THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

S. Phillip Lenski, Administrative Law Judge

Case No. 2024-ALJ-17-0391-IJ

Appellate Case No. 2025-001745

South Carolina Department of Revenue..... Respondent,

v.

Market Hall, LLC d/b/a Soda City Market..... Appellant.

SOUTH CAROLINA DEPARTMENT OF REVENUE'S INITIAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Rules

Other Authorities

INTRODUCTION

The General Assembly has tasked the South Carolina Department of Revenue (Department) with administering and enforcing the provisions of the South Carolina Sales and Use Tax Act (Act), including the licensing of any person engaged in the business of retail sales in the State. To aid in the performance of those duties and to ensure compliance with the Act, the General Assembly created a statutory system that gives the Department broad authority to summon a taxpayer to give testimony or produce documents "relating to a tax or other matter administered by the Department." *See* S.C. Code Ann. §§ 12-4-330; 12-54-110 (Summons Statutes). If a taxpayer or third-party fails to comply with a summons, the Summons Statutes empower the South Carolina Administrative Law Court (ALC) to enforce that summons.

This case presents a straightforward application of the Summons Statutes. Appellant Market Hall, LLC (Market Hall) does not dispute that the Department has the responsibility to investigate or conduct compliance checks related to the Act. It does not dispute that the Department has the legal authority to issues summons. It does not dispute that the Department followed the proper procedures for issuing the summons at issue in this case. And although Market Hall chose not to comply with the summons, its owner agreed that Market Hall's vendor (who the Department was investigating for compliance issues) was notoriously difficult to deal with or communicate with, and admitted the information sought by the summons would be "amazingly easy" for Market Hall to produce. Against this backdrop, the ALC rightly found that the Department demonstrated a legitimate purpose for the summons and that the information sought was relevant to the Department's investigation of matters within the scope of its statutory duties.

Notwithstanding the plain and unambiguous provisions of the Summons Statutes, Market Hall contends that its noncompliance was justified based on a variety of extra-statutory objections. Market Hall claims the summons was merely a "speculative fishing expedition," lacked a "particularized

suspicion," was not "reasonably tailored," and was an unreasonable invasion of privacy (despite simultaneously telling the ALC that the requested information is "publicly available"). And Market Hall's owner proudly declared that he refused to answer the summons because he believed it was time for him "to have a backbone" and defend his "rights as [an] American citizen[]" not to "willfully" provide the requested information "just because some government agency writes me an email." The ALC rightly rejected these arguments and, as authorized by the Summons Statutes, ordered Market Hall to comply with the summons.

Importantly, Market Hall failed to file a motion to reconsider—as required by the ALC's Rules of Procedure—before appealing to this Court. As a result, under those Rules and prior precedent, this Court lacks appellate jurisdiction over this appeal. However, even if jurisdiction is proper, the substantial record evidence supports the ALC's findings that the Department's summons complied with the requirements of the Summons Statutes. And the ALC did not clearly err in concluding that Market Hall's noncompliance was legally unsupported (either by statute or case law). Thus, the Department respectfully requests this Court affirm the ALC's Order and require Market Hall to fully comply with the summons.

COUNTER-STATEMENT OF THE ISSUES ON APPEAL

I. Does this Court lack appellate jurisdiction over this case because Market Hall failed to comply with the Administrative Law Court's procedural rules for perfecting an appeal?

II. Did the Administrative Law Court err by requiring Market Hall to comply with the Department's summons where the summons was statutorily authorized and the evidence established the summons was related to matters the Department has authority to investigate or determine?

III. Did the Department waive its right to enforce the summons by consenting to Market Hall's motion to stay enforcement of the Administrative Law Court's order during the pendency of this appeal?

STATEMENT OF THE CASE

This matter came before the ALC in accordance with S.C. Code Ann. § 12-54-110. The Department filed a Petition for Rule to Show cause with the ALC requesting that the ALC enforce certain summonses the Department issued to Market Hall. *See* Petition for Rule to Show Cause (filed Nov. 8, 2024) **(R. pp.)**. Following a hearing on the Department's Petition, the ALC entered an Order Enforcing Summons (Order) on August 4, 2025, requiring Market Hall to comply with the Department's Second Revised Summons.[1] *See* Order Enforcing Summons (Aug. 4, 2025) **(R. pp.)**. Market Hall did not file a motion for reconsideration, but instead filed its Notice of Appeal on August 29, 2025. On September 9, 2025, this Court dismissed this appeal finding that the Order was not an appealable final order. On September 15, 2025, Market Hall filed its Petition for Rehearing arguing that the Order was an appealable final order and asking this Court to reinstate this appeal.[2]

On October 6, 2025, having received this Court's order remitting this matter to the ALC, the Department filed its Motion for Rule to Show Cause with the ALC because Market Hall had not complied with the Order and it had not filed a Petition for Writ of Supersedeas. In response, Market Hall filed a Motion to Stay with the ALC. The Department consented to the stay pending the resolution of this appeal. On October 19, 2025, this Court entered its Order reinstating this appeal.

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[1] The Department's Petition for Rule to Show Cause sought to enforce several administrative summonses. The first summons (dated June 5, 2024) sought certain information related to Elevation Catering LLC a/k/a Bubblelicious Waffles LLC, Cedric McEachin, and Felicia Mack (First Summons). The second summons (dated June 8, 2024) sought records related to Soda City Market's vendors generally (Second Summons). On August 15, 2024, the Department issued revised versions of both the First Summons and Second Summons. At the hearing, Market Hall provided previously undisclosed information and testimony regarding its records responsive to the summons related to Elevation Catering. As a result of this newly provided information, the Department withdrew its request to enforce the First Summons. Thus, the ALC's Order addressed only the Second Summons as revised on August 15, 2024. The ALC refers to this as the "Second Revised Summons" in its Order; for sake of clarity and consistency, the Department adopts this same nomenclature in this Brief.

[2] The Department did not respond to Market Hall's Petition for Rehearing because "no return to a petition for rehearing may be filed unless requested by the appellate court." Rule 221(a), SCACR. This Court did not request a response from the Department to Market Hall's Petition.

