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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Administrative Law Court
Hon. Ralph King Anderson III

Appeal Case No. 2025-000288
ALC Docket No. 24-ALJ-07-0367-CC

Walter Buchanan, Appellant

v.

South Carolina Department of Environmental Services and Silfab Solar, Inc.,
Respondents.

APPELLANT RETURN TO RESPONDENT SOUTH CAROLINA DEPARTMENT OF ENVIRONMENTAL SERVICES MOTION TO STRIKE

Appellant here responds to Respondent South Carolina Department of Environmental Services ("SCDES") Motion to Strike filed before this court May 8, 2025 and requests the court of appeals respectfully deny the motion. In support, Appellant respectfully shows the following.

Respectfully submitted,

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INTRODUCTION AND PROCEDURAL HISTORY

Respondent SCDES now moves to strike Appellant Designation of Matter submitted to this court April 21, 2025 allegedly for purposes of a clear, proper record. It does so where the department's predecessor South Carolina Department of Health & Environmental Health ("SCDHEC") entirely failed to transcribe accurate and sufficiently detailed information that permittee Silfab Solar, Inc. (SILFAB) and SCDHEC *jointly* presented to public forum October 30, 2023. The underlying proceedings would include the record transcript not properly preserved by the regulatory agency, nor forwarded to the ALC prior to procedural dismissal December 24, 2024 yet in possession of the department at all times.

Appellant agrees that Rule 210(C) SCACR ("The record [on appeal] shall not…include matter which was not presented to the lower court or tribunal."). The question is why the lower court or tribunal would not have the record in the first instance and even if it did, why the record is inexplicably incomplete. Noteworthy is the public hearing staged by SCDHEC as predecessor administrative department is devoid of accurate or detailed information presented to the public at public hearing October 30, 2023. This is especially true given major changes that occurred at Silfab request deferring to county requirements after the permit was granted March 1, 2024.

While the October 30, 2023 public forum began well before the 7:18 pm hour, the transcript omits entirely anything presented prior to 7:18 pm by Silfab or the department to the affected public. *See,* Exhibit-A. SCDES indicates only the public hearing was transcribed by court reporter; not the "*public meeting*" that occurred prior to the "*formal* public hearing"; respondent alleges this information "was not subject to transcription". Exhibit-A. Noteworthy is the public meeting conveyed SCDES and Silfab information to the public, which appellant cites was far from transparent and insufficiently detailed if not wholly inaccurate as plant construction has now

evolved in Fort Mill. Appellant respectfully avers there is no difference between public meeting and formal public hearing, both scheduled by the government department. The irregularities in procedure by respondent begin March 30, 2023 under SCDHEC public forum and continue well into July 30, 2024 under SCDES. A regulatory process begun under the SCHDEC continues under the newly-created SCDES after July 1, 2024 government restructuring. Instead of requiring new permit where Silfab changed stack height and chemical processes, information after March 1, 2024 permit and July 30, 2024 letter circumvented the public, and likewise the below court. It should not now evade this court review by motion to strike.

As cited by the ALC order of December 23, 2024 on July 1, 2024, the South Carolina Department of Health and Environmental Control (SCDHEC) was abolished. The administrative *authority to regulate permits* pursuant to the National Pollutant Discharge Elimination System Permit Program (NPDES) was transferred to the newly-created South Carolina Department of Environmental Services (SCDES). *See*, Act No. 60, 2023 S.C. Acts, 302-27, (implanting government agency restructuring) S.C. Code Ann. §1-30-140. Thus, as evidence by Exhibit-A SCDES now wishes to regulate, belatedly, irregularities and improper procedure begun under the former SCDHEC. It now does so through use of procedural bar granted by the lower court, which appellants allege was abuse of discretion. It is technicality over form and substance and attempt to block best available records evidencing failure to comply with both substantive and procedural due process by the departments and Silfab. Even Silfab did not preserve the transcript. Exhibit-B.

