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IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
April 4, 2023 Session

WASTE MANAGEMENT, INC. OF TENNESSEE v. METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY BY AND THROUGH DAVIDSON COUNTY SOLID WASTE REGION BOARD

Appeal from the Chancery Court for Davidson County
No. 21-0371-II Anne C. Martin, Chancellor

No. M2022-00531-COA-R3-CV

This appeal involves judicial review of the denial of approval to expand a private construction and demolition waste landfill. The board overseeing the metropolitan government's solid waste management plan denied the application for expansion, finding that expansion of the landfill was inconsistent with the waste management plan. The operator of the landfill filed a petition for review in the Chancery Court for Davidson County, arguing that the board failed to act within ninety days of receiving the application, followed an uncertified plan, and lacked substantial and material evidence to support the denial. The chancery court affirmed the board's denial, and the operator has appealed. We have determined that the operator waived its arguments regarding the plan's certification status by failing to raise those arguments before the board. We affirm the trial court's decision in all other respects.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

ANDY D. BENNETT, J., delivered the opinion of the Court, in which THOMAS R. FRIERSON, II, and W. NEAL MCBRAYER, JJ., joined.

William Lewis Penny and Kenneth Mark Bryant, Nashville, Tennessee, and Rik Tozzi, Birmingham, Alabama, for the appellant, Waste Management, Inc. of Tennessee.

Catherine Jane Pham, Ashley Lynn Brown, Jessica Brook Heavener, and Kelli Fay Woodard, Nashville, Tennessee, for the appellee, Metropolitan Government of Nashville and Davidson County.

OPINION

FACTUAL AND PROCEDURAL BACKGROUND

A. The Parties and the Solid Waste Plan

The Southern Services Landfill ("the Landfill"), owned by Waste Management, Inc. of Tennessee ("Waste Management"), is an approximately 77-acre Class III/IV landfill in Nashville, Tennessee that accepts construction and demolition ("C&D")[1] waste, among other types of waste, and is located on a 183-acre tract of land owned by Waste Management. The Landfill is currently the only C&D landfill in Davidson County, and it receives more than ninety percent of the C&D materials generated in Davidson County. At issue in this case is Waste Management's application to expand the Landfill by 17 acres.

The Solid Waste Management Act of 1991 ("the Act"), Tenn. Code Ann. §§ 68-211-801 to -874, "establishes a comprehensive program for managing solid waste in Tennessee." *Waste Mgmt., Inc. of Tenn. v. Solid Waste Region Bd. of Metro. Gov't of Nashville & Davidson Cnty.*, No. M2005-01197-COA-R3-CV, 2007 WL 1094131, at *1 (Tenn. Ct. App. Apr. 11, 2007). Under the Act, the state is divided into municipal solid waste planning districts, each managed by a board. Tenn. Code Ann. §§ 68-211-811, -813. These boards "create and maintain a plan for managing the disposal of solid waste within the district." *Waste Mgmt.*, 2007 WL 1094131, at *1. The plan must be formulated in compliance with requirements outlined in Tenn. Code Ann. § 68-211-815 and must be updated periodically to address changing circumstances and needs. Tenn. Code Ann. §§ 68-211-814(a)(2) to -(3). In 1992, the Metropolitan Nashville and Davidson County Council ("Metro Council"), acting pursuant to its authority under the Act, created the Metropolitan Nashville and Davidson County Solid Waste Region Board ("Region Board"), which is authorized to make solid waste planning decisions for Davidson County. *See* Tenn. Code Ann. § 68-211-813 to -815; *Waste Mgmt.*, 2007 WL 1094131, at *1. The Region Board prepared its first solid waste management plan for the Metropolitan Nashville and Davidson County region in 1994 and "approved the continued use of the existing Southern Services Landfill." *Waste Mgmt.*, 2007 WL 1094131, at *1.

The Region Board approved its updated solid waste plan, entitled, "Solid Waste Master Plan: *Achieving Zero Waste*" (hereinafter referred to as the "2019 Plan") at its September 16, 2019 meeting. The 2019 Plan was to replace the prior plan which had been in effect since 2007 ("the 2007 Plan"). The 2019 Plan contains specific prohibitory language related to the expansion of landfills, including landfills that accept C&D waste, providing, in part:

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[1] Construction and demolition materials consist of concrete, metal, asphalt, brick, glass, dirt, drywall, plaster, etc. from residential and commercial building projects.

