three nursing home facilities based on interest-free shareholder loans made by the facilities. The Commission's ruling reduced the allowable reimbursement to the facilities for interest expense.[38] In affirming the administrative agency's order, the court of appeals followed the traditional rule that accords great deference to the interpretations by an agency of the laws it is statutorily charged[39] with implementing.[40] *Hampton Nursing Center* is

35. *See* Triska v. Department of Health & Envtl. Control, 292 S.C. 190, 194, 355 S.E.2d 531, 533 (1987) ("DHEC must also follow its own regulations . . . . Any action taken by DHEC outside of its statutory and regulatory authority is null and void.") (citations omitted).

36. *Adams*, 399 S.E.2d at 790.

37. 399 S.E.2d 434 (S.C. Ct. App. 1990).

38. *Id.* at 435.

39. The Commission is the single state agency in South Carolina designated for implementation of the Medicaid Program. *See* S.C. Code Ann. § 44-6-30(1) (Law. Co-op. 1976).

40. *See Hampton Nursing Center*, 399 S.E.2d at 436 (citing South Carolina Police Officers Retirement Sys. v. City of Spartanburg, 301 S.C. 188, 391 S.E.2d 239 (1990)).

instructive as an interpretation of the parameters of the South Carolina Administrative Procedure Act,[41] under which the nursing homes brought the appeal.

The Commission routinely contracts with nursing facilities in South Carolina to provide services to Medicaid patients.[42] The nursing homes are reimbursed for expenses associated with the care of these patients through a complex formula incorporated into their provision contracts.[43] These contracts also incorporate guidelines provided by a government publication entitled the Provider Reimbursement Manual.[44] The three nursing homes involved in *Hampton Nursing Center* had these contracts with the state. As the court of appeals noted, "A cardinal principle of Medicare and Medicaid law is that reasonable costs are allowable, 'excluding therefrom any part of incurred cost found to be unnecessary.' "[45] Furthermore, the court pointed out that costs related to interest expense "are deemed to be necessary only where a loan is made to 'satisfy a financial need of the provider.' "[46] Moreover, "interest expense is 'reduced by investment income.' "[47]

In the present case Hampton, Cypress, and Bayview nursing homes each claimed reimbursement for interest expense incurred in providing Medicaid services. After securing loans resulting in interest expense, the nursing homes each made loans to some of their respective shareholders free of interest, payable on demand. The funds used in the making of these loans did not come from the funds received through the loans that generated the interest expense. The nursing homes were each reimbursed for their services. Consistent with the normal practice of the state, the Office of the State Auditor conducted audits of the nursing homes to determine if the reimbursement paid to the homes was allowable under the applicable federal and state guidelines contained in their contracts with the state. Upon discovering that the nursing homes issued interest-free shareholder loans during the same period in which they received reimbursement for interest expense, the auditor notified the facilities that the otherwise reimbursable interest expense would be reduced by the value of the available interest which could have been earned on the shareholder loans.[48]

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41. S.C. CODE ANN. § 1-23-310 to -400 (Law. Co-op. 1986).

42. *See id.* § 44-6-50(3) (Law. Co-op. 1976) (authorizing Commission to "[c]ontract for other operational components of programs administered under this chapter as considered appropriate").

43. *Hampton Nursing Center*, 399 S.E.2d at 436.

44. *Id.*

45. *Id.* (quoting 42 U.S.C. § 1395X(v)(1)(A) (1988)).

46. *Id.* (quoting 42 C.F.R. § 413.153(b)(2)(i) (1990)).

47. *Id.* (quoting 42 C.F.R. § 413.153(b)(2)(iii) (1990)).

48. *Id.* at 435.

The nursing homes each sought administrative review of the auditor's decision and, in a consolidated hearing, a panel of the Commission affirmed the challenged audit adjustment. The nursing homes sought judicial review in circuit court. The circuit court affirmed the Commission's order. The nursing homes appealed.[49]

The court of appeals noted that section 1-23-380 of the South Carolina Administrative Procedure Act[50] sets forth very limited and specific guidelines for judicial review of agency decisions.[51] The court also noted the widely accepted rule that decisions of the agency designated to implement a particular statutory program must be accorded great deference.[52] The agency is usually most familiar with the complexities of the program it administers.

