

South Carolina Law Review

Volume 45
Issue 1 *ANNUAL SURVEY OF SOUTH CAROLINA
LAW*

Article 3

Fall 1993

Administrative Law

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Recommended Citation

(1993) "Administrative Law," *South Carolina Law Review*. Vol. 45 : Iss. 1 , Article 3.
Available at: <https://scholarcommons.sc.edu/sclr/vol45/iss1/3>

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SOUTH CAROLINA LAW REVIEW

VOLUME 45

AUTUMN 1993

NUMBER 1

ADMINISTRATIVE LAW

I. COURT APPLIES STATE FREEDOM OF INFORMATION ACT

In *Newberry Publishing Co. v. Newberry County Commission on Alcohol & Drug Abuse*¹ the South Carolina Supreme Court held that the South Carolina Law Enforcement Division's (SLED)² policy of routinely denying requests made pursuant to the South Carolina Freedom of Information Act (FOIA)³ for criminal investigative reports violated that Act.⁴ The court found that materials that would otherwise be available to the public are not exempt merely by their inclusion in a criminal investigative report.⁵ Therefore, the court held that a criminal investigative report containing both exempt and nonexempt material is subject to the statutory requirement that exempt material be redacted and that nonexempt material be made available for public inspection.⁶

The *Newberry Observer (Observer)* initiated an action against the Newberry County Commission on Alcohol and Drug Abuse (Commission) when it refused to disclose a SLED report in its possession.⁷ After SLED

1. ___ S.C. ___, 417 S.E.2d 870 (1992).

2. "SLED was allowed to intervene to assert its interest in maintaining the confidentiality of the criminal investigative report." *Id.* at ___, 417 S.E.2d at 871. After SLED became a party, the Newberry County Commission on Alcohol and Drug Abuse agreed to be bound by the court's decision and was dismissed from the matter. *Id.* at ___, 417 S.E.2d at 871 n.2.

3. S.C. CODE ANN. §§ 30-4-10 to -110 (Law. Co-op. 1991 & Supp. 1992). For an overview of the FOIA, see DAVID E. SHIPLEY, SOUTH CAROLINA ADMINISTRATIVE LAW ch. VIII, (2d ed. 1989). For a discussion of the development of state Freedom of Information laws, see Burt A. Braverman & Wesley R. Heppler, *A Practical Review of State Open Records Laws*, 49 GEO. WASH. L. REV. 720 (1981).

4. *Newberry*, ___ S.C. at ___, 417 S.E.2d at 872.

5. *Id.*

6. The South Carolina FOIA provides: "If any public record contains material which is not exempt under subsection (a) of this section, the public body shall separate the exempt and nonexempt material and make the nonexempt material available in accordance with the requirements of this chapter." S.C. CODE ANN. § 30-4-40(b) (Law. Co-op. 1991), *quoted in Newberry*, ___ S.C. at ___, 417 S.E.2d at 872.

7. *Newberry*, ___ S.C. at ___, 417 S.E.2d at 871.

intervened,⁸ the trial judge conducted an *in camera* review of the report and ruled that it was entirely exempt from FOIA disclosure requirements.⁹ The South Carolina Supreme Court reversed the trial court's ruling and ordered SLED to make portions of the report available to the *Observer*.¹⁰

The FOIA provides an exemption from disclosure for records of law enforcement agencies only under certain circumstances.¹¹ However, SLED routinely denied all FOIA requests for disclosure of material contained in criminal investigative reports.¹² The court held that SLED's policy contravened the FOIA because SLED never determined whether any parts of the requested reports were subject to disclosure.¹³ The court also noted that SLED mistakenly relied on cases construing the more expansive Federal Freedom of Information Act¹⁴ because this case involved the South Carolina FOIA.¹⁵

The court determined that the FOIA only exempts criminal investigative reports from disclosure when "disclosure of the information would harm the agency in one of four enumerated ways"¹⁶ or when another exemption found in the FOIA¹⁷ applies to the reports.¹⁸ The court concluded that documents contained in the report, which would otherwise be public records, did not become exempt by their incorporation into SLED's report.¹⁹ Instead, it ordered SLED to disclose "the Commission's bylaws and certificate of incorporation, the audit performed on the Commission, and any accompanying letters from the accountant."²⁰ The remainder of the SLED report contained

8. *Id.*; see *supra* note 2.