> As Metro advances and meets its Zero Waste goal, . . . C&D landfills will serve a decreased role in the integrated solid waste management system. . . .
>
> Waste Management's Southern Services C&D Landfill, located within Davidson County, accepts approximately 90% of Davidson County's landfilled C&D waste. . . .
> Furthermore, with Metro Nashville aggressively working to reduce reliance on landfills, *the Plan does not include recommendations for any new or expanding landfills in Davidson County. Permitting new or expanding landfills would be inconsistent with the goals of the plan.*

(Emphasis added). The 2019 Plan defines "Zero Waste" as ninety percent diversion of solid waste from landfill disposal over the next thirty years by "moving from disposing of waste to managing waste as a resource." To achieve this, the 2019 Plan outlined various policies and programs, including the creation of a solid waste authority, overall waste reduction through recycling, and other efforts.[2]

In addition to these goals, the 2019 Plan acknowledges that:

> Flexibility exists within the Plan, so that Metro can adjust the schedule based on changing priorities, preferences, funding, or immediate needs. The Plan must be flexible and modifiable to address the potential for unknown setbacks and delays. Ultimately, the Plan provides general direction with the key to success driven by the timely and successful implementation of the strategies.

At the time the 2019 Plan was drafted, Atomic Resources, LLC ("Atomic"), a C&D waste management facility, was operational in Davidson County. The parties do not dispute that Atomic closed its C&D facility in the fall of 2020. Likewise, the parties do not dispute that Davidson County's output of C&D materials increased unexpectedly following a tornado in the spring of 2020 and after a bombing in downtown Nashville in December 2020.

The Region Board submitted the 2019 Plan for approval by the Tennessee Department of Environment and Conservation ("TDEC") on October 3, 2019. For reasons not explained in the record, TDEC did not formally approve the Plan until March 8, 2021.

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[2] According to the 2019 Plan, C&D waste comprised twenty-three percent of the total regional waste stream in 2016. To curb C&D waste and divert C&D waste from landfills to recycling centers, the 2019 Plan called for "a C&D waste recycling deposit program" requiring developers applying for construction or demolition permits to "leave a financial deposit that is reclaimed only when they provide documentation at the end of the project that they recycled or reused a threshold amount of the material generated on-site."

Metro Council approved the 2019 Plan on August 17, 2021.[3] *See* Tenn. Code Ann. § 68-211-815(b)(15).

B. Waste Management's Application for Expansion and the Region Board's Decision

On October 13, 2020, Waste Management e-mailed an application to the Region Board requesting a 17-acre expansion of the Landfill. On November 20, 2020, Waste Management's representative e-mailed to confirm whether the application had been received by the Region Board and learned that the application had not been received; because the email had been inadvertently blocked. Waste Management re-submitted the application on that same day. On January 12, 2021, the Region Board notified Waste Management that its application was incomplete because section seven of the application was not signed and notarized. Although Waste Management disagreed that a notarized signature was required, Waste Management procured the requested signature and notarization and resubmitted the application on February 3, 2021. As noted above, TDEC and Metro Council had not approved the 2019 Plan at this point.

On February 11, 2021, Waste Management was notified of the Region Board's March 24, 2021 scheduled public hearing to discuss the application for expansion. At the public hearing on March 24, 2021, a number of elected officials and citizens gave statements, and the Region Board engaged in discussion on the record. The Region Board voted, by a margin of 10 to 1, to deny the application for expansion, determining that the application was inconsistent with the 2019 Plan. The Region Board rendered a written decision rejecting Waste Management's application on April 1, 2021, stating:

> 1. The Metropolitan Nashville and Davidson County Solid Waste Plan: Achieving Zero Waste outlines clearly that permitting new or existing landfills would be inconsistent with the goals of the Plan as outlined in Section 8-2- and 9-4 as well as I-4 within the Plan.
> 2. The position paper of Waste Management indicates "expanding landfills would be inconsistent with the goals of the Plan," after which they

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[3] The Act requires all solid waste plans to meet a series of requirements, set out in Tenn. Code Ann. § 68-211-815(b). Some of those requirements appear in Tenn. Code Ann. § 68-211-815(b) which provides:

> (b) At a minimum, each . . . revised plan submitted by a municipal solid waste region shall include the following:
> . . .
> (15) A certification from the region's title 68, chapter 211, part 9 solid waste authority, if such an authority has been formed, or if no such authority has been formed, the county legislative body of each county in the region that they have reviewed and approved of the region's plan and/or revised plan;

Although there is a Region Board, there is no regional solid waste authority, therefore, the "county legislative body"—the Metro Council—must review and approve the plan for Metro Nashville.

argue the tense of the language, which is inconsistent with the spirit of the plan - as there was no proposed expansion at that moment the Plan was written and approved. The Plan was written with that language in order to prevent just this kind of expansion request as evidenced by Section 5.

