IN THE SUPERIOR COURT OF DEKALB COUNTY
STATE OF GEORGIA

CITY OF STONECREST, GEORGIA Plaintiff, And CITIZENS FOR A HEALTHY AND SAFE ENVIRONMENT Intervenor-Plaintiff, v. METRO GREEN RECYCLING THREE, LLC, et al. Defendants.	)	Civil Action No. 20-CV-5610

CHASE'S MOTION FOR AN INTERLOCUTORY INJUNCTION AND MEMORANDUM OF LAW IN SUPPORT

Intervenor-Plaintiff Citizens for a Healthy and Safe Environment (CHASE), an environmental justice organization focused on protecting the health and wellbeing of south DeKalb County residents, moves for an interlocutory injunction against Defendant Metro Green Recycling Three, LLC (Metro Green) under O.C.G.A. § 9-5-1, and asks the Court to enjoin Metro Green from completing any remaining construction and from commencing operations in order to stop serious and ongoing harms to CHASE and its members during this litigation.

Introduction

Metro Green is constructing and intends to operate a massive solid waste handling facility directly next to hundreds of homes and apartments in a solidly Black community in south DeKalb County, just inside the City of Stonecrest's boundary. In late 2018, Metro Green received a solid waste handling permit from the Georgia Environmental Protection Division

(EPD) to construct and operate the facility. In order to obtain that permit, Metro Green had to submit a letter from the "host jurisdiction" verifying that the solid waste facility was consistent with the local solid waste management plan, which in this case is the DeKalb County Solid Waste Management Plan (SWMP).

DeKalb County informed Metro Green, however, that its facility would not be consistent with the SWMP. In turn, the company asked the City of Stonecrest for the letter instead. The City signed the letter, despite not being a part of the DeKalb County SWMP and despite lacking authority under its charter to perform any solid waste management planning functions or services. CHASE did not discover the City's unauthorized activity until well after Metro Green obtained its solid waste handling permit.

CHASE has members who live directly next to and across the street from Metro Green's proposed solid waste facility in both the City of Stonecrest and unincorporated DeKalb County. Many of the families and individuals living in those neighborhoods have lived there for over 20 years, and before Metro Green arrived, their neighborhoods were peaceful and quiet. All that changed in 2020, when Metro Green cleared approximately 50 acres of mature trees, moved around tons of dirt, covered the area in concrete, and built an enormous industrial building along Miller Road in plain view of the neighbors. *See infra*, Fig. 1.

Now, dust and dirt from the site consistently coat nearby residents' windows, porches, and cars, loud booms and beeping sounds bother these residents almost daily, unpleasant odors from the site waft through the neighborhoods, and vibrations from Metro Green's ongoing construction shake their homes. If Metro Green is allowed to complete construction and begin operating, these injuries will continue.

Fig. 1: Aerial Photograph of Metro Green Site on December 19, 2020

Credit: Geronimo Usuga

Legal Background

"An interlocutory injunction is a device to keep the parties in order to prevent one from hurting the other whilst their respective rights are under adjudication." *Outdoor Advertising Ass'n of Ga., Inc. v. Garden Club of Ga., Inc.*, 272 Ga. 146, 147 (2000) (quotations omitted). A trial court has broad discretion in granting a request for an interlocutory injunction. *Id.*

The trial court should grant an interlocutory injunction if the moving party shows:

> (1) there is a substantial threat that the moving party will suffer irreparable injury if the injunction is not granted; (2) the threatened injury to the moving party outweighs the threatened harm that the injunction may do to the party being enjoined; (3) there is a substantial likelihood that the moving party will prevail on the merits of her claims at trial; and (4) granting the interlocutory injunction will not disserve the public interest.

City of Waycross v. Pierce Cnty. Bd. of Comm'rs, 300 Ga. 109, 111 (2016).

Because the test for issuing an interlocutory injunction is a balancing test, the moving party is not required to prove all four factors to obtain an injunction. *Id.* A "trial court may issue

an interlocutory injunction to maintain the status quo until the final hearing if, by balancing the relative equities of the parties, it would appear that the equities favor the party seeking the injunction." *Lee v. Envtl. Pest & Termite Control*, 271 Ga. 371, 373 (1999) (citation omitted). Here, the equities favor CHASE, and an injunction should be granted.

Argument

I. There is a substantial threat that CHASE will suffer irreparable injury absent an injunction against Metro Green.

Irreparable injury is injury that "cannot be readily, adequately, and completely compensated with money, or when the damages . . . cannot be measured by any certain pecuniary standard." *Colter v. Livingston*, 154 Ga. 401, 114 S.E. 430, 433–34 (1922) (quotation omitted). The term "irreparable injury" means that "the injury would be a grievous one, or at least a material one, and not adequately reparable by damages." *Camp v. Dixon*, 112 Ga. 872, 38 S.E. 71, 73 (1901) (quotation omitted).