STATEMENT OF THE FACTS

1. Market Hall owns and operates the Soda City farmer's market.

Market Hall owns and operates Soda City market (Soda City), a weekly farmer's market located in Columbia, South Carolina. Tr. 121:9-15. **(R. pp.)**. To participate in Soda City, a business must submit an online application (Application), along with a one-time application fee, to Market Hall. Tr. 137:10-12; **(R. pp.)**; Tr. 138:5-15. **(R. pp.)**. Whether a business can participate in Soda City is within Market Hall's sole discretion; it can "rescind vendor participation" at Soda City if any rules are broken or for "any reason Soda City sees fit." Petitioner's Ex. 3 at 7. **(R. pp.)**. Approved vendors must pay a variety of yearly, monthly, or weekly fees to secure membership in Soda City. Petitioner's Ex. 2. **(R. pp.)**. Market Hall has developed comprehensive rules for Soda City; vendors agree to abide by these rules (as amended) as a condition to participate in Soda City. Petitioner's Ex. 3 at 3. **(R. pp.)**.

Among these rules, Market Hall requires all vendors to obtain a South Carolina retail license to sell items at Soda City. Petitioner's Ex. 3 at 1. **(R. pp.)**. The Application requires vendors to disclose whether they have a South Carolina retail license. Petitioner's Ex. 4 at 2. **(R. pp.)**. The rules provide a link to Department instructions and forms for obtaining a retail license. Petitioner's Ex. 3 at 1. **(R. pp.)**. Vendors receive regular communications from Market Hall about Soda City, and vendors must communicate to Market Hall on a monthly or weekly basis to sign-up to participate in Soda City each Saturday. *See* Petitioner's Ex. 2 at 3. **(R. pp.)**. Soda City has a roster of over 400 vendors who come and go throughout the year; on any given Saturday, the Soda City market hosts between 150 to 220 vendors. Tr. 122:24. **(R. pp.)**.

2. The Department is charged with statutory responsibility to administer and enforce South Carolina sales and use tax laws.

The Department is statutorily tasked with administering and enforcing the provisions of the South Carolina Sales and Use Tax Act (Act), including licensing any person engaged in the business of retails sales in South Carolina. S.C. Code Ann. § 12-36-2660. Every retailer is required to obtain a

retail license for any permanent business location. S.C. Code Ann. § 12-36-510. The retail license requirement extends to certain artists and craftsmen, as well as retailers operating transient or temporary businesses. *Id.* Separate licenses are required for each retail sales location. S.C. Code Ann. § 12-36-540. Retail licenses must be conspicuously displayed at all times and are not transferrable or assignable. S.C. Code Ann. § 12-36-550. Operation of a business without a retail license or with a suspended retail license is a criminal offense. S.C. Code Ann. § 12-36-560. And every retailer engaged in selling tangible personal property at retail is subject to a sales tax; taxes and returns are due monthly. S.C. Code Ann. §§ 12-36-910; 12-36-2570. The Act imposes a duty on retailers to keep sufficient records that may be necessary for the Department to determine the amount of tax due under the Act. S.C. Code Ann. § 12-36-2540.

There are unique challenges to regulating businesses that operate primarily at festivals or markets, in contrast to those businesses that operate primarily at a permanent brick-and-mortar location. Tr. 34:23-35:23. **(R. pp.)**. Festivals often attract out-of-state retailers or transient/temporary in-state retailers; it is not unusual for those retailers to be unaware of their obligation to obtain a retail license and remit sales tax for their sales in South Carolina. Tr. 21:25-22:14. **(R pp.)**. Accordingly, the Department (typically through its revenue officers) routinely coordinates with festival and market promoters or organizers to obtain a list of approved or participating vendors (i.e. retail businesses). Tr. 22:15-23:11. **(R. pp.)**. This enables the Department to create a "master list" of retailers for each festival or market, which it uses for administration, enforcement, and compliance purposes. Tr. 21:22-22:5 **(R. pp.)**; 34:20-35:23. **(R. pp.)**. This also enables the Department to identify and work with all noncompliant businesses prior to the festival or event to avoid unnecessary disruptions during the event. Tr. 34:23-35:23 **(R. pp.)**; 111:9-111:17. **(R. pp.)**. The Department's goal is to encourage voluntary compliance, not to penalize or shut down businesses at an event. Tr. 34:23-35:23 **(R. pp.)**; 103:9-104:17 **(R. pp.)**; 111:9-111:17. **(R. pp.)**.

Moreover, it is not uncommon for businesses applying for a retail license to provide the Department misleading or inaccurate information about the identity of the business or its principals, often to hide prior violations or because the principals have outstanding tax debts. *See* Tr. 24:15-26:13. **(R. pp.)**. Accordingly, when licensing retail businesses, the Department regularly obtains and reviews independent, third-party information to confirm or verify the accuracy of information provided by the applicant. Tr. 22:25-23:11 **(R. pp.)**; 34:23-35:23 **(R. pp.)**; 95:3-96:17. **(R. pp.)**. This is especially helpful when dealing with transient/temporary retailers that do not otherwise have a permanent business location for a revenue officer to visit. *See* Tr. 25:17-24. **(R. pp.)**.

3. The Department investigated a Soda City vendor, Bubblelicious Waffles.

At some point prior in early 2024, the Department revoked the retail license of Elevation Catering, LLC d/b/a Bubblelicious Waffles LLC (Bubblelicious) for noncompliance issues. Tr. 24:15-25:5. **(R. pp.)**. Thereafter, Bubblelicious attempted to apply for multiple retail licenses under different individual/business names, which the Department denied. Tr. 25:6-24. **(R. pp.)**. Bubblelicious did not have a business location (only the purported owner's home address), but the Department also learned that Bubblelicious was operating its food truck business at Soda City without a retail license in violation of South Carolina law (and Soda City's rules). Tr. 24:19-26:5. **(R. pp.)**. As part of its investigation of Bubblelicious, the Department's collections supervisor (Bailie Campbell) asked Market Hall for certain information she believed would help determine the identity of the true owners or principals of Bubblelicious was operating its food truck at Soda City. *Id.*

In conjunction with this specific investigation, Ms. Campbell also informally asked Market Hall for its complete vendor list and copies of the Application each business submitted to become a vendor at Soda City. *See* Petitioner's Ex. 1. **(R. pp.)**. This request was not unusual. The Department's revenue officers do regular license checks throughout the state, including physically appearing at events like markets and festivals to ensure the vendors comply with state law. Tr. 34:23-35:23 **(R.**

pp.); 94:9-23. **(R. pp.)**.[3] As part of this compliance process, revenue officers routinely coordinate with festival and market promoters or organizers in advance of the event to obtain lists of approved or participating vendors (i.e. retail businesses). Tr. 57:11–58:17. **(R. pp.)**. The event coordinators/operators are typically cooperative and provide this information willingly; the Department rarely must issue a summons for this information, and it is even more rare for a taxpayer to refuse to comply with a summons. Tr. 95:9–96:17. **(R. pp.)**. As explained above, there are unique challenges to regulating businesses like Bubblelicious that operate primarily at festivals or markets, in contrast to those businesses that operate primarily at a permanent brick-and-mortar location.