9. *Newberry*, ___ at ___, 417 S.E.2d at 871.

10. *Id.* at ___, 417 S.E.2d at 872.

11. Section 30-4-40(a)(3) provides for the following exemption:

Records of law enforcement . . . agencies . . . that were compiled in the process of detecting and investigating crime if the disclosure of the information would harm the agency by: (A) Disclosing identity of informants not otherwise known; (B) The premature release of information to be used in a prospective law enforcement action; (C) Disclosing investigatory techniques not otherwise known outside the government; (D) By endangering the life, health, or property of any person.

S.C. CODE ANN. § 30-4-40(a)(3) (Law. Co-op. 1991). The FOIA also exempts "[i]nformation of a personal nature where the public disclosure thereof would constitute unreasonable invasion of personal privacy." *Id.* § 30-4-40(a)(2).

12. *Newberry*, ___ S.C. at ___, 417 S.E.2d at 872.

13. *Id.* at ___, 417 S.E.2d at 872.

14. The Federal FOIA is codified at 5 U.S.C. § 552 (1988).

15. *Newberry*, ___ S.C. at ___, 417 S.E.2d at 872 n.4.

16. *Id.* at ___, 417 S.E.2d at 872; see *supra* note 11.

17. For a complete list of exemptions found in the FOIA, see S.C. CODE ANN. § 30-4-40(a) (Law. Co-op. 1991).

18. *Newberry*, ___ S.C. at ___, 417 S.E.2d at 872 n.5.

19. *Id.* at ___, 417 S.E.2d at 872.

20. *Id.*

statements from confidential informants and a summary of their allegations.²¹ The court ruled these remaining portions exempt from disclosure.²²

Although the confidential informants' statements in this case were exempt from disclosure, the court cautioned that this result may not be reached in all cases.²³ The court noted that often the only applicable exemption will be the one protecting the identity of informants.²⁴ The court suggested that in many cases, an agency could remove an informant's name and any identifying information and then disclose the remainder of the information.²⁵ The agency must determine on a case-by-case basis which portions of such reports should be removed and which portions should be disclosed.²⁶

SLED argued that public policy supports nondisclosure of the reports because of a potential chilling effect on informants if their identities are disclosed.²⁷ In support of this argument, SLED cited several federal and state opinions²⁸ as well as an opinion from the South Carolina Attorney General which states: "The FOIA itself [reflects] recognition by the General Assembly of the importance of maintaining confidentiality with respect to criminal investigations."²⁹ However, the court noted that the FOIA protects confidentiality with the exemption for an informant's identity³⁰ and suggested that it might be possible to remove the informant's name and identifying information while still revealing the substance of any statements.³¹ Indeed,

21. *Id.*

22. *Id.* at ___, 417 S.E.2d at 872-73. The court concluded that these portions of the report fell within one or more of the exemptions found in S.C. CODE ANN. § 30-4-40(a)(2)-(3) (Law. Co-op. 1991), upon which the trial judge relied. *Newberry*, ___ S.C. at ___, 417 S.E.2d at 873 & n.6.

23. *Newberry*, ___ S.C. at ___, 417 S.E.2d at 873.

24. *Id.* at ___, 417 S.E.2d at 873. This exemption is found in S.C. CODE ANN. § 30-4-40(a)(3)(A) (Law. Co-op. 1991).

25. *Newberry*, ___ S.C. at ___, 417 S.E.2d at 873. The court also noted that the FOIA differs from the Federal Freedom of Information Act because the Federal Act protects the identity of informants. *Id.* at ___, 417 S.E.2d at 873. *But cf.* *Bellamy v. Brown*, 305 S.C. 291, 408 S.E.2d 219 (1991) (stating that the State FOIA and the Federal FOIA share essentially the same purpose).

26. *Newberry*, ___ S.C. at ___, 417 S.E.2d at 873.

