

**BEFORE THE JEFFERSON COUNTY BOARD OF HEALTH**

**GASP,  
Petitioner.**

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**Case No.: 2017-001**

**ORDER**

On July 27, 2017, the Petitioner in this matter, GASP (“GASP”), filed a Petition for Declaratory Ruling requesting the Jefferson County Board of Health (“JCBH”) to issue a ruling regarding the validity of certain rules and regulations that are part of the Jefferson County local air pollution control program. More specifically, GASP has alleged that the JCBH did not meet the appropriate notice and hearing requirements for the repeal and replacement of Chapter 12 of the Jefferson County Air Pollution Control (“JCAPC”) Rules and Regulations and requests a declaratory ruling that said chapter is invalid.<sup>1</sup>

For the reasons set forth below, it is hereby ORDERED that GASP’s petition is **DENIED**:

1. Pursuant to Ala. Code § 22-28-3(b) of the Alabama Air Pollution Control Act, the Jefferson County Board of Health (“JCBH”) administers within its jurisdiction a local air pollution control program (hereinafter referred to as the “JCAPC Program”).

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<sup>1</sup> In GASP’s Petition for Declaratory Ruling, GASP states, “The only question before the Board is the validity *vel non* of rules adopted without substantial compliance with Ala. Code § 41-22-5.” GASP Petition for Declaratory Ruling, p. 13. Accordingly, the Board addresses only that issue in this order.

2. The same statute that authorizes JCBH to establish and administer the JCAPC Program also authorizes JCBH to adopt rules and regulations to effectuate the requirements of its local air pollution control programs as follows:

Each municipal governing body and *each county board of health establishing a program under this section may advertise and adopt all rules and regulations in accordance with the same procedure provided in this chapter* for the adoption of rules, regulations, and standards by the commission, and all judicial remedies provided by this chapter and Chapter 22A of this title shall be available and enforceable by the municipal governing body and by the county board of health.

Ala. Code § 22-28-23(b)(2)(emphasis added).

3. The procedure for the adoption of rules and regulations referenced in Ala. Code § 22-28-23(b)(2) is set forth as follows:

§22-28-15. Regulations – Hearings; procedure for adoption.

(a) No substantive regulations shall be adopted, amended, or repealed until after a public hearing. *At least 20 days prior to the scheduled date of the hearing, the commission shall give notice of such hearing by public advertisement in a newspaper of general circulation in the area of the state concerned of the date, time, place and purpose of such hearing and make available to any person upon request copies of the proposed regulations together with summaries of the reasons supporting their adoption.*

Ala. Code § 22-28-15(a)(emphasis added).

4. On February 19, 2017, JCBH published in *The Birmingham News* a “Notice of Public Hearing” regarding revisions to Chapter 12 of the Jefferson County Board of Health Air Pollution Control Rules and Regulations (the “JCBH Notice”). *The Birmingham News* is the only newspaper of general circulation in the area of the state concerned by the regulations. The JCBH Notice provided the date, time, place, and purpose of the hearing. The hearing was set for March 21, 2017, at 10:00 am in Conference Room A of the Jefferson County Department Health, 1400

6<sup>th</sup> Avenue South, Birmingham, Alabama. The JCBH Notice also provided the purpose of the hearing as giving interested persons the opportunity to comment on the proposed changes to the JCAPC Rules and Regulations. The JCBH Notice made clear that the proposed revisions were available for viewing at the offices of the Jefferson County Department of Health, Environmental Health Services.

5. On March 21, 2017, at 10:00 am in Conference Room A of the Jefferson County Department Health, JCBH held a hearing regarding the proposed revisions to Chapter 12 of the JCAPC Rules and Regulations. Kay Parker spoke on behalf of the JCAPC Program. The purpose of the revisions was to make Chapter 12 of the JCAPC Rules and Regulations, which has local application to Jefferson County, consistent with the rules of procedure for administrative hearings as set forth by the Alabama Department of Environmental Management (“ADEM”) in the Alabama Administrative Code. At the hearing, the public was given an opportunity to make statements. On April 19, 2017, JCBH duly adopted the proposed revisions to Chapter 12 of the JCAPC Rules and Regulations. JCAPC Rules and Regulations. At the JCBH meeting, Ms. Parker, made clear that “The adoption of ADEM’s rules in this manner will resolve any inconsistencies between the state and *local* rules while retaining *local* jurisdiction for hearings.”<sup>2</sup>

7. JCBH satisfied all of the requirements set forth in Ala. Code § 22-28-15 with respect to the notice and public hearing requirements for the repeal and replacement of Chapter 12 of the JCAPC Rules and Regulations.

8. The Alabama Administrative Procedure Act (“AAPA”) does not apply to JCBH or to the JCAPC Program. The AAPA excludes from the definition of agency “boards of trustees of

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<sup>2</sup> The JCBH meeting to consider the adoption of the Rules and Regulations at issue was initially scheduled for April 12, 2017 and was rescheduled to April 19, 2017. Although under no obligation to do so, the Clerk of the Board notified GASP counsel of this change. See Exhibit A. The agenda and proposed Rules and Regulations were available on the Board’s website.

postsecondary institutions, boards of plans administered by public pension systems, *counties*, municipalities, or *any agencies of local governmental units*, unless they are expressly made subject to this chapter by general or special law.” Ala. Code § 41-22-3(1) (emphasis added).