In response to Ms. Bailey's requests, Market Hall directed her to the Soda City Market Facebook page. *Id.* As Ms. Campbell testified, the information available on Facebook contained only a map showing where each vendor booth would be located during the upcoming Soda City; the businesses were listed by name, but the map did not provide any of the other identifying information contained in the Application. Tr. 75:18-77:6. **(R. pp.)**. Moreover, upon review of the map, Ms. Campbell could not determine whether the listed business name was a "d/b/a" or if it matched the entity name that would have been listed on its South Carolina retail license. *Id.* **(R. pp.)**. Thus, the map alone was insufficient for the Department to identify whether the vendors for the upcoming Soda City were licensed retailers. *Id.* **(R. pp.)**.

Because Market Hall appeared unwilling to provide the Department with the requested information through informal means, the Department issued a summons to Market Hall on June 8, 2024, requesting copies of the Applications for all vendors for 2024. Tr. 96:24-97:2. **(R. pp.)**; Petitioner's Ex. 6. **(R. pp.)**. Market Hall did not respond. Tr. 36:18-22. **(R. pp.)**.

[3] The revenue officers have performed these compliance checks at Soda City. Tr. 97:5–12. **(R. pp.)**.

On August 15, 2024, the Department issued the Second Revised Summons, which clarified that the scope of information sought was limited to copies of the Soda City vendor Applications for 2024 (including the specific information contained on the Applications). Tr. 37:11-18 **(R. pp.)**; Petitioner's Ex. 8. **(R. pp.)**. The Second Revised Summons was left at the personal residence of Emile DeFelice, the owner and president of Market Hall. Tr. 98:12-100:24. **(R. pp.)**. Although Market Hall later emailed the Department some information related to Elevation Catering, LLC, that email was unresponsive to the Second Revised Summons. Tr. 39:23-40:2 **(R. pp.)**; Respondent's Ex. 3. **(R. pp.)**.

4. **The ALC conducted a hearing to determine whether Market Hall should comply with the Second Revised Summons.**

The Department sought to enforce the Second Revised Summons pursuant to the Summons Statutes. S.C. Code Ann. § 12-54-110(D) (directing the ALC to enforce compliance with the summons). At the ALC hearing, Ms. Campbell testified that in her role at the Department she works to enforce and encourage compliance with the sales tax laws of South Carolina. Tr. 20:18-21:7. **(R. pp.)**. Part of this compliance work involves contacting businesses and specifically festival or special event promoters to gather the sort of information sought in this case. Tr. 21:15-22:5. **(R. pp.)**. Ms. Campbell explained that the Department is seeking the information at issue in this case in furtherance of its duty to enforce and encourage compliance with the sales tax laws and specifically the requirement that businesses have a retail license. *See* Tr. 24:19-25 **(R. pp.)**; 26:6-12 **(R. pp.)**; 34:23-35:23. **(R. pp.)**.

Market Hall's president (Emile DeFelice) testified that when a business applies to participate in Soda City through the online Application, that information is stored in a Google spreadsheet (Spreadsheet) that can be accessed only by certain Market Hall employees. Tr. 121:9 **(R. pp.)**; 163:14-165:12. **(R. pp.)**. Mr. DeFelice also conceded that "it's amazingly easy for me to give [the Department] all that information, all it takes is a couple o' clicks . . .." Tr. 166:1-3. **(R. pp.)**. In light of this testimony and the evidence presented during the hearing, the Department stipulated that if Market Hall produced a copy of Spreadsheet for all vendors during 2024, that would fully satisfy the Second Revised

Summons. Tr. 196:8-11. **(R. pp.)**. Despite this stipulation, Mr. DeFelice testified that it would be "unduly burdensome" for him to produce the Spreadsheet. Tr. 165:18. **(R. pp.)**. He also argued he should not be required to produce the information contained on the Spreadsheet because it is simultaneously both publicly available and his private, proprietary information. Tr. 149:21-25 **(R. pp.)**; 165:2-3 **(R. pp.)**; 166:6. **(R. pp.)**.

STANDARD OF REVIEW

The Administrative Procedures Act governs appellate review of decisions from the ALC. This Court may not substitute its judgment for that of the ALC as to the weight of the evidence on questions of fact, and may reverse the ALC only if its finding, conclusion, or decision was:

(a) in violation of constitutional or statutory provisions;
(b) in excess of the statutory authority of the agency;
(c) made upon unlawful procedure;
(d) affected by other error of law;
(e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
(f) arbitrary or capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-610(B); *DIRECTV, Inc. & Subsidiaries v. S.C. Dep't of Revenue*, 421 S.C. 59, 68, 804 S.E.2d 633, 638 (Ct. App. 2017).

Judicial review of the ALC's findings of fact is limited to determining if the findings are supported by "substantial evidence." *MRI at Belfair, LLC v. S.C. Dep't of Health & Envtl. Control*, 379 S.C. 1, 6, 664 S.E.2d 471, 474 (2008). Substantial evidence is evidence which, when considering the record as a whole, would allow reasonable minds to reach the conclusion that the ALC reached. *Books-A-Million, Inc. v. S.C. Dep't of Revenue*, 430 S.C. 388, 391, 844 S.E.2d 399, 400–01 (Ct. App. 2020). When the evidence conflicts on an issue, the court's substantial evidence standard of review defers to the findings of the fact-finder, and the mere possibility of drawing two inconsistent conclusions from the evidence does not prevent a finding from being supported by substantial evidence. *Risher v. S.C. Dep't of Health & Envtl. Control*, 393 S.C. 198, 210, 712 S.E.2d 428, 435 (2011).

ARGUMENT

This Court should dismiss this appeal because Market Hall's failure to follow the ALC's Rules eliminates this Court's appellate jurisdiction over this case. Even if the appeal survives the jurisdictional defects, the ALC's Order was not clearly erroneous and is supported by substantial evidence. The ALC correctly concluded that the Department had statutory authority to issue the Second Revised Summons, that the Second Revised Summons was issued for legitimate purposes and did not violate any of Market Hall's constitutional rights, and that the ALC has the power to require Market Hall to comply with the Second Revised Summons. Accordingly, and in light of the applicable standards of review, this Court should affirm.