The U.S. Supreme Court has held that environmental injury, "by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment." *Amoco Prod. Co. v. Village of Gambell, Alaska*, 480 U.S. 531, 545 (1987). Environmental injuries include air pollution and increased noise, dust, traffic, and odor. *See, e.g.*, *Latin Ams. for Social & Econ. Dev. v. Fed. Hwy. Admin.*, 756 F.3d 447, 453 (6th Cir. 2014); *RB Jai Alai, LLC v. Sec., Fla. Dep't of Transp.*, 47 F. Supp. 3d 1353, 1361–63 (M.D. Fla. 2014); *see also* 40 C.F.R. § 1508.1 (defining "human environment" and "effects" as including ecological, aesthetic, social, and health effects). Environmental injury can occur even if the defendant is in compliance with its permits. *Galaxy*

Carpet Mills, Inc. v. Massengill, 255 Ga. 360, 360–61 (1986) (holding compliance with air permit was no excuse for bothersome soot and ash, loud and offensive noises, and vibrations).

A. CHASE will suffer irreparable injury because a solid waste handling facility that is not consistent with the DeKalb County SWMP will be allowed to operate directly next to its members and the community it strives to protect.

The Georgia legislature enacted the Georgia Comprehensive Solid Waste Management Act "to assure that solid waste does not adversely affect the health, safety, and wellbeing of the public and that solid waste facilities, whether publicly or privately owned, do not degrade the quality of the environment by reason of their location, design, method of operation, or other means." O.C.G.A. § 12-8-21(a). To meet that goal, each city and county in Georgia must develop or be included in a local solid waste management plan. *Id.* § 12-8-31.1(a)(1).

Solid waste management plans are so important in Georgia that "no permit, grant, or loan shall be issued" for a solid waste handling facility unless the host jurisdiction is part of an approved solid waste management plan and the facility is consistent with that plan. *Id.* §§ 12-8-24(g), 12-8-31.1(e)(3). An applicant's eligibility for a solid waste permit "is contingent upon a local government having adopted a plan." Ga. Comp. R. & Regs. r. 110-4-3-.01(2)(a).

Solid waste management planning by local governments "is necessary to prevent environmental degradation." *Id.* r. 110-4-3-.01(3). It therefore follows that a local government's determination that a proposed solid waste handling facility is not consistent with its solid waste plan demonstrates that the facility would "adversely affect the health, safety, and wellbeing of the public" and would "degrade the quality of the environment." *See* O.C.G.A. § 12-8-21(a).

The only approved local solid waste management plan at issue in this case is the DeKalb County SWMP. DeKalb County's Sanitation Division Director, Tracy Hutchinson, testified that the DeKalb County SWMP was adopted in part for "racial justice" reasons and to "stabilize

South DeKalb." (Ex. 1 at 40.) Not that long ago, south DeKalb County "had the highest number of landfills and transfer stations that actually operated in the state of Georgia," and those solid waste facilities "basically degraded that whole section" of the county. (*Id.* at 40–41.) Director Hutchinson testified that DeKalb County therefore adopted the SWMP to ensure that solid waste handling facilities, like Metro Green's facility, "would not return" to south DeKalb County and "to protect the citizens of DeKalb County." (*Id.* at 41, 65.)

DeKalb County informed Metro Green that its solid waste handling facility "was not going to be consistent" with the SWMP's goal "to protect the citizens of the county" because of racial justice and environmental concerns and because DeKalb County already recycles the same waste at its own facilities. (*Id.* at 40, 60, 64–65.) In other words, DeKalb County determined that Metro Green's facility would adversely affect the health, safety, and wellbeing of the public and would degrade the quality of the environment. *See* O.C.G.A. § 12-8-21(a).

DeKalb County's inconsistency determination alone is sufficient to establish that CHASE will suffer irreparable injury absent injunctive relief.[1] Indeed, had EPD known then what we know now, it would have been required to deny Metro Green's permit based on DeKalb County's inconsistency determination and the fact that Stonecrest does not belong to the DeKalb SWMP. In other words, this facility should not be here and its unlawful presence is an injury.

Unless this Court enjoins Metro Green from completing construction and commencing operation, CHASE will suffer irreparable injury because a solid waste handling facility will begin operating in the exact type of community that both the DeKalb County SWMP and CHASE strive to protect: a Black community in south DeKalb County. *Colter*, 114 S.E. at 433–34 (holding irreparable injury cannot be compensated by money damages).

[1] The City of Stonecrest's ultra vires consistency determination has no legal effect, as discussed in more detail in Section III.A below. Moreover, even though Stonecrest is not a part of the DeKalb SWMP, Stonecrest intended to join that plan, so DeKalb County's determination is highly relevant.