27. Brief of Respondent's at 7-9.

28. *Id.* Cases which SLED cited in support of its position include: *Irons v. FBI*, 880 F.2d 1446 (1st Cir. 1989) (en banc); *Cleary v. FBI*, 811 F.2d 421 (8th Cir. 1987); *King v. United States Dep't of Justice*, 830 F.2d 210 (D.C. Cir. 1987); *L & C Marine Transp. Ltd. v. United States*, 740 F.2d 919 (11th Cir. 1984); *Johnson v. United States Dep't of Justice*, 739 F.2d 1514 (10th Cir. 1984); *Iowa ex rel. v. Iowa Dist. Court*, 356 N.W.2d 523 (Iowa 1984); *Grodjesk v. Faghani*, 487 A.2d 759 (N.J. Super. Ct. App. Div. 1985), *modified*, 514 A.2d 1328 (N.J. 1986).

29. Brief of Respondent at 8 (alteration in original) (quoting 1989 Op. S.C. Att'y Gen. No. 89-78, at 207, *abrogated by* *United States Dep't of Justice v. Landano*, 113 S. Ct. 2014 (1993)).

30. S.C. CODE ANN. § 30-4-40(a)(3)(A) (Law. Co-op. 1991).

31. *Newberry Publishing Co. v. Newberry County Comm'n on Alcohol and Drug Abuse*, ___

the court exempted from disclosure those portions of the report which were given by confidential informants.³² The court noted South Carolina's departure from the Federal FOIA on this point.³³

On the surface, this opinion seems to allow an interested party access to public records³⁴ even when exempt material is contained therein. However, what happens when a public body turns over documents, pursuant to an FOIA request, which are redacted to such an extent that the available portions are useless? The requesting party should probably proceed as if the public body had refused access to the entire record. South Carolina Code section 30-4-100(a) allows any South Carolina citizen to apply to the circuit court for enforcement of the FOIA provisions.³⁵ Thus, a party alleging that nonexempt material was wrongfully withheld is not without a remedy. Additionally, as an incentive to avoid willful violations, the FOIA awards attorney's fees to a challenging party who prevails³⁶ and holds willful violators of the FOIA guilty of a misdemeanor.³⁷

Another potential problem a party seeking access to public records may encounter is that the public body in possession of the records may refuse to release them by claiming that segregating exempt and nonexempt materials would be too laborious or too expensive. The FOIA does not directly address this situation, but seems to require that the public body redact the nonexempt

S.C. ___, ___, 417 S.E.2d 870, 873 (1992).

32. *Id.* at ___, 417 S.E.2d at 872. Although the court does not specifically state the statutory authority on which these exemptions are based, it does refer to S.C. CODE ANN. § 30-4-40(a)(2)-(3) (Law. Co-op. 1991).

33. *Newberry*, ___ S.C. at ___, 417 S.E.2d at 873 ("Unlike the federal FOIA, our FOIA protects only the identity of informants, not the information contained in their statements."). The court also noted that the exemptions found in the Federal FOIA are more expansive than South Carolina's exemptions. *Id.* at ___, 417 S.E.2d at 872 n.4.

34. Neither party contested the document's status as a public record as defined by S.C. CODE ANN. § 30-4-20(c) (Law. Co-op. 1991). *Newberry*, ___ S.C. at ___, 417 S.E.2d at 871 n.3.

35. South Carolina Code § 30-4-100(a) provides:

Any citizen of the State may apply to the circuit court for either or both a declaratory judgement and injunctive relief to enforce the provisions of this chapter in appropriate cases as long as such application is made no later than one year following the date on which the alleged violation occurs or one year after a public vote in session, whichever comes later.

S.C. CODE ANN. § 30-4-100(a) (Law. Co-op. 1991).

36. *Id.* § 30-4-100(b).

37. South Carolina Code § 30-4-110 provides:

Any person or group of persons who willfully violates the provisions of this chapter shall be deemed guilty of a misdemeanor and upon conviction shall be fined not more than one hundred dollars or imprisoned for not more than thirty days for the first offense, shall be fined not more than two hundred dollars or imprisoned for not more than sixty days for the second offense and shall be fined three hundred dollars or imprisoned for not more than ninety days for the third or subsequent offense.