9. JCBH and the JCAPC Program are not “agencies” as defined by the AAPA. JCBH and the JCAPC Program fall squarely within the exclusions to agencies because they are local governmental units and neither one has been expressly made subject to the AAPA by general or special law.<sup>3</sup>

10. Because JCBH and the JCAPC Program are not agencies as defined by the AAPA, the notice of rulemaking procedures set forth in Ala. Code § 41-22-5 do not apply.

11. Although the AAPA’s notice of rulemaking procedures do not apply to JCBH and the JCAPC Program, JCBH’s notice and hearing procedures substantially complied with the AAPA.<sup>4</sup>

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<sup>3</sup> GASP’s reliance on various authorities in support of its argument that JCBH and the JCAPC Program are subject to the notice of rulemaking procedures of the AAPA is misplaced. None of the cases or authority cited by GASP holds that JCBH or the JCAPC program are state agencies as defined by Ala. Code § 41-22-3(1). In *Smith v. Smith*, 778 So.2d 189 (Ala. Civ. App. 1999), the court held that the county board of health is a state agency such that the board and its employees were entitled to sovereign immunity. Likewise, in Opinion to Hon. David S. Maxey, Attorney, Jefferson County Board of Health (AG May 1, 2007), the Attorney General relied on *Smith* to conclude that JCBH is a state agency for purposes of the Relationship Disclosure Law set forth at Ala. Code § 41-16-80, *et seq.*

The question of whether JCBH and the JCAPC program are “agencies” as defined by § 41-22-3(1) of the AAPA was not before the court in *ABC Coke v. GASP, Inc.*, Nos. 2150490 & 2150489, 2016 WL 7321557 (Ala. Civ. App. Dec. 16, 2016). Instead, the court addressed whether JCBH had improperly dismissed GASP’s petition contesting the renewal of a Title V permit to ABC Coke. In its determination, the court interpreted and applied Rule 12 of the JCAPC Rules and Regulations and its subparts, which were enacted pursuant to the authority given to JCBH in Ala. Code § 22-28-23(b)(2) and in accordance with the notice and hearing requirements of § 22-28-15. The court in no way questioned the validity of Rule 12 based on any procedural aspects of the promulgation of the rule, and in fact, granted GASP the relief that it sought pursuant to that rule.

<sup>4</sup> In *Ex parte Traylor Nursing Home, Inc.*, the court held that the Alabama Statewide Health Coordinating Council (“SHCC”) did not substantially comply with the AAPA’s notice of rulemaking requirements when it published proposed amendments to the State Health Plan in seven (7) metropolitan newspapers rather than publishing the amendments in the Alabama Administrative Monthly. In its decision, the court made a fact-specific determination that the SHCC was an agency that must comply with the notice requirements of the AAPA because: (1) the SHCC’s amendment to the State Health Plan constituted a “rule” and (2) the SHCC was a state agency with rulemaking authority regardless of whether Ala. Code § 22-4-8 expressly conveyed rulemaking authority to the agency. The court found that although the SHCC’s basic purpose as set forth in Ala. Code § 22-4-8 was to serve in an advisory and not a rulemaking capacity, the SHCC had in fact taken on the duty of promulgating rules making it subject to the

12. Section 41-22-5(a) of the AAPA requires an “agency,” as defined in Ala. Code § 41-22-3(1), to give at least 35 days’ notice prior to the adoption, amendment, or repeal of any rule by publishing notice in the Alabama Administrative Monthly; however, § 41-22-7(b) provides an exception for rules that apply to only one county or a part thereof. In these circumstances, the secretary of the agency “may omit from its administrative code rules that are general inform, but are applicable to only one county or a part thereof. Rules so omitted shall be filed with the secretary of the agency, and *exclusion from publication shall not affect their validity or effectiveness.*”

13. The JCAPC Rules and Regulations apply to only one county, Jefferson County. JCBH published in *The Birmingham News* a notice of a public hearing regarding its proposed amendments to the JCAPC Rules and Regulations. *The Birmingham News* is the only newspaper of general circulation in Jefferson County. Because of the local application of the JCAPC Rules and Regulations, exclusion of the proposed amendments to Chapter 12 of the JCAPC Rules and Regulations from the Alabama Administrative Monthly does not affect their validity or effectiveness.

**[SIGNATURES ON FOLLOWING PAGE]**

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procedural requirements of the AAPA. In *Traylor*, the court makes no holding regarding whether the AAPA applies to counties, agencies of local governmental units, and more specifically, local air pollution control programs.

The present case and *Traylor* are further distinguished by the local application of the JCAPC Rules and Regulations, which apply and are enforced in only one county. It is logical that publication in a newspaper of general circulation in the area of the state concerned is appropriate and sufficient for rules that apply in only one county and that publication through the Alabama Administrative Monthly is appropriate for amendments to rules that have statewide application.

Done, this 6<sup>th</sup> day of September 2017.



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Max Michael, MD

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Yocunda Clayton, MD



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Jimmie Stephens, Commissioner



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Hernando Carter, MD



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Joshua B. Miller, DO

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Sylvie Stacy, MD, MPH