The court should deny strike of the (25) items designated by appellant, most of which had to be gleaned from public freedom of information (FOIA) request by the affected public. Under new procedures of SCDES, the department continues failed regulation attempts begun well prior to July 1, 2024 (state government restructuring) which failed to comply with substantive or

procedural due process; where, ultimately, a March 1, 2024 permit issued. But then, the permit parameters drastically change. The construction and addition of stacks underwent major (not minor) changes through the July 30, 2023 SCDES letter. The public is left *hoodwinked* of major changes being implemented by Silfab under delegation, not regulation, by SCDES. Appellant argued newly discovered evidence before the ALC, which was denied. This court is reviewing and evolution of heavy industrial use in Fort Mill, obscured by government restructuring and a state government agency exceeding its statutory authority to evade federal mandate, inclusive of the NPDES (see, fn.1 12/23/2024 Order p. 1). Either due process was complied with, or it was not. Circumvention of due process by SCDES after SCDHEC did so would be evidence of similar happenings, particularly evidence of other incidents to show a party's (SCDHEC) knowledge or foreseeability. Cf. *JKT Co. v. Hardwick*, 274 S.C. 413, 265 S.E.2d 510 (1980) (prior complaints of similar defects regarding a manufacturing process) and evidences of other incidents of due process violations to show a course of conduct or plan or scheme. *Pittman v. Galloway*, 281 S.C. 70, 313 S.E.2d 632 (Ct. App. 1984) (course of conduct). At minimum, what respondent seeks to strike is Relevant and material under Rule 402 SCRE, and more probative than prejudicial in any way to Respondents. SCRE 403. Evidence of non-happenings (public disclosures after 10/30/2023) may Be admissible to prove that a fact does not exist or an event did not happen. See, *Mize v. Blue Ridge Ry. Co.*, 219 S.C. 119, 64 S.E.2d 253 (1951).

FACTUAL BACKGROUND

Appellant has appealed from an order of the Administrative Law Court (ALC) dismissing request or ability to have a *contested case hearing*. Appellant contested case hearing request was submitted in response to 7/30/2024 correspondence from the SCDES department to Respondent Silfab Solar, Inc. who was the corporate holder of a previously issued air quality permit issued

March 1, 2024. The air permit issued, in fact, not on July 30, 2024; rather on March 1, 2024. This is fact. Silfab thereafter makes material changes after their permit was granted, outlined in Appellant Initial Brief pending before this court.

1. **The transcript of public forum proceedings will evidence improper procedure, lack of transparency and unlawful procedure by the department.**

Two (2) major changes in stack height occur at Silfab request to "*comply with county requirements*". Under guise of SCDES "air quality permit" dated July 30, 2024 neither SCDES or its predecessor SCDHEC accurately or in sufficient detail provide transparent information to the public as to the major changes occurring on the fly. Such changes include, but are not limited to, two changes in stack height – from 19.7' feet to 70' feet, then lowering to 50' feet. None of this is conveyed to the affected public. At the relevant time, SCDHEC will soon be abolished by statute July 1, 2024. The citizens review board is now abolished.

The newly created SCDES is the new sheriff in town, totally asleep at the regulatory wheel. SCDES and SILFAB joint motions to dismiss Appellant contested case hearing are filed on November 27, 2024. (Order of dismissal, p.1). Irrespective of what deadline this court adopts as to filing deadlines cited by the below court, no record is presented to the ALC. (see, fn. 4 and fn. 5 12/24/2024 Order, p. 3). Appellant filed a request for contested hearing, and the case had been assigned to the Hon. Ralph King Anderson III effective October 16, 2024. Appellant filed no response to the written motion(s) to dismiss, and no hearing was held by the ALC trial judge; the judge dismisses the case on procedural grounds December 24, 2024. Appellants assert abuse of discretion.

Turning to the motion to strike now before this court, Respondent(s) now desire to strike relevant and material data from designation of matter proposed by appellant, and the reason is patent. No proper record was preserved in the first place, under the agency predecessor SCDHEC.