Id. § 30-4-110.

material, regardless of the time or expense involved.³⁸ Furthermore, the FOIA permits public bodies to “establish and collect fees not to exceed the actual cost of searching for or making copies of records.”³⁹ Thus, although this situation has yet to be addressed by the South Carolina courts, it appears that the General Assembly intended neither the labor or the cost involved with segregating the documents to impede the public’s right of access.

To reach a different conclusion⁴⁰ would be inconsistent with the purposes of the FOIA.⁴¹ As evidenced by the *Newberry* decision, the South Carolina Supreme Court seems dedicated to accomplishing the stated objectives of the South Carolina General Assembly.⁴²

Arnold L. Ashley

II. SOUTH CAROLINA COURTS APPLY CONFLICTING STANDARDS OF REVIEW OF COASTAL COUNCIL PERMITTING PROCEDURES

In *330 Concord Street Neighborhood Ass’n v. Campsen*¹ the South Carolina Court of Appeals applied the substantial evidence test to uphold the South Carolina Coastal Council’s issuance of a permit to build a restaurant. The appeals court ruled that a public need for the restaurant existed, and this need outweighed the negative environmental impact that the restaurant would

38. See *id.* § 30-4-40(b). *Contra* *Hines v. District of Columbia Bd. of Parole*, 567 A.2d 909, 913 (D.C. 1989) (holding that a person seeking access to records pursuant to D.C.’s FOIA “cannot simply ask for a mass of documents, many of which are incontrovertibly exempt from production, and demand that the trial judge go through each document to determine if there is some part of it to which [the party] may be entitled”).

39. S.C. CODE ANN. § 30-4-30(b) (Law. Co-op. 1991).

40. *E.g.*, *Hines*, 567 A.2d at 913-14.

41. The FOIA expresses the following purpose:

The General Assembly finds that it is vital to a democratic society that public business be performed in an open and public manner so that citizens shall be advised of the performance of public officials and of the decisions that are reached in public activity and in the formulation of public policy. Toward this end, provisions of this chapter must be construed so as to make it possible for citizens, or their representatives, to learn and report fully the activities of their public officials at a minimum cost or delay to the persons seeking access to the public documents or meetings.

S.C. CODE ANN. § 30-4-15 (Law. Co-op. 1991).

42. See also *Weston v. Carolina Research & Dev. Found.*, 303 S.C. 398, 401 S.E.2d 161 (1991) (holding that a non-profit eleemosynary corporation was a public body within the meaning of the FOIA when it received and spent federal grant money); *cf.* *Bellamy v. Brown*, 305 S.C. 291, 295, 408 S.E.2d 219, 221 (1991) (stating that the “essential purpose of the FOIA is to protect the public from secret government activity”).

1. ___ S.C. ___, 424 S.E.2d 538 (Ct. App. 1992).

have on the mudflat areas of the Cooper River.² On the same day that *Campsen* was decided, the South Carolina Supreme Court, also using the substantial evidence test, ruled that a public need did not exist for a marina in *Concerned Citizens Committee v. South Carolina Coastal Council*.³ The supreme court and the court of appeals applied conflicting standards of review regarding the Coastal Council's issuance of permits. The two cases leave open the issue of how much deference South Carolina courts will give to a state agency's day-to-day decisions.

In *Campsen* the respondent, George Campsen, Jr., applied to the South Carolina Coastal Council for a permit to build a 19,950 square foot restaurant on the banks of Charleston Harbor as part of a joint project with the City of Charleston and the National Park Service. Approximately 3,200 square feet of the proposed restaurant would encroach upon the mudflat area. The appellants, 330 Concord Street Neighborhood Association (the "Neighborhood"), argued that the restaurant's shading over the mudflat area would have a negative environmental impact on the organisms requiring sunlight for photosynthesis. Campsen argued that the vitality of the entire project depended upon the restaurant and no feasible alternatives existed.⁴

After reviewing Campsen's application, the Coastal Council issued a permit to build the restaurant in the area's critical zone.⁵ On appeal the circuit court agreed with the Coastal Council's decision holding that substantial evidence supported the Council's decision and that the Coastal Council had not abused its discretion; the court of appeals affirmed.⁶