3. Section 5 of the Plan refers to research and diversions strategies, and the presentation and documents from Waste Management Inc. did not show the Region Board any other strategies to deal with the current solid waste that has inert materials that won't dissolve. Having a landfill to increase Construction and Demolition waste (C&D) would go against the priority of diverting C&D as outlined in this section.

4. With regard to the triple bottom line found in section 10-2 the negative social impact of an expansion of the landfill has been clearly articulated as inconsistent in the Plan during the public comment period of the meeting held March 24, 2021 as well as many previous meetings that were cited during the public comment period. Health concerns, livability, home resale value were all mentioned. Therefore, the concerns are environmental, economic, and social, which are all outlined in the Plan.

5. The Plan itself is called the Achieving Zero Waste plan, and this proposal does not move us toward that goal of achieving zero waste. The goals of the Plan do not provide for the addition or expansion of landfills. To approve this proposal would contradict the Plan, both in spirit and in letter.

C. Chancery Court Appeal

On April 22, 2021, Waste Management appealed the Region Board's decision to the Davidson County Chancery Court. The Region Board filed the administrative record with the chancery court on June 16, 2021. On August 4, 2021, Waste Management filed a motion to supplement the record with "newly discovered evidence that the Metropolitan Council will convene on August 17, 2021 to vote on a resolution to approve the currently unauthorized [2019] Plan." On August 13, 2021, Waste Management filed a First Amended Petition for Review, stating that, "[u]pon reviewing the Administrative Record, [Waste Management] discerned that it could not locate documentation of the [2019 Plan's] approval by the [Metro Council." Thus, Waste Management asserted in its Amended Petition:

> 45. By failing to follow the procedure set forth in the statutory provisions of Tenn. Code Ann. §§ 68-211-814 and 815 when it rejected the Application, the Board issued administrative findings, inferences, conclusions or decisions in violation of the statutory provisions of the Solid Waste Management Act. *See* Tenn. Code Ann. § 4-5-322(h)(1).
>
> 46. Additionally, the Board's administrative findings, inferences, conclusions or decisions were made upon unlawful procedure because the

> Board concluded that the Application was inconsistent with a Plan that had never been properly authorized. *See* Tenn. Code Ann. § 4- 5-322(h)(3).
>
> 47. Finally, by denying the Application based on a Plan that had no approval of the Council, the Board exceeded its statutory authority. *See* Tenn. Code Ann. § 4-5-322(h)(2).

The chancery court granted Waste Management's motion to supplement the record pursuant to Tenn. Code Ann. § 4-5-322(g), which allows the court to take evidence not in the record "in cases of alleged irregularities in procedure before the agency."

The chancery court heard arguments on March 1, 2022, and upheld the decision of the Region Board. The court found that the Region Board made its decision within 90 days of receiving Waste Management's application, stating:

> The Court finds that Petitioner's completed Application was received by the Region Board on February 3, 2021, and the Act's 90-day consideration window commenced at that time. The April 1, 2021 Resolution was timely issued well within that period. Thus, the Court does not find a basis to overturn the Region Board's decision based upon Tenn. Code. Ann. § 4-5-322(h)(1).

Next, the Court considered Waste Management's allegations related to the irregularities with the approval process of the 2019 Plan:

> The Court disagrees that these issues are ones of *procedural* deficiency under Tenn. Code. Ann. § 4-5-322(h)(3), but rather constitute substantive challenges to the validity of the Plan . . . .
>
> The Court appreciates Petitioner's frustration that the process of TDEC Plan approval was not complete prior to the Application, and that Metro Council approval was not obtained until after the filing of this action. The issue is whether the timing of those approvals render the Region Board's Resolution arbitrary and capricious. The Court finds that it does not.

Finally, the court analyzed each of the Board's five findings under the substantial and material evidence standard and found that each finding was sufficiently supported by the record.