The fact is that an air quality permit issued under SCDHEC on March 1, 2024. The ALC order of dismissal cites procedural grounds and appellant has asserted abuse of discretion. The grounds cited by the below court were (i) Appellants failure to respond in writing after petition for contested hearing was *deemed consented to* under ALC procedural rule 19; (ii) the appellant challenged the July 30, 2024 "permit" which per the court did not give rise to a contested case within the ALC's subject matter jurisdiction; and (iii) Appellant's contested case request was *untimely*.

The ALC court cited lack of subject matter jurisdiction, yet improperly *weighed evidence* with no record before it as to appellant having vested vs. non-vested, present, existing constitutional rights. An example of the lower court exceeding the scope of review is weighing of stack height changes under worse case scenarios, and ruling at law atop SCDES proceeding to allow the permit to stand as "minor revision" July 30, 2024. Appellant asserts this action exceeded the department's statutory authority. SCDES did not regulate. By contrast, it did delegate to the corporation who would be wholly in charge of compliance modeling with no third party or independent review. Appellant respectfully assert respondent SCDES does this in violation of its statutory authority to regulate. Title V of the federal NPDES would – *upon change in pollutant discharge data or stack height changes* – required a new permit vs. "*revision*" or recycle of an old permit issued (3) months prior March 1, 2024. The appellant should have, given the delegation (not regulation) have been entitled to contested hearing specifically as to air modeling given ever changing parameters not accurately conveyed to the affected public. Yet, how was appellant to know whether to request a contested hearing in the first instance ? No accurate information updated or otherwise is conveyed to the public regarding stack height changes, or potential exposure to volatile organic compounds, subsequent to public forum October 30, 2023. What is crystal clear at this juncture is Silfab added buildings. Silfab added Tanks. Silfab added Production lines. It will use hazardous chemicals. It

will utilize specialty gases. Under the radar it has created a heavy industrial *use* where only a light industrial use is permitted per county zoning.

2. **Respondent and the ALC court utilize procedural bar in lieu of substance, where the respondent department(s) never provide the ALC with proper record and the ALC dismissal was abuse of discretion.**

As cited by respondent brief footnote (3), the October 30, 2023 public hearing transcript never made it before the ALC court, despite being of record in the proceeding below which culminate in the March 1, 2024 permit. Note: not a July, 30, 2024 letter deemed a minor revision. As cited by respondents "*the October 23, 2023 public hearing transcript was never (sic) submitted to the ALC for its review during proceedings below*". Exhibit A: Appellant would have inability to do so absent FOIA requests compelling disclosure by the state department. It is literally hide the ball litigation tactic by design under government restructuring. The motion to strike is no different. Respondent emails to this court evidence the newly created SCDES now wishes to regulate, where its abolished predecessor entirely failed to do so. It is not surprising, therefore, respondents seek the public hearing data to be stricken because the regulatory agency engaged in improper procedure, continued under SCDES as SCDHEC was abolished July 1, 2024.

Respondent cites a March 18, 2025 email from department counsel to the parties and the court declaring the transcript was not a record of a hearing before the ALC as contemplated by Rule 207 SCACR. Absolutely no authority is cited for this proposition, the department at all times held possession of the record. Respondent concedes this record was inexplicably never submitted to the ALC for its review by SCDES, which culminates in court ruling of dismissal under purported consent deemed mandatory under Rule 19 ALC rules of procedure. No hearing was held by the ALC. Yet, respondent seeks to evade a public hearing not properly transcribed that was held October 30, 2023 on a draft Silfab permit. The permit becomes granted March 1, 2024. *What were*

the changes from March 1, 2024 to the date of July 30, 2024 correspondence ? Simply "minor revision" and not a "major change" in respondents' view and position before the below court and now this Court of Appeals. On May 14, 2025 respondent writes this court to declare the public meeting that happened before the "formal" public hearing was not subject to transcription. Exhibit-A. As the public forum was hosted by the predecessor to SCDES; it is splitting hairs to now decide what was (and was not) subject to being transcribed. Respondent declaration cites absolutely no authority in support of the proposition in its email to this court attached under Exhibit-A. The lower court was left to work in the blind, opting the easy route of dismissal predicated on procedural Rule 19A of the ALC rules.