In *Concerned Citizens* the respondent, D & D Enterprises (D & D), received a permit from the South Carolina Coastal Council to build a sixty slip marina on the Ashley River in North Charleston.⁷ The appellants, Concerned Citizens Committee for the Ashley River ("Concerned Citizens"), argued that the Coastal Council violated its own regulations by issuing the permit. The Coastal Council's Permitting Committee issued the permit, and Concerned Citizens appealed to the hearing officer.⁸ The Full Coastal Council approved the issuance of the permit, and on appeal the circuit court affirmed, finding that substantial evidence supported the Council's decision. The supreme court then reversed the circuit court.⁹

The courts in both cases demonstrated differing degrees of judicial intervention and review over the Coastal Council's permitting process.

2. *Id.* at ___, 424 S.E.2d at 540-41.

3. ___ S.C. ___, 423 S.E.2d 134 (1992).

4. *Campsen*, ___ S.C. at ___, 424 S.E.2d at 539.

5. *Id.* at ___, 424 S.E.2d at 539.

6. *Id.* at ___, 424 S.E.2d at 539.

7. *Concerned Citizens*, ___ S.C. at ___, 423 S.E.2d at 135.

8. *Id.* at ___, 423 S.E.2d at 137.

9. *Id.* at ___, 423 S.E.2d at 135.

However, both the *Concerned Citizens* and the *Campsen* courts applied the substantial evidence test.¹⁰ The South Carolina Supreme Court outlined the substantial evidence test in *Lark v. Bi-Lo, Inc.*¹¹ “[T]he court on review [is empowered] to reverse or modify the decision ‘if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are: (5) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.’”¹² The *Campsen* court based its standard of review on whether substantial evidence existed to reverse the Council’s finding that the proposed restaurant, as a “nonwater-dependent” structure,¹³ met all of the criteria necessary to fall within the regulatory exception.¹⁴ This exception allows for placement of nonwater-dependent structures within a critical zone only if there is (1) no significant environmental impact, (2) an overriding public need for the structure, and (3) no feasible alternative.¹⁵ The *Campsen* court addressed each criterion separately to determine whether substantial evidence supported the Council’s finding that the criteria had been met.¹⁶

The *Campsen* court found that substantial evidence supported the finding that the restaurant would not cause a significant environmental impact, thereby satisfying the first criterion of the regulatory exception.¹⁷ Even though the Neighborhood presented evidence to the contrary, the court noted that “the possibility of drawing two inconsistent conclusions from the evidence does not prevent the agency’s decision from being supported by substantial evidence.”¹⁸ In *Lark* the South Carolina Supreme Court ruled that although the substantial evidence test allows the court more deference when reviewing an agency’s decision, the test “‘need not and must not be either judicial fact-finding or a substitution of judicial judgment for agency judgment.’”¹⁹ Accordingly, the *Campsen* court reasoned that conflicting evidence does not

10. *Id.* at ___, 423 S.E.2d at 135; *Campsen*, ___ S.C. at ___, 424 S.E.2d at 539.

11. 276 S.C. 130, 276 S.E.2d 304 (1981).

12. *Id.* at 135, 276 S.E.2d at 306 (quoting S.C. CODE ANN. § 1-23-380(g) (Law. Co-op. 1986)).

13. A “nonwater-dependent” structure is “a facility which cannot demonstrate that dependence on, use of, or access to coastal waters is vital to the functioning of its primary activity.” S.C. CODE REGS. 30-1(C)(9) (Supp. 1992).

14. *Campsen*, ___ S.C. at ___, 424 S.E.2d at 539.

15. S.C. CODE REGS. 30-12(M) (1976).

16. *Campsen*, ___ S.C. at ___, 424 S.E.2d at 539.

17. *Id.* at ___, 424 S.E.2d at 539-40; see S.C. CODE REGS. 30-12 (M) (1976).

18. *Id.* at ___, 424 S.E.2d at 540 (citing *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981)).