I. Because Market Hall failed to comply with the Administrative Law Court's procedural rules for perfecting an appeal, this Court lacks appellate jurisdiction over this case.

Market Hall failed to comply with the procedural requirements for an appeal from the ALC; this procedural defect in the appeal divests this Court of appellate jurisdiction and requires dismissal of the appeal.

A. Rule 29 of the Rules of Procedure for the Administrative Law Court requires a party to file a motion for reconsideration prior to filing a notice of appeal, which Market Hall did not do.

"All hearings before an administrative law judge must be conducted exclusively in accordance with the rules of procedure promulgated by the court pursuant to this section." S.C. Code Ann. § 1-23-650 (2014). Among those statutorily-required rules of procedure is SCALC Rule 29, which provides that "[a]ny party may move for reconsideration of a final decision of an administrative law judge in a contested case. A party *must file a motion for reconsideration prior to filing a notice of appeal* and must state with particularity the points supposed to have been overlooked or misapprehended by the Court." SCALC Rule 29(D) (emphasis added). The notes to Rule 29 further explain that "[i]n accordance with applicable case law on issue preservation, a motion for reconsideration is a prerequisite to filing a

notice of appeal." Therefore, Market Hall could not file a notice of appeal concerning the ALC's Order unless it first filed a motion for reconsideration on or before August 18, 2025.

Appellant is correct that the first sentence of SCALC Rule 29(D) contains permissive language; insofar as a party (prevailing or non-prevailing) is not required to file a motion for reconsideration or an appeal—they can choose to accept the findings and conclusions of the ALC's final order. But SCALC Rule 29(D) contains clear and unambiguous mandatory language as well: if the party intends to file a notice of appeal, then it *must first* file a motion for reconsideration.

Market Hall filed its Notice of Appeal on August 29, 2025, but never filed a motion for reconsideration as required under SCALC Rule 29.[4] That decision has repercussions because "the failure of a party to comply with procedural requirements for an appeal divests a court of appellate jurisdiction." *State v. Brown*, 358 S.C. 382, 387, 596 S.E.2d 39, 41 (2004) (citing *Great Games, Inc. v. S.C. Dep't of Rev.*, 339 S.C. 79, 82 at n. 5, 529 S.E.2d 6, 7 at n. 5 (2000)). As the Supreme Court has consistently noted, compliance with rules, regulations, and statutes governing an appeal invoke questions of appellate jurisdiction. *Allison v. W.L. Gore & Associates*, 714 S.E.2d 547, 549, 394 S.C. 185, 188 (2011) (citing *In Re November 4, 2008 Bluffton Town Council Election*, 385 S.C. 632, 686 S.E.2d 683 (2009)).

B. SCALC Rule 29 is a valid procedural rule and does not conflict with applicable statutes.

Contrary to Market Hall's contention, the requirement to file a motion for reconsideration before filing a notice of appeal does not conflict with statutes controlling rights to appeal from the ALC. It is well-established that the General Assembly has the authority to regulate the right to appeal, including creating requirements that must be complied with in order to maintain an appeal. *Horn v.*

[4] The time for filing a motion for reconsideration is within ten (10) days after notice of the final decision. SCALC Rule 29(D)(1).

Blackwell, 48 S.E.2d 322, 323, 212 S.C. 480, 483–84 (1948). The General Assembly also has the right to delegate to state agencies the authority to make rules, provided those rules do not conflict with the statute that conferred the authority. *S.C. Coastal Conservation League v. S.C. Dep't of Health & Env't Control*, 380 S.C. 349, 375, 669 S.E.2d 899, 912 (Ct. App. 2008) (citing cases). Here, the Legislature specifically directed the ALC to promulgate rules governing the proceedings at the ALC, including those requirements that must be followed in order to perfect an appeal to the Court of Appeals. *See* S.C. Code Ann. § 1-23-650. The ALC did so, and SCALC Rule 29 is presumptively valid. *See* S.C. Code Ann. § 1-23-650 (explaining process for promulgating rules for ALC); Const. art. V, § 4A (detailing how court rules should be submitted and approved by the legislature).

SCALC Rule 29 and section 1-23-610 do not conflict, so there is no reason for this Court to engage in statutory construction to construe one requirement as superseding the other. Section 1-23-610 imposes general requirements for how and when to serve a notice of appeal in order to seek judicial review of a final decision of the ALC. Rule 29(D) simply adds a further requirement that the aggrieved party move for reconsideration of the final order before filing the notice of appeal. As Rule 29(D) makes clear, the 30-day timeline for filing an appeal (as provided in section 1-23-610) is stayed by a timely motion to reconsider. Thus, the requirements of section 1-23-610 and Rule 29(D) are harmonious—not conflicting.

Additionally, proposed ALC rules are submitted to the General Assembly before promulgation, and the General Assembly has an opportunity to reject the proposed rules. *See* S.C. Code Ann. § 1-23-650 (explaining process for promulgating rules for ALC); Const. art. V, § 4A (detailing how court rules should be submitted and approved by the legislature). If Rule 29 conflicted with the General Assembly's intent for how a party may appeal a decision of the ALC, it could have rejected that requirement when the ALC promulgated Rule 29. It did not; instead, the General Assembly approved it.

C. The Department has not waived its right to raise the issue of appellate jurisdiction.

The Department did not waive its right to challenge appellate jurisdiction because, as Market Hall acknowledges, matters of appellate jurisdiction are not subject to waiver. *See* Market Hall Return to Department's Motion to Dismiss at 5; 4 C.J.S. Appeal and Error § 49. This Court has held that "[t[he right to appeal is a jurisdictional matter and, even if the parties do not raise the issue of appealability, we must dismiss the appeal on our own motion if we conclude we do not have jurisdiction." *Levi v. N. Anderson Cnty. EMS*, 409 S.C. 374, 379, 762 S.E.2d 44, 47 (Ct. App. 2014) (quoting *Dorothy J. Pierce Family Mineral Trust v. Jorgenson,* 816 N.W.2d 779, 781 (N.D.2012) (internal quotation marks omitted)).

Even if the Department could waive its objection to appellate jurisdiction, the Department's consent to a stay of the ALC Order pending the disposition of this appeal does not constitute such a waiver. A motion to reconsider may only be made in response to a final order. *See* SCALC Rule 29(D). At the time the Department consented to the stay, this Court had determined that the ALC Order was not a final order and sent the remittitur back to the ALC. Thus, filing a motion to dismiss the appeal, which itself had already been dismissed, based on Market Hall's failure to file a motion to reconsider would be nonsensical—such a motion would assume the ALC Order was a final order in direct contravention of this Court's decision in effect at the time. Shortly after this Court reinstated this appeal and determined that the ALC Order is a final order, the Department filed its Motion to Dismiss.