Waste Management appeals, raising the following issues:

1. Whether the chancery court erred in finding that the decision of the Region Board to deny Waste Management's application was not "[m]ade upon unlawful procedure" under Tenn. Code Ann. § 4-5-322(h)(3), where the plan the Region Board applied had not been certified by the Metro Council.

2. Whether the chancery court and Region Board erred by failing to evaluate Waste Management's application for consistency with the 2007 Plan.

3. Whether the chancery court erred in finding that the Region Board acted within ninety days of receiving the "complete application."

4. Whether the chancery court and Region Board erred by finding that Waste Management's application to expand the Southern Services Landfill was inconsistent with the 2019 Plan.

STANDARD OF REVIEW

Pursuant to Tenn. Code Ann. § 68-211-814(b)(2)(B), the procedure a region board must use to review applications, such as the one submitted by Waste Management, is as follows:

> The region may reject an application for a new solid waste disposal facility or incinerator or expansion of an existing solid waste disposal facility or incinerator within the region *only upon determining that the application is inconsistent with the solid waste management plan adopted by the county or region and approved by the department*, and the region shall document in writing the specific grounds on which the application is inconsistent with such plan.

(Emphasis added). Judicial review of the decision of the Region Board, both in the trial and appellate courts, is performed under the narrow standard of review outlined in the Uniform Administrative Procedures Act ("UAPA"), Tenn. Code Ann. § 4-5-322(h). Tenn. Code Ann. § 68-211-814(b)(2)(D); *see also StarLink Logistics Inc. v. ACC, LLC*, 494 S.W.3d 659, 668 (Tenn. 2016) (recognizing that under the UAPA, appellate review of an agency decision is both "narrow and deferential"). The UAPA limits reversal or modification of an agency's decision to situations where the decision is:

> (1) In violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority of the agency;
> (3) Made upon unlawful procedure;
> (4) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
> (5)(A)(i) . . . [U]nsupported by evidence that is both substantial and material in the light of the entire record;
>
>> (ii) In determining the substantiality of evidence, the court shall take into account whatever in the record fairly detracts from its weight, but the court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.

Tenn. Code Ann. § 4-5-322(h).

The UAPA standard of review is narrower than what is generally applied in other appeals because it "reflects the general principle that courts should defer to decisions of administrative agencies when they are acting within their area of specialized knowledge, experience, and expertise." *StarLink Logistics Inc.*, 494 S.W.3d at 669; *see also Metro. Gov't of Nashville & Davidson Cnty. v. Shacklett*, 554 S.W.2d 601, 604 (Tenn. 1977) (describing review under the UAPA as "confined to a narrow and statutorily prescribed review of the record made before the administrative agency"). Reviewing courts do not second-guess the agency regarding the weight of the evidence, even where the evidence could support a different outcome. *Id*. Rather, we review an agency's factual findings to determine whether they are supported by substantial and material evidence in the record. Tenn. Code Ann. § 4-5-322(h)(5); *see also Macon v. Shelby Cnty. Gov't Civ. Serv. Merit Bd.*, 309 S.W.3d 504, 508 (Tenn. Ct. App. 2009).

ANALYSIS

I. Impact of 2019 Plan Certification Status

Waste Management argues that the Region Board's decision was made in violation of statutory provisions and upon unlawful procedure because the Region Board analyzed Waste Management's application for expansion under the 2019 Plan, which had not been certified by the Metro Council as required by Tenn. Code Ann. § 68-211-815(b). Metro acknowledges that it "overlooked" the requirement for Metro Council certification under Tenn. Code Ann. § 68-211-815(b)(15) but advances a twofold argument in response: 1) Waste Management has waived this issue by failing to raise it before the Region Board, or 2) Metro's oversight in failing to procure Metro Council approval of the 2019 Plan constitutes harmless error. Ultimately, the chancery court held, "Although the Metro Council had not approved the Plan, and that approval is contemplated in the Act at Tenn. Code Ann. § 68-221-815(b)(15), the Court does not find that deficiency so significant as to cause the determination to be arbitrary and capricious."