19. *Lark*, 276 S.C. at 136, 276 S.E.2d at 307 (quoting *Dickinson-Tidewater, Inc. v. Supervisor of Assessments*, 329 A.2d 18 (Md. 1974)).

bar a finding that the Coastal Council's decision was supported by substantial evidence.²⁰

The *Campsen* court further found that an overriding public need existed for the proposed structure; consequently, this finding satisfied the second criterion of the regulatory exception.²¹ The court recognized that "[t]he term 'overriding public need' is not defined in Coastal Council's statutes and regulations."²² Again the court looked to testimony and exhibits presented at the hearing to decide that substantial evidence existed to establish a public need for the restaurant.²³ The court rejected the Neighborhood's argument that the Council erred in analyzing the evidence subjectively instead of objectively, stating "We note the appellants' last argument seems to confuse evidence and analysis. The objective evidence in the case was the testimony and exhibits. However, the agency is required to exercise discretion in making its decision on the permit. In doing so, it must necessarily make a subjective judgment."²⁴

In considering whether an overriding public need existed, the *Campsen* court discussed *South Carolina Wildlife Federation v. South Carolina Coastal Council*,²⁵ which established that "evidence of purely economic benefit is insufficient as a matter of law to establish an overriding public interest."²⁶ However, the court factually distinguished *South Carolina Wildlife Federation* from the instant case. In *South Carolina Wildlife Federation* the proposed waterfront residential lots generated only an economic benefit for the local tax base and the local job market;²⁷ whereas in *Campsen* the proposed development would produce more than purely economic benefits because "[t]he museum and tour boat facility will provide educational and recreational benefits to the public as well as an economic benefit to the community."²⁸

Finally, the *Campsen* court held that substantial evidence supported the Coastal Council's finding that no feasible alternatives existed, the third criterion of the regulatory exception.²⁹ *Campsen* presented testimony of

20. *Campsen*, ___ S.C. at ___, 424 S.E.2d at 540.

21. *Id.* at ___, 424 S.E.2d at 540-41; S.C. CODE REGS. 30-12(M) (1976).

22. *Campsen*, ___ S.C. at ___, 424 S.E.2d at 540.

23. *Id.* at ___, 424 S.E.2d at 540. The decision focused on the testimony of several witnesses who stated that the restaurant was an integral part of the three phase development consisting of the aquatic science museum, tour boat facility, and restaurant. [T]he witnesses stated the restaurant would provide a needed food service to the public. No other restaurant was within walking distance and the witnesses testified their expectation was that people would spend several hours visiting the museum and taking the boat tour. *Id.*

24. *Id.* at ___, 424 S.E.2d at 540.

25. 296 S.C. 187, 371 S.E.2d 521 (1988).

26. *Id.* at 190, 371 S.E.2d at 523.

27. *Id.* at 190, 371 S.E.2d at 522-23.

28. *Campsen*, ___ S.C. at ___, 424 S.E.2d at 541.

29. *Id.* at ___, 424 S.E.2d at 541; see S.C. CODE REGS. 30-12 (M) (1976).

several experts involved in the project regarding the necessity of building in the critical zone.³⁰ The Neighbors contended that the testimony was only opinion and lacked probative value.³¹ In rejecting the Neighbors' argument, the court concluded, "Given our standard of review, we find no error since the conclusion reached by Coastal Council based upon the record before it is one a reasonable mind might have reached."³²

The *Concerned Citizens* court resolved whether substantial evidence existed to support the Council's decision that a "public demand" for the marina existed. After reviewing the testimony, the supreme court concluded that D & D showed only "a conjecture that the need will, in the future, be established."³³ The court noted that the second criterion of the regulatory exception, public need, requires proof of a present need or demand for the marina.³⁴ Therefore, the supreme court reversed the Coastal Council's decision and revoked D & D's permit because "[t]he fact that the marina may create a demand for wet moorage does not satisfy the requirement of need."³⁵

Campsen and *Concerned Citizens* raise issues concerning the degree to which South Carolina courts will apply the substantial evidence test and at what level the determination of "public need" should be made. The cases represent opposite ends of the spectrum. In *Campsen* the court of appeals applied the substantial evidence test strictly and limited its review; whereas, in *Concerned Citizens* the supreme court acted as a finder of fact. This conflict breeds confusion and uncertainty among practitioners and state agencies.