Noteworthy is respondent SCDES cites in this footnote that the public hearing held by its predecessor SCDHEC was held "*in connection with*" a **draft** air quality permit for Silfab Solar, Inc. The draft permit became **grant** of permit on March 1, 2024 – *and not* July 30, 2024. The relevant question is what occurs in between these dates. And, after July 30, 2024. The process is evolving continuously. The public and the ALC court were not properly provided information related to major changes. This is why the court of appeals should decline the motion to strike.

SCDES now wishes to regulate procedurally, where clearly there was no regulation of permit activities in the first instance. It now does so using a procedural dismissal, not a dismissal on the merits by the lower court, seeking to strike relevant documents. It is undeniable that Silfab has constructed a *change of use* from existing local zoning where it will employ specialty gases and hazardous chemicals and pollutants that should have required updated air emissions permit, not a recycle or revision of the March 1, 2024 permit. If a change in use materialized by way of construction after March 1, 2024 federal law would mandate no change in use, and any addition of additional construction of buildings, tanks or manufacturing lines beyond that permitted March

1, 2024 would per federal law require an updated air emissions modeling *prior to initiating this work*. This did not and has not occurred.

If the transcript of public forum omits accurate or sufficient detail, it is founded upon improper procedure which – *later* – defalcates SCDES further duties a law as successor entity to SCDHEC. *It does not matter that government restructuring has taken place July 1, 2024*. What matters is neither SCDHEC or its successor SCDES failed to do its job truthfully and accurately as to the affected public, where SCDES now seeks to omit material evidence of the administrative body irregularities in procedure, erroneous findings, and error of law. The department delegates, taking the corporation's word for it, never verifying.

This court should respectfully decline the motion to strike. The existing partial transcript is, *absent filings with the department record,* the best evidence of what occurred between October 30, 2023 and omission of "minor revisions" of a permit "revision" later approved in July, 2024. This court should deny respondents' motion to strike due to the lack of transparency, alone.

3. Respondents seek procedural bar over substance and form atop irregularities of the department beginning September 30, 2023 and continued by SCDES through July 30, 2024 where the documentary evidence will show the department exceeded its statutory authority ignoring clear evidence of unlawful change of use.

Pursuant to S.C. Code Ann. 1-23-610(B), this court's review on appeal "must be confined to the record." *Argabright v. Argabright*, 398 S.C. 176, 179, n.3, 727 S.E.2d 748, 750 n.3 (2012) ("We are, of course, bound by the record established at trial.)" The sole impediments making the transcript not before the administrative law court were department failures to provide it to the court in full candidness, and the ALC dismissal under abuse of discretion compounding the error. The ALC defers to the department under abuse of discretion. The department defers to the corporation to follow county "requirements". It is well settled that the words of a statute will be given their plain and ordinary meaning. *Miller v. Doe*, 441 S.E.2d 319 (1994). So should the words of the

ALC rules of civil procedure Rule 19(A). Here, the ALC rule 19 explicitly provides that the court "*may*" deem consent to dismissal, not "*shall*". The use of the word `may' signifies permission and generally means that the action spoken of is optional or discretionary. *State v. Wilson*, 274 S.C. 352, 356, 264 S.E.2d 414, 416 (1980). Thus, by using "may", rather than "shall", the legislature has provided that the action (dismissal under Rule 19 ALC rules of procedure) is discretionary with the trial court, not mandatory.

Respondent concedes that records exist in addition to the transcript. According to respondents, however, because the materials designated by appellant were never presented to the ALC, matters identified should now be stricken. This would not be fault of appellant; Rather, it is the fault of respondent who at all relevant times were in possession of documents from permit application through public forum, *forward.* Pursuant to Rule 210(C) SCACR the documents are alleged by respondent not part of the record on appeal and thus never can be part of the record on appeal. The proposition is predicated upon procedure, not substance. Given the public forum October 23, 2023 was conducted by SCHDEC upon patent irregularities in procedure, the only accurate information that could *ever* have been provided to the below court was the public filings by Silfab with SCDHEC and SCDES records. Enter collusion as between the regulatory department(s) and Silfab. Except via FOIA requests, appellants would not be in possession of the information. The respondent Silfab would, *one would think.* Exhibit-B. This likewise appears to not be the case.