Finally, the Department did not waive its appellate objection merely because it did not file a return to Market Hall's Petition for Rehearing. As provided in Rules 240 and 221(a), SCACR, a return to a petition for rehearing may be filed only if requested by the court. This Court never requested a return from the Department to Market Hall's Petition for Rehearing.

D. This Court has not ruled on whether Market Hall's failure to comply with SCALC Rule 29 deprives this Court of appellate jurisdiction.

To the extent Market Hall argues that this Court has already ruled on the question of appellate jurisdiction by reinstating Market Hall's appeal after initially dismissing it, this argument is unfounded. The Department filed a Motion to Dismiss only *after* this Court entered its Order reinstating this appeal. Under Market Hall's theory, the Department was required to file its Motion to Dismiss after this Court entered its Order of dismissal but before this Court reinstated the appeal. It makes no sense for the Department to ask this Court to dismiss a matter that it has already dismissed.

Moreover, this Court's Order reinstating Market Hall's appeal dealt only with whether the ALC's Order Enforcing Summons was a final order. *See* December 30, 2025, Order. **(R. pp.)**. The reinstatement order says nothing about SCALC Rule 29 or Market Hall's failure to file a motion for reconsideration. *See id.*

Finally, this Court's Order on the Department's Motion to Dismiss denied the motion "without prejudice to the parties addressing this court's appellate jurisdiction in their briefs." *See id.* Rather than finally deciding the issue, this language indicates the Court has left that question open for further consideration. Although our courts distinguish between appellate jurisdiction and subject matter jurisdiction, the Department contends that appellate jurisdiction—like subject matter jurisdiction—can be raised at any time. *S.C. Dep't of Soc. Servs. v. Tran*, 418 S.C. 308, 314–15, 792 S.E.2d 254, 257 (Ct. App. 2016) ("Lack of subject matter jurisdiction can be raised at any time, can be raised for the first time on appeal, and can be raised *sua sponte* by the court.").

SCALC Rule 29 plainly requires a party to file a motion for reconsideration before appealing the ALC's decision to this Court. The ALC's rules "are not mere technicalities," and SCALC Rule 29 provides an orderly mechanism to guide appeals from the ALC. *Henning v. Kaye*, 307 S.C. 436, 437, 415 S.E.2d 794, 794 (1992). Consequently, because Market Hall has failed to comply with the requirements

of SCALC Rule 29, the Department respectfully submits that this Court lacks appellate jurisdiction in this matter and therefore requests that this matter be dismissed with prejudice.

II. The Administrative Law Court correctly required Market Hall to comply with the Department's Second Revised Summons because the summons is statutorily authorized and the evidence established the summons was related to matters the Department has authority to investigate or determine.

A. The Department is charged with administering and enforcing South Carolina's sales and use tax laws, which includes the licensure and tax compliance of the vendors at Soda City Market.

The Department is charged with administering and enforcing the requirements of the Sales and Use Tax Act in Chapter 36 of Title 12 (the Act). *See* S.C. Code Ann. § 12-36-2660 (2014). The Act requires all retailers to obtain a retail license from the Department before making any retails sales that are subject to the sales and use tax. *See* S.C. Code Ann. § 12-36-510 (2014). The Act imposes a number of obligations on businesses in connection with retail licenses, and the Department is required by statute to ensure compliance with those obligations, including with respect to transient or temporary retailers and artists, crafters, hobbyists who participate as vendors at festivals. *See generally* S.C. Code Ann. §§ 12-36-510, 12-36-520, 12-36-550, 12-36-560, 12-36-2540, 12-36-2570 (2014).

In this case, the Department's administrative and enforcement responsibilities extend both to Market Hall and its numerous vendor members at Soda City who are subject to the statutory requirements of the Act. This includes processing and reviewing license applications and investigating whether businesses are complying with the Act.

B. The plain language of the Summons Statutes authorizes the Department to summon any person it considers proper and requires them to give testimony or produce certain records and documents.

The Department's authority to issue an administrative summons is provided in the Summons Statutes located in S.C. Code Ann. §§ 12-4-330 and 12-54-110 (2014). Section 12-4-330 reads, in relevant part:

SECTION 12-4-330. Witnesses before department.

(A) The director may summon witnesses to appear and give testimony and to produce records, books, papers, and documents relating to any matters which the department has authority to investigate or determine.

(B) The director may cause the deposition of witnesses residing within or without the State or absent from the State to be taken upon notice to the interested party, if any, in the manner that depositions of witnesses are taken in civil actions pending in the circuit court in any matter which the department has authority to investigate or determine.

(C) Oaths to witnesses may be administered by the department. A person who testifies falsely in a matter under consideration by the department is guilty of and, upon conviction, will be punished for perjury.

* * *

HISTORY: 1991 Act No. 50, Section 2; 1994 Act No. 516, Section 27; 1995 Act No. 76, Section 9; 1998 Act No. 432, Section 2.

Section 12-54-110 reads, in relevant part:

SECTION 12-54-110. Power of department to summon taxpayer or other person; remedy for failure to comply with summons.

(A) The department may summon:

(1) a person who:

(a) is required to make a return or obtain a license pursuant to the provisions of law administered by the department and who fails to do so at the time required;

(b) delivers a return that the department considers erroneous; or

(c) refuses to allow an authorized agent of the department to examine his books and records;

(2) another person having possession, care, or custody of books of account containing entries relating to the business of such person; or

(3) another person it considers proper.

(B) The summons may demand that the person appear before the department and produce the books at a time and place named in the summons and to give testimony and answer questions under oath relating to a tax or other matter administered by the department.

(C) The summons must be served by an authorized agent of the department by delivering an attested copy to the person in hand or leaving the copy at the person's last or usual place of abode. When the summons requires the production of books and returns, it is sufficient if the books are described with reasonable certainty.

(D) If a person summoned pursuant to this section neglects or refuses to obey the summons, the department may apply to the Administrative Law Court for an attachment against him for contempt. Any administrative law judge may hear the application and, if satisfactory proof is made, shall issue an attachment directed to the sheriff of the county in which the person resides for his arrest. When the person is brought before him, the judge shall proceed to a hearing of the case and may enforce obedience to the requirements of the summons by making an order consistent with existing laws for the punishment of contempt.