B. CHASE will also suffer irreparable injury because its members and the Black community it works to protect will be subjected to air pollution, noise, traffic, vibrations, and other environmental injustice impacts of living next to a solid waste site that should not have been approved.

CHASE members already have been harmed by intrusive noise, dust, odors, and vibrations from Metro Green's construction activities. For instance, Kamla Gonzales lives in the Miller Woods subdivision just north of the Metro Green site in the City of Stonecrest, and until recently, her neighborhood was quiet. (Ex. 2, Gonzales Aff. ¶ 4.) Now, however, she hears construction noise from Metro Green's site "that sounds like banging, beeping, and heavy machinery." (*Id.* ¶ 8.) Ms. Gonzales is a nurse practitioner who works the night shift on the front lines of the coronavirus pandemic, and Metro Green's construction noise during the day has kept her awake and has increased her stress and anxiety. (*Id.* ¶ 15.)

Ever since Metro Green began construction, Ms. Gonzales has noticed "numerous dust events" where her car and house get covered in dust. (*Id.* ¶ 10.) The dust gets everywhere, "like pollen in the spring." (*Id.*) During the summer of 2020, many of those dust events had a foul smell, like something had died. (*Id.* ¶ 11.) Ms. Gonzales also has a nine-year-old son who has asthma and uses a nebulizer machine, and she has had to restrict his playtime outside because of the dust in the air. (*Id.* ¶¶ 3, 20.) Because he has had to do virtual school from home during the pandemic, the restricted amount of outdoor time "has been particularly rough on him." (*Id.* ¶ 20.)

Jacqueline Bryant is a CHASE member who lives in unincorporated DeKalb County, and Metro Green is building its facility right across the street from her backyard. (Ex. 3, Bryant Aff. ¶¶ 2–4.) Throughout the summer, fall, and winter of 2020, Ms. Bryant regularly heard loud thuds and booms from the Metro Green site, even from inside her house. (*Id.* ¶ 10.) She still frequently hears beeping sounds coming from the site, even with her doors and windows closed, as well as occasional pounding noises. (*Id.* ¶ 11.) More than once, she has felt her house tremble and shake

from vibrations coming from the site. (*Id.* ¶ 14.) Since Metro Green began construction, a cabinet in her kitchen has pulled away from the wall. (*Id.* ¶ 15.)

Ms. Bryant's back deck and windows have been covered with dust and dirt from Metro Green's site. (*Id.* ¶ 17 & attached photograph.) She never had this problem before Metro Green started construction. (*Id.*) Although the dust and dirt are not as bad now as in the summer and fall of 2020, she still gets enough dust (and noise) that she cannot sit comfortably on her back deck to watch birds as much anymore. (*Id.* ¶¶ 6, 17–18.) She has also noticed fewer birds in the area since Metro Green cut down all the trees and began construction across the street. (*Id.* ¶ 16.)

Jennifer Wilson also lives in unincorporated DeKalb County, and Metro Green is building its facility right across the street from her neighborhood. (Ex. 4, Wilson Aff. ¶¶ 2, 8.) Ms. Wilson has lived in her home for over 25 years, and her neighborhood is filled with working-class, mostly Black families. (*Id.* ¶¶ 2, 4.) She is particularly concerned about the environmental justice harms here, because solid waste facilities are disproportionately concentrated in communities of color and because asthma affects African-Americans at a greater percentage than other races. (*Id.* ¶ 12.) In fact, her adult son, who has been living with her during the pandemic, has moderate to severe asthma requiring daily medication. (*Id.* ¶¶ 5–6.)

Ms. Wilson's backyard used to be "an oasis" where she could work and enjoy fresh air, but now she hears invasive construction noise and trucks moving around on Metro Green's site. (*Id.* ¶ 9.) She has also smelled pungent odors coming from the site. (*Id.* ¶¶ 13–14.) Ms. Wilson has suffered significant stress as a result of Metro Green's construction in her community and is constantly worried about what this facility will do in terms of dust and air pollution, health impacts to her asthmatic son, and increased truck traffic. (*Id.* ¶¶ 16–18.)

Each of these examples completely undercuts Metro Green's statement last summer to elected officials that the company "want[s] to be a good neighbor" and is "confident that neighbors won't see or hear anything that is going on on the site."[2] If anything, CHASE's members are confident that they will continue to suffer harm and will continue to see dust, hear loud noises, and experience other injuries like emotional distress from Metro Green's activities if it starts accepting and processing solid waste.