Within the framework of the six-part test set forth in section 1-23-380, two primary issues faced the court. First, the court had to decide whether the Commission's order exceeded the authority of the Commission. The nursing homes argued that no statutory authority exists that would allow the imputation of interest income for the interest-free shareholder loans.[53] The court of appeals conceded that the issue was one of first impression in South Carolina, but cited several federal decisions allowing "offset of available interest income against interest expense."[54] These cases supported the Commission's decision.[55]

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49. *Id.*

50. S.C. CODE ANN. § 1-23-380 (Law. Co-op. 1986).

51. *Hampton Nursing Center*, 399 S.E.2d at 436 (citing S.C. CODE ANN. § 1-23-380 (Law. Co-op. 1986)). Section 1-23-380(g) states:

> The court shall not substitute its judgement for that of the agency as to the weight of the evidence on questions of fact. . . . The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
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> (1) In violation of constitutional or statutory provisions;
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> (2) In excess of the statutory authority of the agency;
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> (3) Made upon unlawful procedure;
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> (4) Affected by other error of law;
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> (5) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
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> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. CODE ANN. § 1-23-380(g) (Law. Co-op. 1986).

52. *Hampton Nursing Center*, 399 S.E.2d at 436 (citing South Carolina Police Officers Retirement Sys. v. City of Spartanburg, 301 S.C. 188, 391 S.E.2d 239 (1990)).

53. Brief of Appellants at 7.

54. *Hampton Nursing Center*, 399 S.E.2d at 436 (citing Forsyth County Hosp. Auth., Inc. v. Bowen, 856 F.2d 668 (4th Cir. 1988) (per curiam); Research Medical Center v. Schweiker, 684 F.2d 599 (8th Cir. 1982); Portland Adventist Medical Center v. Heckler, 561 F. Supp. 1092 (D.D.C. 1983) (mem.); Gosman v. United States, 573 F.2d 31 (Ct. Cl. 1978)).

55. *See id.* at 437.

Second, the court had to determine whether evidence existed in the administrative record from which the hearing panel of the Commission could have determined that the nursing homes retained access to the income. The court correctly held that the nursing homes' acknowledgement that the interest-free loans to the shareholders were payable on demand constituted evidence from which the panel could reasonably conclude that the nursing homes had access to the funds for the purposes of investment or debt reduction.[56]

The court ignored, however, an argument put forth by the nursing homes. The nursing homes asserted that the Commission's decision to impute investment income on shareholder loans "retroactively penalizes the nursing homes for engaging in an activity which has never been prohibited by State or Federal law and regulations or the contract between the State and the nursing homes."[57] Simply put, the nursing homes argued that if the Commission wished to impute investment income on shareholder loans, then it should do so through the administrative rulemaking process and not through ad hoc adjudication.[58]

It is unfortunate that the court of appeals chose not to take the opportunity to address this argument. It is a well-established principle of administrative law that "the choice . . . between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency."[59] There are many legitimate considerations that might lead an agency to change or expand existing policy through adjudication rather than proceeding through the rulemaking process. The agency may seek to avoid public criticism by hiding new policies in adjudications of which only a limited number of people are aware, or the issues may be too intricate to be adequately addressed in the broad-based setting of rulemaking. Alternatively, the agency may not even have considered the need for a new policy until late in the adjudicatory process.[60]

There is, however, very little if any case law in South Carolina that acknowledges this inherent agency discretion. The court of appeals perhaps missed an opportunity to create meaningful precedent in the area of administrative law in South Carolina.

John P. Hutchins

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56. *Id.*

57. Reply Brief of Appellants at 2.

58. *Id.*

59. SEC v. Chenery Corp., 332 U.S. 194, 203 (1947) (citing Columbia Broadcasting Sys. v. United States, 316 U.S. 407, 421 (1942)).

60. *See id.* at 202-03.