We begin our analysis by considering whether Waste Management has waived appellate review of this issue. There is no dispute that Waste Management presented its application to the Region Board relying on the standards outlined in the 2019 Plan. Indeed, Waste Management included a copy of the 2019 Plan in its application package to the Region Board and, at the Region Board meeting on March 24, 2021, a Waste Management representative discussed its application for expansion in relation to the 2019 Plan. For example, the representative stated, "In terms of the Solid Waste Master Plan, you know, Waste Management is ready and willing to do our part to help the city achieve the ambitious zero waste vision outlined in its Solid Waste Plan." Waste Management never argued before the Region Board that its application should have been considered under the 2007

Plan, and it never raised a concern before the Region Board regarding the 2019 Plan's lack of certification by the Metro Council. This is problematic for Waste Management.

Review of an agency's decision "shall be confined to the record" except "[i]n cases of alleged *irregularities in procedure before the agency*, not shown in the record, proof thereon may be taken in the court." Tenn. Code Ann. § 4-5-322(g); *see also StarLink Logistics*, 494 S.W.3d at 668. Relying on Tenn. Code Ann. § 4-5-322(g), the trial court allowed Waste Management to supplement the administrative record with documentation that the 2019 Plan was not certified by the Metro Council at the time the Region Board considered its application. However, the trial court later determined that the issue of whether the Metro Council had properly certified the 2019 Plan was not an issue of "unlawful procedure" under Tenn. Code Ann. § 4-5-322(h)(3). We agree with the trial court that the belated certification of the 2019 Plan was not "unlawful procedure" as contemplated by Tenn. Code Ann. § 4-5-322(h)(3).

When considering the parameters of our review under Tenn. Code Ann. § 4-5-322(h)(3), this Court has explained that § 4-5-322(h)(3) "refers to the procedure of the agency itself." *Mack v. Civ. Serv. Comm'n of City of Memphis*, No. 02A01-9807-CH-00215, 1999 WL 250180, at *6 n.1 (Tenn. Ct. App. Apr. 28, 1999). For example, constitutional challenges to an agency's procedure, "such as the right to counsel, the privilege against self-incrimination, and the right to procedural due process" are "procedural irregularities" that may be addressed for the first time on judicial review. *Richardson v. Tenn. Bd. of Dentistry*, 913 S.W.2d 446, 457-58 (Tenn. 1995); *see also Tidwell v. City of Memphis*, 193 S.W.3d 555, 560 (Tenn. 2006) (finding violation of Tenn. Code Ann. § 4-5-322(h)(3) where procedures at the administrative level hearing did not comply with contested case procedures under the UAPA); *Mosely v. City of Memphis*, No. W2019-00199-COA-R3-CV, 2019 WL 6216288, at *10 (Tenn. Ct. App. Nov. 21, 2019) (finding no violation of Tenn. Code Ann. § 4-5-322(h)(3) where petitioner was granted full hearing according to the city charter and a decision was issued within 90 days*); Liberty Mut. Ins. Co. v. Tenn. Dep't of Labor and Workforce Dev.*, No. M2010-02082-COA-R3-CV, 2012 WL 11739, at *7 (Tenn. Ct. App. Jan. 3, 2012) (finding violation of Tenn. Code Ann. § 4-5-322(h)(3) and vacating a penalty assessed by the Tennessee Department of Labor and Workforce Development where the department failed to provide proper notice of the claims brought against the petitioner in violation of its due process rights). Tennessee Code Annotated section 4-5-322(h)(3) is not implicated under these facts because Waste Management has not complained about a procedural irregularity in the hearing or review process before the Region Board itself. Rather, Waste Management argues that its application for expansion of the Landfill was substantively evaluated under the wrong waste management plan. But, Waste Management did not raise this issue before the Region Board and proceeded before the Region Board urging that its application was consistent with the 2019 Plan. Waste Management's assertions related to the timing of

Metro Council's certification of the 2019 Plan are not a review of "unlawful procedure" within the meaning of Tenn. Code Ann. § 4-5-322(h)(3).[4]

We are also mindful that "[t]he principle that a litigant must raise his objection at the first available opportunity applies no less where the tribunal of first instance is an administrative body." *Emory v. Memphis City Sch. Bd. of Educ.*, 514 S.W.3d 129, 146 (Tenn. 2017). Our review of the Region Board's actions on Waste Management's application is constrained to the administrative record under Tenn. Code Ann. § 4-5-322(g), and in light of this, Waste Management has waived appellate review of whether its application should have been reviewed under the 2007 Plan because it failed to raise this issue at its first available opportunity before the Region Board. We therefore decline to consider whether Waste Management's application should have been considered under any different plan.[5]