The South Carolina Code clearly outlines as follows the extent to which a court, acting in its appellate capacity, should review a state agency's decision:

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 if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are:

. . . .

(5) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record³⁶

30. *Campsen*, ___ S.C. at ___, 424 S.E.2d at 541.

31. *Id.* at ___, 424 S.E.2d at 541.

32. *Id.* at ___, 424 S.E.2d at 541.

33. *Concerned Citizens*, ___ S.C. at ___, 423 S.E.2d at 136.

34. *Id.* at ___, 423 S.E.2d at 136; see S.C. CODE REGS. 30-12(M) (1976).

35. *Concerned Citizens*, ___ S.C. at ___, 423 S.E.2d at 136.

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

Traditionally, the South Carolina Supreme Court adhered strictly to the Code in reviewing state agency decisions. *Lark v. Bi-Lo, Inc.*³⁷ is the leading case illustrating the court's application of the substantial evidence test. There, the supreme court interpreted the substantial evidence test as a protection for agencies against subjective judicial interference in their daily decision-making processes as it stated the following:

We, therefore, caution the Bench and Bar as to the limitations upon the application of the "substantial evidence" rule in reviewing the decision[s] of administrative agencies. As stated in *Dickinson-Tidewater, Inc. v. Supervisor of Assessments*], the substantial evidence test "need not and must not be either judicial fact-finding or a substitution of judicial judgment for agency judgment;" and a judgment upon which reasonable men might differ will not be set aside.³⁸

The supreme court repeatedly referred to *Lark* in several recent cases. In *Hamm v. South Carolina Public Service Commission*³⁹ the Public Service Commission ("PSC") granted Wild Dunes Utilities, Inc. ("Wild Dunes") an increase in water and sewage utility rates. Hamm, a consumer advocate, appealed the PSC's order, claiming that Wild Dunes failed to produce sufficient evidence to support such an increase.⁴⁰ The court held that "[t]he PSC's order is presumed to be valid and reasonable, and it has the force and effect of law. This Court is precluded from substituting its judgment for that of the PSC upon a question as to which there is room for a difference of intelligent opinion."⁴¹ In *Roper Hospital v. Board of South Carolina DHEC*,⁴² the agency appealed the circuit court's reversal of its order denying Roper Hospital's application for a certificate of need to construct a new hospital.⁴³ The court held that DHEC's "findings are adequately supported by evidence in the record, including testimony of the DHEC staff and other witnesses. Albeit there is evidence contrary to the findings made by the Board, under *Lark* . . . the Board's findings are conclusive when supported by substantial evidence."⁴⁴ Therefore, the supreme court reversed the circuit court and reinstated DHEC's order of denial.⁴⁵

37. 276 S.C. 130, 276 S.E.2d 304 (1981).

38. *Id.* at 136, 276 S.E.2d at 307 (citation omitted); *see supra* notes 11-19 and accompanying text.

39. ___ S.C. ___, 422 S.E.2d 118 (1992).

40. *Id.* at ___, 422 S.E.2d at 119.

41. *Id.* at ___, 422 S.E.2d at 120.

42. 306 S.C. 138, 410 S.E.2d 558 (1991).

43. *Id.* at 139-40, 410 S.E.2d at 559.

44. *Id.* at 141, 410 S.E.2d at 560 (footnote omitted).

45. *Id.*

The *Lark*, *Roper Hospital*, and *Hamm* decisions establish a sound and consistent line of reasoning. However, the *Concerned Citizens* decision departs from that line of cases insofar as it requires more evidence in the record to satisfy the substantial evidence test. Even though the evidence presented in *Concerned Citizens* appears as substantial as that presented in *Lark*, *Roper Hospital*, and *Hamm*, the *Concerned Citizens* court found the evidence insufficient to support the Coastal Council's issuance of a permit.⁴⁶ Justice Harwell's dissent in *Concerned Citizens* outlined some of the evidence relied upon by the Coastal Council in finding a demand existed for a marina as follows:

In its marina permit application submitted to Coastal Council, D & D specifically stated that "the existing marina capacities are insufficient (as well as inefficient) to meet the current demand."