Appellants respectfully assert the information does not in any way confuse the appellant record; rather the information will evidence glaring discrepancies of major change vs. minor "revisions" impacting the affected public after the Silfab permit is granted. This motion to strike seeks to evade scrutiny from the actual issues presented for the court of appeals review – e.g., irregularity of procedure compounded by SCDES failures upon taking over regulatory duty for

SCHDEC as to regulation of air pollution modeling before permits. As such, the information should – if it were submitted by the permittee to the state regulatory agency – not be subject to hide the ball on procedural grounds seeking technicality over substance and form.

The department can easily find certainty based on this court declining respondents' motion to strike, as the information is obtained from FOIA where change in procedures both at the administrative department level and mid-government restructuring occur. S.C. Code Ann. §1-30-140. Respondents seek to play procedural hide and circumvention as to designated matters for the record on appeal that the court of appeals is entitled to review, particularly in view of patent irregularities of procedure from October 30, 2023 (public forum) to October 1, 2024 (permit grant) to July 30, 2024 (permit revision). The continuing evolution of Silfab's facility is noteworthy, and the absence of further transparent information to the public is telling. It is made even more important as to July 30, 2024 "*minor revisions*" of a March 1, 2024 grant of permit where, at minimum, the record which should have made it to the purview of the ALC shows two (2) drastic changes to stack height, and inaccurate detail as to exhaust levels of volatile chemical compounds, otherwise known commonly as pollution. Despite respondent SCDES citing of new procedures and *abolishment* of SCDHEC, the truth of documentary evidence necessary and material to review by this court is sought to be shielded inappropriately and excluded under motion to strike. Appellants respectfully assert the court of appeals should deny the motion to strike.

CONCLUSION

It is a correct statement of law when the respondent says it recognizes that the Record on Appeal may include all relevant pleadings, motions, filings, and correspondence presented before the ALC (*including all exhibits and attachments thereto*). *Why then evade the best evidence of procedural irregularities whether by SCDHEC or SCDES under its newly adopted procedural*

vices? Several (not one) members of the public attempt – *after permit* – to address the alarming major changes that occur with state department deference to the corporation change of stack height and chemical cocktails to be processed on site. (12/24/224 Order, p. (3) at fn. 3) Silfab will absolutely treat hazardous material in every form that it exists upon a light industrial (not zoned heavy industrial) site; *gas, liquid and solid.* By definition, this is not light industrial activity permitted lawfully by the county zoning code.

Walter Buchanan here is listed as the sole appellant, he is not the sole or singular affected member(s) of the public. The information is, and will be, if reviewed by this court, manifestation of dark contrast to the information presented to the public October 30, 2023 by public forum. It does not matter how respondent characterizes the public forum, whether "meeting" or "official meeting". It was staged by the department nonetheless. The affected public at all times had vested constitutional right to substantive and procedural due process; the affected public was entitled to know regarding chemical processes, treatment, pollutant discharge, and change of stack height by Silfab. The public was hoodwinked, instead, in the midst of government restructuring.

Noteworthy is the department(s) defer to Silfab, who is deferring to "*county requirements*" for the drastic changes back and forth on stack height and diameter. What county requirements ? More importantly, what federal NPDES requirements ? Only respondents would possess records of this information which was at no time conveyed to the public in accurate or sufficient detail at public forum. The transcript evidences this. Oddly, only public commentary is transcribed. This court should note the first half of the public forum was not public comment. It was government dissemination of information to the public as proposed by Silfab. IT was not presentation by respondents of accurate, truthful or data in sufficient detail. The affected public is caught behind the eight ball at all times, scrambling to figure out how a "conditional major" pollutant source is

evolving upon a light industrial tract adjacent to schools and homes. Where, the government agencies supposedly regulating the permit(s) do nothing. SCDES after July 30, 2024 requires no updated air modeling, and the appellant cites that the affected public was entitled to contested hearing, denied by the lower tribunal under abuse of discretion .