II. Completeness of Waste Management's Application for Expansion

Waste Management argues that the Region Board failed to "render a decision on its application within ninety (90) days after receipt of a complete application" as was required by Tenn. Code Ann. § 68-211-814(b)(2)(A). Waste Management believes the application for expansion of the Landfill it submitted on either October 13, 2020, or November 20, 2020, was the "complete application," and the Region Board's action in March 2021 fell outside the ninety-day decision period required by statute. The trial court disagreed and

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[4] Similarly, the lack of Metro Council certification was not an "irregularit[y] in procedure before the agency" pursuant to Tenn. Code Ann. § 4-5-322(g); therefore, supplementation of the record pursuant Tenn. Code Ann. § 4-5-322(g) was not warranted. *See Freeman v. City of Chattanooga*, No. E2010-01286-COA-R3-CV, 2011 WL 1197676, at *2 (Tenn. Ct. App. Mar. 31, 2011) (noting that the trial court properly confined its review to the administrative record where petitioner "did not show or allege any procedural irregularities by the panel").

[5] Waste Management includes a cursory argument in its brief that, "To be consistent with the State of Tennessee 2015-2025 Solid Waste and Materials Management Plan's 'Targeted – Minimum Level of Solid Waste/Materials Management' guidance for disposal systems in '[l]arge to very large suburban and urban areas' with a '[p]opulation over 100,001,' urban counties must have '[a]t least one Class III/IV disposal facility available to the county either locally or regional[ly].'" This skeletal argument was not included in the statement of the issues, was not thoroughly briefed, and does not appear to have been raised before the Region Board or trial court. Therefore, we deem the argument waived. *See City of Memphis v. Edwards by & Through Edwards*, --- S.W.3d ---, No. W2022-00087-SC-R11-CV, 2023 WL 4414598, at *2 (Tenn. July 5, 2023) (emphasizing that "an issue must be presented in the manner prescribed by [Tenn. R. App. P. 27] . . . and may be deemed waived when it is argued in the brief but is not designated as an issue in accordance with Rule 27(a)(4)").

determined that the "completed Application was received by the Region Board on February 3, 2021, and the Act's [ninety]-day consideration window commenced at that time."

We acknowledge, as did the trial court, that Waste Management confronted a series of frustrating mishaps with respect to the receipt of their application. A review of the timeline of submissions and communications tells the story: 1) October 13, 2020, Waste Management submitted the application for expansion of the Landfill via email, but this email was not received because it was inadvertently blocked (at no fault of Waste Management) by the recipient's SPAM filter; 2) November 20, 2020, Waste Management emailed to confirm the Region Board received the application and learned the application was not received; 3) November 20, 2020, Waste Management re-sent the same application it previously sent; 3) January 12, 2021, the Region Board informed Waste Management for the first time that the application was incomplete because it was not signed and notarized; 4) February 3, 2021, Waste Management resubmitted its application with the requested signature and notarization; 5) February 11, 2021, the Region Board notified Waste Management of the public hearing on Waste Management's application; and 6) March 24, 2021, the Region Board conducted a public hearing on Waste Management's application and voted to deny its application for expansion of the Landfill.

We first address the statute and regulation governing this issue. The relevant version of the statute, Tenn. Code Ann. § 68-211-814(b)(2)(A), required Waste Management to "submit a copy of the application to the [municipal solid waste] region at or before the time the application is submitted to [TDEC]." The statute goes on to require the region to "render a decision on the application within ninety (90) days after receipt of a *complete* application." Tenn. Code Ann. § 68-211-814(b)(2)(A) (emphasis added). This Court has previously held that rendering a decision on the complete application within ninety days is an "essential requirement" of a region board. *Consol. Waste Sys., LLC v. Solid Waste Region Bd., Metro. Gov't of Nashville*, Nos. M2002-00560-COA-R3-CV, M2001-01662-COA-R3CV, 2003 WL 21957137, at *5 (Tenn. Ct. App. July 2, 2003). The ninety-day window in which the Region Board must render a decision does not begin until the Region Board receives a "complete application." Tenn. Code Ann. § 68-211-814(b)(2)(A). What constitutes a complete application? The relevant regulations define the term "complete application" as: "a copy of the Part 1 application required by subpart (3)(c)1.(i) of this rule; and (II) Other information which the region may reasonably require for its purposes of determining whether a proposed landfill . . . is consistent with the region's solid waste plan." TENN. COMP. R. & REGS. 0400-11-01-.02(1)(c)1.(iii)(1)I.-II. Subpart (3)(c)1.(i) states that the "Part I disposal permit application must be submitted on forms provided by the Department with appropriate attachments which includes a disclosure statement," and that "[a]ll forms must be complete as per the accompanying instructions."