Metro Green's own plans demonstrate that these harms will continue. The facility will accept on average 400 tons of solid waste every day of operation, which means more dump trucks, traffic, and diesel fuel emissions will come to the community. (Ex. 5 at Sheet 4). The facility will also crush large quantities of concrete, and the concrete crushers, combined with excavators, wood grinders, conveyers, dump trucks, and other heavy equipment, will generate noise that will disrupt the peace and quiet that neighbors used to enjoy. (*Id.*)

In fact, one weekday last summer, Ms. Gonzales drove to Metro Green's other mixed construction and demolition solid waste recycling facility at 4351 Pleasantdale Road in Atlanta to get an idea of what the Stonecrest site would be like when it starts operating. (Ex. 2 ¶ 18.) She saw a line of trucks going in and out of the facility, and in her opinion the site was an "eyesore" and looked like "piles of garbage." That facility is located in an industrial area, but was still the loudest facility around. (*Id.*) Ms. Gonzales heard "what sounded like dumping or crunching heavy debris and machinery noise." She is confident that she would be able to hear those same noises from her house if Metro Green operates its Stonecrest facility like the Pleasantdale Road location. (*Id.*) Given that both sites are mixed construction and demolition solid waste recycling facilities operated by the same company, this is a reasonable assumption.

[2] J.D. Capelouto, "Officials Incensed over Recycling Plant Planned for Residential Area in DeKalb," The Atlanta Journal-Constitution (July 2, 2020), https://www.ajc.com/news/local/officials-incensed-over-recycling-plant-planned-for-residential-area/icBef5D4Lv8pWrm3QqYKQL/ (last visited Jan. 22, 2021).

PM from EPD, the agency was not required to consider the environmental justice impacts at issue here, including the possibility for disparate health impacts to this Black community or intrusive noise, increased traffic, vibrations, and odors.[5]

Critically, this facility should have zero impacts on this community, because it should not have been permitted in the first place based on DeKalb County's determination that it is not consistent with the SWMP and would not protect the citizens of DeKalb County and because Stonecrest is not a part of the SWMP. *Infra*, Section III.A.

Absent an injunction, Metro Green's operation would continue to injure CHASE members and their neighbors by exposing them to air pollution like PM, visible dust, noise, emotional and psychological stress, and other injuries. These irreparable injuries, especially when combined with DeKalb County's determination that the facility is not consistent with the SWMP, demonstrate that an injunction is warranted. *Cf. Fund for Animals v. Clark*, 27 F. Supp. 2d 8, 14 (D.D.C. 1998) (finding that aesthetic injury to plaintiffs combined with injury suffered due to defendant's failure to comply with law bolstered case for injunction); *see also Amoco Prod. Co.*, 480 U.S. at 545 (holding environmental injury is often irreparable).

II. The threatened injury to CHASE far outweighs any threatened harm that the injunction may do to Metro Green.

If an injunction is not issued, Metro Green's operation will seriously and negatively affect the character of this community and will impair CHASE's mission to promote environmental justice and protect south DeKalb County communities from industrial facilities. Meanwhile, Metro Green's ability to turn a profit will simply be delayed if the Court ultimately

[5] Deganian, David, "Environmental Justice on my Mind: Moving Georgia's Environmental Protection Division Toward the Consideration of Environmental Justice in Permitting," *Environmental and Earth Law Journal (EELJ)*: Vol. 2: Iss. 1, Article 3 at 35–36 (2012), *available at* https://lawpublications.barry.edu/ejejj/vol2/iss1/3 (noting EPD has no environmental justice laws in place requiring it to consider environmental justice in decisionmaking).

rules in its favor. Metro Green can afford this delay, particularly because any injuries it suffers would be self-inflicted.

On this latter point, Metro Green knew in 2018 that its solid waste handling facility was not consistent with the DeKalb County SWMP, yet it circumvented DeKalb County's authority and got a consistency letter from Stonecrest instead. (Ex. 8) (Email from Director Hutchinson); (Ex. 1 at 40–41, 65) (TRO Hearing Testimony). Metro Green knew that Stonecrest lacked authority to issue that letter, but it incurred the costs of seeking a solid waste handling permit and beginning construction anyway. (Ex. 9) (Email from Metro Green citing City charter); *see United States v. Jenkins*, 714 F. Supp. 2d 1213, 1224 (S.D. Ga. 2008) (finding defendant's "disregard for authority" and refusal to stop work after being directed undercut argument that equities fell in his favor).

Metro Green also knew it was facing legal hurdles last summer, when the community started protesting and the City issued a temporary stop-work order. (Ex. 10.) Rather than live up to its assurances that it would "be a good neighbor," the company kept building. This Court even warned Metro Green during the September 3, 2020 hearing on the City's motion for a temporary restraining order that Metro Green was taking a risk with construction because the City had a high likelihood of success on the merits of its claim that the City lacked authority to issue the consistency letter. (Ex. 1 at 101–02.)