HISTORY: 1985 Act No. 201, Part II, Section 32A; 2003 Act No. 69, Section 3.L, eff June 18, 2003; 2005 Act No. 161, Section 12, eff June 9, 2005.

Section 12-54-110 was first enacted in 1985 and has been amended substantively twice to expand the scope of summonses to include both tax and regulatory matters (in 2003) and to vest the ALC with jurisdiction to enforce administrative summonses (in 2005). *See* Act No. 69 (2003); Act No. 161 (2005). Section 12-4-330 has not been substantively amended since it was first enacted in 1991.

South Carolina's Summons Statutes are not unique. Congress has granted the Internal Revenue Service (IRS) similar authority to examine books and witnesses by means of an administrative summons. *See* 26 U.S.C. § 7602. South Carolina's Summons Statutes, in particular section 12-54-110,

largely mirror section 7602 of the Internal Revenue Code (IRC § 7602). Many of South Carolina's sister states have also authorized their respective state taxing agency to issue administrative summonses through statutes similar to IRC § 7602.[5]

C. Substantial record evidence established that the Second Revised Summons requested information related to the Department's specific and general investigations of certain Market Hall vendors to determine whether those vendors were properly licensed and in compliance with South Carolina's sales tax laws.

The undisputed testimony established that the Department routinely seeks information (similar to what was requested in the Second Revised Summons) to facilitate compliance by retail businesses at festivals and markets throughout South Carolina. Tr. 21:15-22:5. **(R. pp.)**. The requested information gives the Department a clear understanding of which businesses may be present at the event and enables the Department to more efficiently identify and work with retailers that may not be compliant. Tr. 23:17-24:2. **(R. pp.)**. More specifically, the Department was engaged in an investigation of Bubblelicious, and the Second Revised Summons is related to that specific investigation because the information provided to Market Hall by Bubblelicious is relevant to the Department's investigation of whether Bubblelicious was in compliance with the sale and use tax laws. And, the fact that Bubblelicious was operating its food truck at Soda City without a retail license—in direct violation of Soda City's own rules—provided even further reason for the Department to expand its compliance inquiry to include Soda City's other vendors.

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[5] *See, e.g.*, Ark. Code Ann. § 26-18-305 (West) (authorizing Secretary to compel production of records by summons in administration of state tax laws); Ala. Code § 40-2A-7 (authorizing Department to summon "records, books, or other information of any kind relating to any matter which the department has authority to administer"); Ga. Code Ann. § 48-2-8 (West) (authorizing tax commissioners to subpoena production of records and documents of any person); N.C. Gen. Stat. Ann. § 105-258 (authorizing Secretary of Revenue to summon persons to produce records as may be relevant or material to an inquiry); Va. Code Ann. § 58.1-3110 (West) (authorizing commissioner to summon records and granting jurisdiction to courts to compel compliance of a taxpayer summoned).

In short, there is no dispute that the information sought in the Second Revised Summons concerned retail businesses that are subject to the Act and is directly related to matters which the Department has the authority to investigate or determine. S.C. Code Ann. § 12-4-330(A). The ALC found that the Second Revised Summons is related to matters which the Department has the authority to investigate or determine, and that finding of fact is supported by substantial evidence; therefore, that finding must be upheld. Order Enforcing Summons at 10-11. **(R. pp.)**.

Additionally, "[t]he Department may summon a person who refused to allow an authorized agent of the department to examine his books and records or another person [the Department] considers proper." S.C. Code Ann. § 12-54-110(A)(1), (A)(3). Ms. Campbell, an authorized agent of the Department, first attempted to obtain the records from Market Hall via email. Tr. 29:16-30:13. **(R. pp.)**. Only after Market Hall refused to provide the requested information did Ms. Campbell issue the Second Revised Summons. Tr. 32:6-21. **(R. pp.)**. Market Hall was therefore a person who refused to allow an authorized agent of the Department to examine his books. The information the Department sought to obtain was in the custody and control of Market Hall, therefore Market Hall was a proper person to whom a summons may be issued pursuant to § 12-54-110(A)(3). Tr. 148:16-149:17. **(R. pp.)**.

D. The Second Revised Summons was in good faith and did not violate the South Carolina Constitution.

1. The Second Revised Summons meets the standards under *United States v. Powell*, which the United States Supreme Court established for evaluating whether the Internal Revenue Service has issued an administrative summons in good faith.

The Department is unaware of any reported appellate decisions evaluating a Department summons issued under the authority of the Summons Statutes. However, there is a robust body of federal law evaluating IRS administrative summonses. The seminal federal case addressing the power of the IRS to issue and enforce an administrative summons is *United States v. Powell*, 379 U.S. 48, 85 S.

Ct. 248 (1964). Because section 12-54-110(D) largely mirrors the language of IRC § 7604(b), the ALC has previously cited to *Powell* when evaluating Department summonses. *See Patel v. S.C. Dep't of Revenue*, 2021 WL 5575370, Docket No. 21-ALJ-30-0446-IJ (S.C. Admin. 2021); *S.C. Dep't of Revenue v. Sunbelt Furniture Xpress, Inc.*, 2019 WL 2576507, Docket No. 19-ALJ-17-0110-IJ (S.C. Admin. 2019).

In *Powell*, the Supreme Court established a four-part test for determining whether an administrative summons was issued in good faith: (1) the agency investigation is for a "legitimate purpose," (2) the information sought by the administrative summons must be "relevant to the purpose" of the investigation, (3) the IRS does not already possess the requested information, and (4) the IRS followed the required administrative procedures when issuing the administrative summons. *Powell*, 379 U.S. 48 at 57–58, 85 S. Ct. at 255; *see also U.S. v. Morton Salt*, 338 U.S. 632, 652, 70 S.Ct. 357 (an agency has authority to issue an administrative subpoena "if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant").

Here, the ALC (relying on the *Powell* framework) found the Second Revised Summons was issued in good faith. *See* Order Enforcing Summons at 13. **(R. pp.)**; *see also United States v. Clarke*, 573 U.S. 248, 254, 134 S. Ct. 2361, 2367 (2014) (noting that when evaluating a summons "courts may ask only whether the IRS issued a summons in good faith, and must eschew any broader role of 'oversee[ing] the [IRS's] determinations to investigate'"); *Palmetto Kids First Scholarship Program*, 2015 WL 2159509 (*citing S.C. Nat'l Bank v. Florence Sporting Goods, Inc.*, 241 S.C. 110, 115-116, 127 S.E.2d 199, 202 (1962)) ("[T]here is a presumption that government officials in South Carolina act in good faith in the discharge of their duties.").