The "Solid Waste Part I Application" submitted by Waste Management on October 13, 2020, and again on November 20, 2020 includes, in section five, a line for "Landowner Signature." In section seven, entitled "CERTIFICATION REQUIRED," the following appears:

> I certify under penalty of law that this document and all attachments were prepared by me, or under my direction or supervision. The submitted information is to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment. As specified in Tennessee Code Annotated section 39-16-702(a)(4), this declaration is made under penalty of perjury.

Below this paragraph there is a signature line for "SIGNATURE OF RESPONSIBLE OFFICIAL" and a separate line for printed name, title, and date. Further below is a signature line for a notary and a spot for a "NOTARY SEAL." Waste Management submitted its application with all of these signature lines empty and without a notary seal.

Waste Management urges that it was not required to submit signatures and notarization on this version of its application because it viewed this unsigned version as an "advance copy" for pre-approval before submitting the application to TDEC. We find this argument unavailing. We view the copy submitted in October and November as incomplete and therefore not triggering the ninety-day window for a decision. Thus, we find, as did the Region Board and the trial court, that the completed application for expansion of the Landfill was received by the Region Board on February 3, 2021, and the ninety-day window for the Region Board's consideration of the application commenced at that time. The Region Board rendered its decision on March 24, 2021, which was within ninety days of February 3, 2021.

III. Review of Region Board's Decision to Deny the Application for Expansion

Waste Management expends much effort in its appellate briefing outlining why the 2019 Plan is unworkable or unrealistic and raises concerns about the viability of adhering to the plan's ambitious goals following unforeseen circumstances in the community. We find these complaints largely irrelevant to our review in this case and view these arguments similarly to the way we must view policy-based concerns regarding the statutes we construe—it is not our duty "to alter or amend a statute, question the statute's reasonableness, or 'substitut[e] [our] own policy judgments for those of the legislature.'" *Griffin v. Shelter Mut. Ins. Co.*, 18 S.W.3d 195, 200-01 (Tenn. 2000) (quoting *BellSouth Telecomms., Inc. v. Greer*, 972 S.W.2d 663, 673 (Tenn. Ct. App. 1997)) (alterations in original). Likewise, it is not our duty to second-guess the 2019 Plan or elevate one section of the plan over another. Our concern is not with the propriety of the substance of the 2019 Plan; rather, we must determine whether there is substantial and material evidence to

support the Region Board's decision finding Waste Management's application to be inconsistent with the 2019 Plan as written or whether the Region Board's decision was arbitrary and capricious.

Under our narrow standard of review, a reviewing court does not review an agency's factual findings de novo or "second-guess the agency as to the weight of the evidence" even when "the evidence could support a different result." *StarLink Logistics Inc.*, 494 S.W.3d at 669. Rather, we review an agency's factual findings to determine whether they are supported by substantial and material evidence in the record. Tenn. Code Ann. § 4-5-322(h)(5); *see also Macon*, 309 S.W.3d at 508.

Tennessee Code Annotated section 4-5-322(h) does not define "substantial and material evidence," but Tennessee courts have described it as "less than a preponderance of the evidence and more than a 'scintilla or glimmer' of evidence." *StarLink Logistics Inc.*, 494 S.W.3d at 669 (quoting *Wayne Cnty. v. Tenn. Solid Waste Disposal Control Bd.*, 756 S.W.2d 294, 280 (Tenn. Ct. App. 1988)). It is "'such relevant evidence as a reasonable mind might accept to support a rational conclusion and such as to furnish a reasonably sound basis for the action under consideration.'" *Macon*, 309 S.W.3d at 508 (quoting *Pruitt v. City of Memphis*, No. W2004-01771-COA-R3-CV, 2005 WL 2043542, at *7 (Tenn. Ct. App. Aug. 24, 2005)). Thus, under this standard of review, we may not reverse an agency's decision merely "'because the evidence could also support another result.'" *Ramos v. Elec. Emps.' Civil Serv. & Pension Bd. of Metro. Gov't of Nashville & Davidson Cnty*, No. M2020-00324-COA-R3-CV, 2020 WL 7861470, at *2 (Tenn. Ct. App. Dec. 23, 2020) (quoting *City of Memphis v. Civil Serv. Comm'n of City of Memphis*, 238 S.W.3d 238, 243 (Tenn. Ct. App. 2007)). We may reverse an agency's decision "'only if a reasonable person would necessarily arrive at a different conclusion based on the evidence.'" *Id.* (quoting *City of Memphis*, 238 S.W.3d at 243).