Because Metro Green knew at the outset that its facility was not consistent with the DeKalb County SWMP and was warned that it was taking a risk by continuing with construction, it cannot now complain that it will suffer irreparable injury if it is enjoined from operating during the pendency of this lawsuit. *Aliera Healthcare, Inc. v. Anabaptist Healthshare*, 355 Ga. App. 381, 389 (Ga. Ct. App. 2020) (holding any harm to defendant was self-inflicted because

defendant could have avoided harm by taking action as soon as plaintiff terminated contract); *Jenkins*, 714 F. Supp. 2d at 1224 ("Equity does not shine on those with unclean hands.").

Furthermore, this likely is not a situation where Metro Green will go out of business or face financial ruin if the injunction is granted. The company could still make money by accepting solid waste at its other three locations, two of which are in the metro Atlanta area.[6] *Aliera Healthcare*, 355 Ga. App. at 389 (holding injury to enjoined party did not outweigh injury to requesting party because the enjoined party could continue making money by selling its own healthcare products to customers).

And even if Metro Green would suffer a significant financial hardship, courts have issued interlocutory injunctions that created such hardships, including bankruptcy, where the equities weighed in favor of the party seeking injunction. *See, e.g.*, *Kennedy v. Shave Barber Co.*, 348 Ga. App. 298, 308 (Ga. Ct. App. 2018) (upholding injunction where court found injunction could lead to bankruptcy for enjoined party but equities favored requesting party). Here, the equities clearly favor CHASE, given that CHASE had no actual notice of the plans for the site, the community it strives to protect will suffer serious environmental injustices if this facility is allowed to operate, and any injury to Metro Green would be self-inflicted, as described.

III. There is a substantial likelihood that CHASE will prevail on the merits at trial.

CHASE also meets the third factor in the balancing test for injunctive relief: a substantial likelihood of success on the merits. "Although the merits of the case are not controlling, they nevertheless are proper criteria for the trial court to consider in balancing the equities" when ruling on injunctive relief. *Kennedy*, 348 Ga. App. at 306. CHASE need not show "ultimate success" on the merits, just a strong likelihood of success. *City of Waycross*, 300 Ga. at 112.

[6] According to its website, Metro Green has three locations: two recycling facilities and one construction and demolition waste landfill. https://www.mgrecycle.com/contact-us/.

Alternatively, this Court could find that the area encompassing the City of Stonecrest remained a part of the DeKalb County SWMP until the end of the City's transition period on May 8, 2019, because the City was not a "full functioning municipal corporation and subject to all general laws of this state" until that time. (Ex. 11 at 47, § 6.02(f).) If that is the case, the City still lacked authority to sign the consistency letter because the City could not have been considered the "host jurisdiction" under the state Solid Waste Management Act; it was not yet a jurisdiction subject to all laws of the state. Instead, DeKalb County, which retained authority over all government functions and services until they could be transferred to the City, would have been the "host jurisdiction." (*Id.* at 46, § 6.02(a), (b).) And here, DeKalb County unequivocally determined that Metro Green's facility was not consistent with the SWMP.

In conclusion, CHASE has demonstrated a substantial likelihood of success on its claim that the City of Stonecrest lacked authority to verify that Metro Green's facility was consistent with the DeKalb County SWMP.

B. The EPD Director committed a gross abuse of discretion by failing to review evidence provided by CHASE, the City, and others, and determine whether revocation of Metro Green's solid waste handling permit was warranted.

CHASE can also demonstrate a substantial likelihood of success on its mandamus claims against the EPD Director. "Mandamus will issue against a public officer under two circumstances: (1) where there is a clear legal right to the relief sought, and (2) where there has been a gross abuse of discretion." *Jackson City v. Earth Res., Inc.*, 280 Ga. 389, 390 (2006) (citations omitted).

"If a mandamus complainant cannot show a clear legal duty incumbent upon the respondent, the complainant may still be entitled to relief if he can show that the respondent grossly abused his or her discretion in taking or refusing to take official action." *Gilmer Cnty. v.*

City of E. Ellijay, 272 Ga. 774, 777 (2000). A public official commits a gross abuse of discretion when his actions are "arbitrary, capricious, and unreasonable." *Id.* (quotations omitted). "Although a court may not direct the manner in which public officers exercise discretion, it may compel an officer to exercise his discretion." *Chatham Cnty. v. Mulling*, 248 Ga. 878, 881 (1982). Mandamus relief should be granted if "a defect in legal justice would ensue from a failure" to grant it. O.C.G.A. § 9-6-20.