. . . .

As the majority notes, Stephen Moore, Coastal Council's permit administrator, also testified regarding the demand for the marina. . . . Moore's testimony that marinas fill up quickly, along with his testimony that he knew of two marinas with waiting lists of over 200 people, definitively demonstrates demand for the marina.⁴⁷

Although this evidence does not mandate a finding of "need" for a marina, it does create a question upon which reasonable persons may differ.⁴⁸ Therefore, the supreme court arguably exceeded the scope of review it established in *Lark*.⁴⁹ Conversely, the court of appeals in *Campsen* paid greater heed to the past decisions of the supreme court by not substituting its own judgment for that of the agency.⁵⁰

Besides the difference between *Campsen* and *Concerned Citizens* involving the standard of review, another interesting difference may prove important. While addressing the public need requirement to issue permits, *Campsen* refers to "public need"⁵¹ while *Concerned Citizens* refers to "public demand."⁵² Both cases cite *South Carolina Wildlife Federation v. South Carolina Coastal*

46. *Concerned Citizens*, ___ S.C. at ___, 423 S.E.2d at 138 (1992) (Harwell, C.J., dissenting).

47. *Id.* at ___, 423 S.E.2d at 138 (Harwell, C.J., dissenting).

48. See *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981) (holding that "a judgment upon which reasonable men might differ will not be set aside").

49. See *supra* notes 11-19 and accompanying text.

50. *Campsen*, ___ S.C. at ___, 424 S.E.2d at 541 (Ct. App. 1992); see *supra* notes 22-24 and accompanying text.

51. *Campsen*, ___ S.C. at ___, 424 S.E.2d at 540-41.

52. *Concerned Citizens Comm. v. South Carolina Coastal Council* ___ S.C. ___, ___, 423 S.E.2d 134, 136-37 (1992).

*Council*⁵³ as persuasive in determining whether need exists. However, *South Carolina Wildlife Federation* discusses “public interest” in determining whether to support the issuance of a permit.⁵⁴ A review of these three cases requires inquiry into whether demand, need, and interest involve the same standard. If so, why are the benefits of a restaurant any less economically driven than supplying a marina in an area with a shortage of boat slips? Arguably, situations may arise where a “demand” but no “need” exists, or where an “interest” but no “demand” exists. The standard appears very arbitrary. The evidence of “need” or “demand” does not seem any more persuasive in *Campsen* than it did in *Concerned Citizens*. The only difference lies in the degree of deference the two courts afforded the Coastal Council. If “need” is so arbitrary, then one can reasonably conclude that the finder of fact, who has the opportunity to weigh all the evidence and testimony first hand, is in the best position to determine what the public needs or demands.

The scopes of review that the court of appeals and the supreme court followed in *Campsen* and *Concerned Citizens* differed significantly and will leave administrative agencies uncertain as to their appropriate roles. The court of appeals’ holding in *Campsen*—that the Coastal Council’s decision will stand because it was reasonable and based on substantial evidence—seems to contradict the supreme court’s holding in *Concerned Citizens*. The supreme court apparently required more evidence to satisfy the substantial evidence test than the court of appeals did. The *Lark* line of cases clearly established that whether substantial evidence exists to support an agency’s decision is answered on a “reasonable person” standard of review. However, in *Concerned Citizens* the supreme court replaces this standard with its own view of reasonableness. Justice Harwell’s dissent in *Concerned Citizens* followed the court’s traditional application of the substantial evidence test and reminded the majority that “this Court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.”⁵⁵

Ralph W. Barbier, III

53. 296 S.C. 187, 371 S.E.2d 521 (1988).

54. *Id.* at 190, 371 S.E.2d at 522-23 (holding that “evidence of purely economic benefit is insufficient as a matter of law to establish an overriding public interest”).

55. *Concerned Citizens*, ___ S.C. at ___, 423 S.E.2d at 139 (Harwell, C.J., dissenting) (citing S.C. CODE ANN. § 1-23-380(g) (Law. Co-op. 1986)).