Moreover, as the party opposing the Second Revised Summons, Market Hall bore the heavy burden of rebutting the presumption of good faith. *Powell*, 379 U.S. at 58; *United States v. Stuart*, 489 U.S. 353 (1989) ("The taxpayer carries the burden of proving an abuse of the court's process."); *United States v. LaSalle Nat. Bank*, 437 U.S. 298, 316 (1978) (explaining that "those opposing enforcement of

a summons do bear the burden to disprove the actual existence of a valid civil tax determination or collection purpose by the [IRS]" and noting "this burden is a heavy one"). Here, the ALC was correct to conclude that Market Hall failed to meet its burden by establishing specific facts or circumstances that overcome the presumption of good faith, much less plausibly raise an inference of bad faith.

a. The ALC's finding that the Department's investigation was for a legitimate purpose is supported by substantial evidence.

The ALC correctly found that the Department's investigation was for a legitimate purpose: administering and enforcing the provisions of the Act with respect to businesses engaged in retail sales in South Carolina, including those businesses who are vendors at Soda City. It is difficult to conceive how such an investigation is not a legitimate exercise of the Department's administrative and enforcement duties, especially considering that Market Hall's rules for Soda City require all vendors to obtain a South Carolina retail license in order to sell goods at the market. Petitioner's Ex. 3 at 1. **(R. pp.)**. In fact, section 12-54-100 specifically authorizes the Department to conduct examinations or investigations in the administration of state tax law, including the examination of precisely the type of information sought in the Second Revised Summons—the Second Revised Summons is simply the legal mechanism by which the Department may obtain that information from Market Hall.[6]

Market Hall asserts that the legitimate purpose prong of the *Powell* test incorporates a particularized suspicion or probable cause requirement—this is incorrect. The *Powell* court explicitly held that "the Government need make no showing of probable cause to suspect fraud unless the

[6] Section 12-54-100(A) provides:

> In the administration of a state tax law, the director or his duly authorized agent, for the purpose of ascertaining the correctness of a return or making a determination of or fixing tax liability, may examine or investigate the place of business, tangible personal property, facilities, computers, computer programs, electronic data, books, invoices, papers, records, memoranda, vouchers, other documents, equipment, or licenses of the taxpayer or other person bearing upon the matters required to be included on a return.

(emphasis added).

taxpayer raises a substantial question that judicial enforcement of the administrative summons would be an abusive use of the court's process, predicated on more than the fact of re-examination and the running of the statute of limitations on ordinary tax liability." *Powell*, 379 U.S. 48 at 51, 85 S. Ct. at 251. Market Hall has raised no substantial question that enforcement would be an abuse of process.

Even assuming that some particularized suspicion was necessary, the record reflects that the Department did have particularized suspicion regarding Bubbleicious. Tr. 24:19-26:12. **(R. pp.)**. Ms. Campbell testified that Bubblelicious's retail license had been revoked, and that the people that operated that business had attempted to obtain another license by providing the Department with slightly different identifying information. *Id.* **(R. pp.)**. The summonses were connected to the Department's suspicion that Bubblelicious was continuing to operate—both at Soda City and elsewhere. *Id.* **(R. pp.)**. Further, the Department's knowledge that Bubbleicious was operating without a retail license at Soda City gave the Department reasonable suspicion that there may be other businesses operating without a retail license at Soda City.

b. The ALC's finding that the Summoned information is relevant to the legitimate purpose is supported by substantial evidence.

The Department requested copies of Market Hall's business records related to its Soda City vendor Applications. *See* Petitioner's Ex. 8 **(R. pp.)**; Tr. 196:1-11. **(R. pp.)**. As discussed above, each vendor must submit an online Application to Market Hall to be approved to participate in the Soda City market. Petitioner's Ex. 4 **(R. pp.)**; Tr. 138:5-15. **(R. pp.)**. The Application solicits important information from each vendor, including the business name and point of contact, email and phone number, production address, and whether the business has a South Carolina retail license. Petitioner's Ex. 4 **(R. pp.)**. Obtaining the information that Market Hall received from its vendor members was relevant to the Department's administration and enforcement of the Act because it would provide the Department with a "master list" of retail businesses that had obtained an annual membership from Market Hall and presumably would be regularly operating at Soda City. Tr. 34:23-35:23. **(R. pp.)**. It

also would enable the Department to identify—in advance of the Soda City market hours of operation on Saturday—any Soda City vendors that may not be compliant with South Carolina tax laws, thereby enabling the Department to work efficiently with those vendors to bring them into compliance. *Id.* And it would provide important third-party data which the Department could cross-check (owner/operator, principal address, contact information) against its own records as a means to verify the accuracy of certain information contained on retailer applications.[7]

Market Hall selectively cites portions of Ms. Campbell's testimony to argue the information requested by the Second Revised Summons was not relevant because Ms. Campbell informed Market Hall that its incomplete response was inadequate.[8] The complete context of Ms. Campbell's testimony explains why this "admission" does not "contradict" the Department's argument concerning relevancy. *See* App. Br. at 6. The summons dated August 15, 2024, requested "business records related to contracts/agreements/application" with Elevation and Market Hall. Petitioner's Ex. 7 at 2. **(R. pp.)**. In response to that summons, Market Hall provided a screenshot of a portion of a spreadsheet via email dated August 21, 2024, but Market Hall did not provide any contracts or agreements between Market Hall and Elevation. Respondent's Ex. 3. **(R. pp.)**. In response, Ms. Campbell advised Market Hall that the screenshot of the spreadsheet "did not in fact assist [the Department] with the request

[7] As Ms. Campbell testified, the Department had received several applications for a new retail license for Elevation Catering LLC / Bubblelicious Waffles after its previously license had been revoked. Tr. 24:19-26:5. **(R. pp.)**. During that process, the applications contained conflicting information concerning the identity of the true owner/operator of the business. *Id.* For that reason, Ms. Bailey issued a summons to Market Hall for information specifically related to Elevation Catering and the person the Department believed to be its principals. Tr. 33:11-34:6. **(R. pp.)**. At the hearing, Mr. DeFelice's testimony confirmed the persons involved with Elevation Catering were notoriously difficult to communicate with and had a history of being less than forthright about their business operations. Tr. 161:5-162:14. **(R. pp.)**.