1. The EPD Director has authority to revoke Metro Green's solid waste handling permit.

As an initial matter, the EPD Director has authority to revoke solid waste handling permits under a wide variety of circumstances. First, the EPD Director has implied authority to revoke a solid waste handling permit that was issued by mistake or in violation of law. *United Gas Improvement Co. v. Callery Props.*, 382 U.S. 223, 229 (1965) (holding that an "agency, like a court, can undo what is wrongfully done by virtue of its order"); *Gun South, Inc. v. Brady*, 877 F.2d 858, 862 (11th Cir. 1989) (recognizing agencies have implied authority "to reconsider and rectify errors even though the applicable statute and regulations do not provide for such reconsideration"); *Kudla v. Modde*, 537 F. Supp. 87, 89 (E.D. Mich. 1982) (finding power "to require a license implies the power to revoke a license which has been improperly issued").

In *Café Risque/We Bare All Exit 10, Inc. v. Camden County*, the Supreme Court of Georgia held that Camden County properly revoked a special use permit where that permit was issued in violation of a local ordinance. 273 Ga. 451, 452 (2001) (noting where "a permit is issued by a governing body in violation of an ordinance, even under a mistake of fact, it is void" and the governing body can properly revoke such permit in those circumstances); *see also Corey Outdoor Advertising, Inc. v. Bd. of Zoning Adjustments*, 254 Ga. 221, 226–27 (1985) (holding that zoning officials may revoke permits mistakenly issued or permits that are plainly illegal).

Second, the EPD Director has explicit authority to revoke solid waste handling permits under section 12-8-23.1(a)(3) of the Solid Waste Management Act:

> (3)(A) To issue all permits contemplated by this part, stipulating in each permit the conditions or limitations under which such permit is to be issued, and to deny, revoke, transfer, modify, suspend, or amend such permits.
>
> (B) To refuse to grant such permit if the director finds by clear and convincing evidence that the applicant for a permit . . . :
>
> (i) Has intentionally misrepresented or concealed any material fact in the application submitted to the director; [or]
>
> (ii) Has obtained or attempted to obtain the permit by misrepresentation or concealment[.]

Id. § 12-8-23.1(a)(3)(A)–(B) (emphasis added). Under these provisions, the Director has discretion to revoke solid waste handling permits generally and when the permit holder "has obtained" the permit by misrepresentation or concealment. *Id.*

While section 12-8-23.1(a)(3)(B) outlines scenarios in which the Director may "refuse to grant" a permit, the scenario listed in roman numeral (ii) specifically authorizes the Director to "refuse to grant" a permit when the permit applicant "has obtained" the permit by misrepresentation or concealment. The literal reading of this provision creates a contradiction, however, because the Director cannot "refuse to grant" a permit that an applicant already "has obtained." Thus, this provision may be construed to grant the Director authority to revoke a permit that an applicant already obtained by misrepresentation or concealment.

In Georgia, if the plain language of a statute "produces contradiction, absurdity or such an inconvenience as to insure that the legislature meant something else," courts must "divine the legislative intent." *Telecom*USA, Inc. v. Collins*, 260 Ga. 362, 363–64 (1990). Courts read statutes in the "context of the other statutory provisions of which it is a part." *Hendry v. Hendry*, 292 Ga. 1, 3 (2012).

Here, the legislature's inclusion of the past tense phrase "has obtained" in O.C.G.A. § 12-8-23.1(a)(3)(B)(ii) means that it intended to give the Director authority to revoke permits of bad actors who obtained permits through deceit. This construction is bolstered by reading this provision in the context of the entire paragraph, which authorizes the Director to grant, deny, and revoke permits generally. *Id.* § 12-8-23.1(a)(3). To conclude otherwise would lead to an absurd result in which a permittee can get away with misrepresentation or concealment as long as EPD does not discover the bad acts right away. Thus, the Director may revoke a solid waste permit if he "finds by clear and convincing evidence" that the permit holder "has obtained . . . the permit by misrepresentation or concealment." O.C.G.A. § 12-8-23.1(a)(3)(B)(ii) (emphasis added).

The EPD Director also has discretion to revoke a solid waste handling permit if the permitted activity "creates a threat to human health or the environment." Ga. Comp. R. & Regs. r. 391-3-4-.02(2). Permitted activities include both construction and operation of a solid waste handling facility. O.C.G.A. § 12-8-24 (requiring permit before any person may construct or operate a solid waste handling facility in Georgia). Thus, construction activities alone may warrant permit revocation if they create a threat to human health or the environment.

2. The EPD Director committed a gross abuse of discretion by ignoring evidence that the City of Stonecrest is not a part of the DeKalb County SWMP and that Metro Green was not eligible for a solid waste handling permit.

Director Dunn grossly abused his discretion by failing to determine whether permit revocation was necessary in light of evidence that the City of Stonecrest was not a part of the DeKalb County SWMP.