Tennessee Code Annotated section 4-5-322(h)(4) also authorizes a reviewing court to modify or reverse an administrative agency's decision if it is "[a]rbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." As we have explained:

> A decision unsupported by substantial and material evidence is arbitrary and capricious. Yet, a clear error of judgment can also render a decision arbitrary and capricious notwithstanding adequate evidentiary support. A decision is arbitrary or capricious if it "is not based on any course of reasoning or exercise of judgment, or . . . disregards the facts or circumstances of the case without some basis that would lead a reasonable person to reach the same conclusion."

City of Memphis, 238 S.W.3d at 243 (citations omitted). "'If there is room for two opinions, a decision is not arbitrary or capricious if it is made honestly and upon due

consideration, even though [a reviewing court] think[s] a different conclusion might have been reached.'" *StarLink Logistics*, 494 S.W.3d at 670 (quoting *Bowers v. Pollution Control Hearings Bd*., 103 Wash. App. 587, 13 P.3d 1076, 1083 (2000)).

As the chancery court pointed out in its comments at the hearing, the Region Board was essentially "unified" and "resolute" in its decision, with ten members voting to deny Waste Management's application to expand the Landfill and one member voting to approve the application. The Region Board supported its decision by citing directly to the 2019 Plan. The 2019 Plan has a common refrain spelled out on multiple pages:

- Page 8-2: "With Metro Nashville aggressively working to reduce reliance on landfills, *this Plan does not include recommendations for any new or expanding landfills in Davidson County. Permitting new or expanding landfills would be inconsistent with the goals of the Plan*."
- Page 9-4: "As Metro advances toward its Zero Waste goal, Subtitle D and C&D landfills will serve a decreased role in the integrated solid waste management system. . . . [*T]his Plan does not include recommendations for any new or expanding landfills in Davidson County. Permitting new or expanding landfills would be inconsistent with the goals of the Plan*."
- Page I-4: "The Southern Services C&D Landfill is projected to exhaust its disposal capacity within five years. . . . Metro should continuously evaluate new programs and end markets to minimize the amount of materials where landfills are the last management option. Furthermore, with Metro Nashville aggressively working to reduce reliance on landfills, *this Plan does not include recommendations for any new or expanding landfills in Davidson County. Permitting new or expanding landfills would be inconsistent with the goals of the Plan*."

(Emphasis added). Waste Management sought to expand the Landfill. The 2019 Plan is clear that expanding a landfill in Davidson County would be inconsistent with the goals of the 2019 Plan. The Region Board "may reject an application for . . . expansion of an existing solid waste disposal facility . . . only upon determining that the application is inconsistent with the solid waste management plan adopted by the county or region[.]" Tenn. Code Ann. § 68-211-814(b)(2)(B). The 2019 Plan also states that it "must be flexible and modifiable to address the potential for unknown setbacks and delays." Nevertheless, it is not our duty to flex or modify the plan, and we may not substitute our judgment for that of the Region Board, even where the evidence could support a different result. *StarLink Logistics*, 494 S.W.3d at 669. Therefore, under the narrow scope of review set out in Tenn. Code Ann. § 4-5-322(h), we find that the trial court correctly upheld the Region Board's decision to deny Waste Management's application for expansion of the Landfill. Based on the evidence and the explicit statements in the 2019 Plan, we cannot find the decision was arbitrary and capricious or not based on substantial and material evidence.

CONCLUSION

The judgment of the chancery court upholding the Region Board's denial of Waste Management's application to expand the Landfill is affirmed. Costs of this appeal are assessed against the appellant, Waste Management, for which execution may issue if necessary.

_/s/_Andy D. Bennett_______________
ANDY D. BENNETT, JUDGE