Given the transcript documentation of irregularities and omissions, the application, draft permit, revisions, and minor changes and all attachments should have properly been before the ALC. *Only the department* (not the appellant) would have these records, *conveniently*. The problem is, not even Silfab can locate it without asking appellant counsel for it. Exhibit-B. If this is the case, how was the ALC court below *ever* expected to see it, absent forward of the record upon notice appellants were seeking a contested hearing after assignment. If the ALC dismisses upon procedural rule under abuse of discretion, the lower court would never in the first instance would have had what the record is, nor need for it in the first instance. Hence deference to the administrative department under procedural bar and abuse of discretion. It is no surprise SCDES now takes the position that the October 30, 2023 is not a transcript of a hearing before the ALC. It was certainly a transcript before the department, properly a record designated for inclusion in the Record on Appeal before this court no different than all items (1) through (6) of page 3 respondents brief. It is a talented articulation, but one which seeks to evade the truth of department and Silfab violations of substantive and procedural due process and the department later exceeding its statutory authority.

The July 30, 2024 letter is the continued *perpetuation* of regulatory failures of the department(s) starting at March 30, 2023 public forum. Noteworthy is the process begins under SCHDEC regardless of government restructuring July 1, 2024. SCDES is allegedly continuing the duty begun by SCHDEC, however irregular, erroneous or incomplete. The information should not

be stricken and is relevant and material where accurate, truthful and full disclosure of material facts is sought to be circumvented. The respondent now seeks to circumvent this court's review by their motion to strike. Appellant respectfully avers before this court the motion should be respectfully denied where appellant had only the assistance of FOIA to challenge an administrative regulatory body of government in its *delegation* – not regulation – as to a permitting process riddled with errors and failure(s) to observe substantive and procedural due process. The public had a right to know. The department had a duty to comply with due process. It failed to do so.

As cited by respondent, a copy of the permit issued to Silfab on March 1, 2024 was included as an exhibit to respondent affidavit in support of respondents' motion to dismiss, and would be part of the record on appeal. (Respondent memo, p. 3 fn.5). So then would be application information and attachments be part of the record. This court should decline respondents any further ability to hide material facts and false representations – information they have long been in possession of, even if they could not somehow locate it timely. See, Exhibit-A and Exhibit-B.

At no time have appellants sought to include material not relevant to the claims and defenses in this appeal. At worst, appellants via Walter Buchanan have been *handicapped* under government restructuring where SCDES change of procedure(s) from SCDHEC were not widely known to the affected public, and SCDES compounds errors of the now-abolished SCDHEC begun initially at public forum October 30, 2023. This continues ad nausem through July 30, 2024. If not properly transcribed, the department referred the citizens to department website for information regarding Silfab application and proposals that became grant of permit March 1, 2024. At all times, the information has been safely safeguarded in possession of the department. The records are relevant for clarity and judicial economy. SCRE 401. It would not be immaterial as there firmly exists logical or rational connection between the fact to be presented (violation of due process) and

a matter in issue, the department exceeding it's statutory authority and thus whether the below court abused it's discretion dismissing predicated on procedural rule over substance.

Appellants therefore pray the court of appeals deny the motion to strike. The information is both relevant and material to the claims and defenses in this case, and not irrelevant pursuant to Rule 210(c) SCACR. The transcript is more probative with no prejudicial effect to respondents.

Appellant thanks the court for its review.

Respectfully submitted May 16, 2025.

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CERTIFICATE OF SERVICE

I hereby certify that I am counsel for the appellant in the above entitled matter and that I did on May 15, 2024 serve a copy of the foregoing APPELLANT RETURN TO RESPONDENTS' MOTION TO STRIKE DESIGNATIONS OF MATTER on counsel for respondents by electronic filing and email as follows:

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Respectfully submitted,

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