Chatham County v. Mulling is instructive. In that case, the Supreme Court of Georgia affirmed the trial court's grant of mandamus relief where the Chatham County Commissioners

denied requests for an additional judge in Savannah. 248 Ga. at 881. The statute at issue in that case authorized the commissioners to appoint an additional judge as follows:

> [W]henever in the opinion of the Chatham County Commissioners the case load of the Municipal Court of Savannah has become too voluminous for the Senior Judge and the other Judge to dispose of such cases properly and to carry out properly the functions of said Court, the Chatham County Commissioners are hereby authorized to appoint an additional Judge to serve during any such period in carrying out the functions of said Court.

Ga.L. 1969, p. 2870.

The Supreme Court held that the commissioners committed a gross abuse of discretion when they summarily denied requests for additional judges "with no consideration for the functioning and caseload of the court" and despite evidence of a "massive increase in caseload [and] the reduction of fulltime judges from two to one." *Mulling*, 248 Ga. at 881. The Supreme Court affirmed the trial court's order that the commissioners must "exercise their discretion in determining whether a judge pro tem be appointed." *Id.*

Just as the Chatham County Commissioners have discretionary authority to appoint a new judge "whenever in the opinion" of the commissioners the court's case load becomes too heavy, the EPD Director has discretionary authority to revoke a solid waste handling permit whenever he finds that the permit was issued by mistake or in violation of the law. *See Gun South, Inc.*, 877 F.2d at 862; *Café Risque*, 273 Ga. at 452; *Corey Advertising*, 254 Ga. at 226–27.

Here, CHASE informed EPD Director Dunn in September 2020 that the City of Stonecrest was not a part of the DeKalb County SWMP. (Ex. 14 at 8.)[9] Specifically, CHASE explained that the City had not adopted the DeKalb County SWMP by local ordinance or resolution—as required under O.C.G.A. § 12-8-31.1(c)—and therefore, the City lacked authority to verify whether Metro Green's facility was consistent with DeKalb's SWMP. (*Id.*)

[9] The exhibits to the September 2020 letter to Director Dunn are identical to other exhibits in this instant motion and are not included to save space.

This new information should have been alarming to the Director, because Metro Green's eligibility for a solid waste handling permit was "contingent upon [the City of Stonecrest] having adopted a plan," Ga. Comp. R. & Regs. r. 110-4-3-.01(2)(a), and "no permit, grant, or loan shall be issued" for a solid waste handling facility unless the host jurisdiction is part of an approved solid waste management plan, O.C.G.A. §§ 12-8-24(g), 12-8-31.1(e)(3). The EPD Director is "responsible for enforcing the environmental protection laws of Georgia." *Id.* § 12-2-2(b)(1). CHASE's information shows, however, that Director Dunn mistakenly and illegally issued a solid waste handling permit to Metro Green.[10]

But just as the Commissioners did in *Mulling*, Director Dunn summarily denied CHASE's request to revoke Metro Green's solid waste handling permit with no consideration of the purpose and importance of local solid waste management plans and despite evidence that no Stonecrest ordinances or resolutions adopting the DeKalb SWMP could be found. At a minimum, Director Dunn should have reviewed CHASE's assertions, opened an investigation, and determined whether Metro Green was even eligible for a solid waste permit. *Cf. Corey Outdoor Advertising*, 254 Ga. at 221, 224 (holding official could revoke a billboard permit where third party informed official that permit was illegal and official conducted an investigation, confirmed the violation, and ordered the company to remove billboard). The failure to do so was a gross abuse of discretion.

Director Dunn also acted arbitrarily, capriciously, and unreasonably when he stated that he could not comment on CHASE's assertion because the legal issues "overlap with those raised in the Litigation" already pending in this Court. (Ex. 15.) But none of the other parties to this litigation informed the Director that the City of Stonecrest was not a part of the DeKalb County

[10] Notably, CHASE is <u>not</u> challenging Director Dunn's initial issuance of the permit back in October 2019. Rather, CHASE is challenging Director Dunn's refusal to consider new evidence and determine whether permit revocation is warranted.

SWMP. CHASE shared new information that was not before this Court, and Director Dunn should have considered it. Also, the mere filing of a lawsuit does not preclude or enjoin the Director from exercising his discretion to revoke a permit or take any other official action relating to permitted facilities.

3. The EPD Director committed a gross abuse of discretion by ignoring evidence that Metro Green obtained its permit by misrepresentation and concealment.

The EPD Director also has a discretionary duty to revoke a solid waste handling permit whenever he "finds by clear and convincing evidence" that the permit holder has obtained the permit by misrepresentation or concealment. *Compare Mulling*, 248 Ga. at 881 (discretionary duty to appoint judge), *with* O.C.G.A. § 12-8-23.1(a)(3)(B)(ii) (discretionary duty to revoke permit). Honesty and full disclosure are so important in the solid waste permitting process that the applicant is required to include in its permit application a "sworn statement that the applicant . . . [h]as not intentionally misrepresented or concealed any material fact in the application submitted to the Director; [and is] not attempting to obtain the permit by misrepresentation or concealment." Ga. Comp. R. & Regs. r. 391-3-4-.02(7)(a)(1)–(2).

In this case, CHASE, the City of Stonecrest, DeKalb County Commissioners, and other elected officials wrote to Director Dunn and provided evidence that Metro Green (1) knew that the City of Stonecrest lacked authority under its charter to verify consistency with the DeKalb County SWMP; (2) knew that that its facility was not consistent with the DeKalb County SWMP; (3) knew that the sign it posted at the site advertising the public hearing was virtually invisible to the public; and (4) intentionally hid and/or misrepresented each of these material facts in its solid waste handling permit application to EPD. (*See, e.g.*, Ex. 14.) Based on this evidence, CHASE and others requested that Director Dunn revoke Metro Green's permit.

But Director Dunn summarily denied the requests to revoke Metro Green's solid waste handling permit despite evidence that Metro Green may have obtained its permit by misrepresenting or concealing material information in its permit application. *See Mulling*, 248 Ga. at 881 (holding commissioners grossly abused discretion by summarily denying request for new judge without considering evidence that a new judge was needed). At a minimum, Director Dunn should have reviewed the allegations, opened an investigation, and determined whether there was "clear and convincing evidence" that Metro Green obtained its permit through deceit.

The Director's failure to do so was arbitrary, capricious, and unreasonable and a gross abuse of discretion. *Gilmer County*, 272 Ga. at 777.

4. The EPD Director committed a gross abuse of discretion by ignoring evidence that Metro Green's ongoing permitted activities create a threat to human health or the environment.

The EPD Director has a discretionary duty to revoke a solid waste handling permit whenever the permitted "activity creates a threat to human health or the environment." Ga. Comp. R. & Regs. r. 391-3-4-.02(2). Here, CHASE and others provided evidence to Director Dunn that Metro Green's construction activities, which are authorized by its solid waste handling permit, are creating a threat to human health and the environment.

For instance, CHASE informed Director Dunn that Metro Green was constructing its facility in a primarily Black community, right next to and across the street from hundreds of single family homes and apartments. (Ex. 14 at 1–2.) CHASE explained the environmental injustices facing this community from Metro Green's activities and the negative effects like dust, noise, and vibrations that community members are facing from Metro Green's construction. (*Id.* at 2.) CHASE also explained how south DeKalb County historically has been overburdened with

solid waste sites and that DeKalb County determined Metro Green's facility was inconsistent with its SWMP based in part on those racial and environmental justice concerns. (*Id.* at 1.)

Furthermore, DeKalb County's determination that Metro Green's facility was "not consistent" with the SWMP is strong evidence that the facility's construction poses a risk to human health or the environment. This is because solid waste management plans are "necessary to prevent environmental degradation," Ga. Comp. R. & Regs. r. 110-4-3-.01(3), identify "sites which are not suitable for solid waste handling facilities based on environmental and land use factors," O.C.G.A. § 12-8-31.1(b), and are meant to assure that "solid waste does not adversely affect the health, safety and well-being of the public," *id.* § 12-8-21(a). DeKalb County found that Metro Green's facility would not "protect the citizens of DeKalb County" for racial justice reasons and because that part of the county previously had been "degraded" by other solid waste sites. (Ex. 1 at 40–41, 65); *see also Murray Cnty. v. R & J Murray, LLC*, 280 Ga. 314, 315 (2006) (holding local government may consider any relevant factor in determining whether a proposed facility is consistent with its SWMP that it considered in developing the SWMP).[11]

But again, as in *Mulling*, Director Dunn summarily denied requests to revoke Metro Green's permit with no consideration of the fact that Metro Green's ongoing construction is a permitted activity and despite evidence that Metro Green's ongoing construction activities are creating a threat to human health and the environment as a result of environmental injustices, noise and dust impacts (among others), and DeKalb County's finding that Metro Green's facility is not consistent with the SWMP. *Cf. Mulling*, 248 Ga. at 881.

[11] Even if the City of Stonecrest was not a part of the DeKalb County SWMP, the County's determination is nevertheless strong, persuasive evidence of a risk to human health or the environment because the City intended to be a part of the SWMP and that area was part of the SWMP before the City was incorporated.

Respectfully submitted this 5th day of February, 2021.

/s/ April S. Lipscomb
April S. Lipscomb
Georgia Bar No. 884175
Robert D. Sherrier
Georgia Bar No. 979890
Southern Environmental Law Center
10 10th Street NW, Suite 1050
Atlanta, GA 30309
(404) 521-9900 (office)
(404) 521-9909 (fax)
alipscomb@selcga.org
bsherrier@selcga.org

Counsel for Intervenor-Plaintiff CHASE