[8] Although Market Hall did not provide a citation to the transcript, the Department believes Market Hall is referencing the testimony of Ms. Campbell beginning on page 47 at line 13 through page 48 at line 1 of the hearing transcript. **(R. pp.)**.

made for the 'business records related to contracts/agreements/application.'" Respondent's Ex. 3. **(R. pp.)**; Tr. 47:22-48:1. **(R. pp.)**. At the hearing, Ms. Campbell further explained that the August 21 email from Market Hall did not include any contract agreements between Market Hall and Elevation or Elevation's application with Market Hall. *Id.* Taken together, the clear intent was that Market Hall's response "did not assist" the Department because it failed to fully comply with the August 15, 2024, summons—not that the requested information was of no use to the Department.

c. The ALC's finding that the Department does not possess the requested information is supported by substantial evidence.

As the ALC found, Soda City vendors are required to complete an online Application, which generates a "Google doc" version of the Application that only Market Hall employees can access. Tr. 138:5-15, 148:13-149:17. **(R. pp.)**. The Department does not have access to, or copies of, the online applications submitted to Market Hall by vendors that were participating at Soda City during 2024. *See* Tr. 148:13-149:17. **(R. pp.)**. Market Hall does not argue that the Department already has the Spreadsheet or copies of the applications. The ALC correctly found that the Department does not have the requested information. Order Enforcing Summons at 13. **(R. pp.)**.

d. The ALC's finding that the Department followed the proper procedure is supported by substantial evidence.

Market Hall did not dispute that the Department followed the required administrative procedures when issuing the Second Revised Summons, including describing the requested records with reasonable certainty, requiring production of the records at a time and place named in the Second Revised Summons, and serving the summons through an authorized agent of the Department. *See* S.C. Code Ann. § 12-54-110(B)–(C). Nevertheless, substantial evidence supports the ALC's finding that the Department followed the requisite procedures in issuing the Second Revised Summons. *See* Tr. 100:14-23; Petitioner's Ex. 8. **(R. pp.)**.

2. The Department's Second Revised Summons is not an unreasonable invasion of privacy under the South Carolina Constitution.

The ALC did not err in rejecting Market Hall's argument that the Second Revised Summons constituted an "unreasonable invasion of privacy" in violation of Article I, § 10 of the South Carolina Constitution. As the ALC correctly noted, the South Carolina Constitution does not provide an absolute right to privacy but prohibits only those invasions deemed "unreasonable." *See* Order Enforcing Summons at 14 **(R. pp.)**; *see also Planned Parenthood S. Atl. v. State*, 440 S.C. 465, 482, 892 S.E.2d 121, 131 (2023) ("When viewed in its full and proper context, it is undeniable that the South Carolina Constitution does not create an absolute bar against all state action that infringes on a person's privacy. Instead, the state constitution draws the line at unreasonable invasions of privacy."); *Hooper v. Rockwell*, 334 S.C. 281, 293-95, 513 S.E.2d 358, 364-66 (1999) (explaining that Article I, Section 10 privacy interests are "not absolute" but must be balanced against the State's interests).

The Summons Statutes represent the General Assembly's determination that a summons properly issued by the Department does not constitute an unreasonable invasion of privacy. Order Enforcing Summons at 14. **(R. pp.)**. "[I]t is the legislature's prerogative to make policy decisions, and it is the Court's duty to evaluate only whether those policy decisions are indisputably repugnant to the federal or state constitutions." *Planned Parenthood S. Atl. v. State*, 440 S.C. 465, 482, 892 S.E.2d 121, 131 (2023). Importantly, Market Hall has not argued that the Summons Statutes are unconstitutional on their face. Instead, its argument appears to be an as-applied challenge to the Second Revised Summons.

The ALC considered Market Hall's as-applied challenge but concluded it was unfounded in light of the evidence, and this Court should affirm. As explained by Mr. DeFelice at the hearing, the content requested by the Second Revised Summons is the sort of information that is generally public

and is not sensitive.[9] Tr. 151:14-152:13. **(R. pp.)**. The Second Revised Summons requests identifying, contact, and license data about and supplied by Soda City vendors who have applied to attend Soda city. Petitioner's Ex. 4. **(R. pp.)**. Vendors that would like to appear at a public market want their business name and contact information to be public—they are trying to sell goods or services. Whether a given business has the appropriate license or licenses is a matter of public record. The requested information is not private in nature by any standard. Thus, Market Hall cannot "assert a legitimate privacy right claim over the requested information while simultaneously arguing that nearly all that information is publicly available." *See* Order Enforcing Summons at 14-15. **(R. pp)**.

Even if Market Hall could establish a privacy right to the information it claims is "publicly available," the Department's request for that information is not unreasonable. Tr. 164:18–65:5. **(R. pp.)**. The Second Revised Summons was limited in scope; the Department conceded that providing a single Spreadsheet would satisfy the summons. Tr. 196:8-11. **(R. pp.)**. This was not an unduly burdensome request because Market Hall concedes that emailing the spreadsheet to the Department would be "amazingly easy." Tr. 166:1-3. **(R. pp.)**. Thus, the ALC was correct to conclude that the State's interest in tax compliance outweighs any alleged privacy interest in "publicly available" information that the businesses voluntarily provided to Market Hall. Tr. 151:14-152:13. **(R. pp.)**.[10] The Second Revised Summons does not violate the South Carolina Constitution.

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[9] The information includes the following for each business that submitted an application: business name, name of individual filling out the application, phone number, business production address, website and social media links, whether credit cards are accepted, business category, whether the business has the appropriate licenses, whether the business has insurance, and practical information regarding the type of electricity connections needed for the business to operate at Soda City. *See* Ex. 4. **(R. pp.)**.

[10] Market Hall's initial brief suggests that the vendors provided this information to Market Hall with an "expectation of confidentiality." Market Hall's Initial Brief at 7. **(R. pp.)**. This is patently absurd. The businesses, which presumably exist to sell goods or services to the public, want their name and contact information to reach as many people as possible, and their name and contact information will clearly be conveyed by Market Hall to members of the public—this is an application for the privilege to appear in public at a certain time and place and conduct business.

III. The Department did not waive its right to enforce the summons just because it consented to a stay of the Administrative Law Court's order during the pendency of this appeal.

Contrary to the arguments advanced in Market Hall's brief, the Department's consent to a stay of enforcement of the Second Revised Summons during the pendency of this appeal does not constitute waiver of this entire matter or end this appeal.[11] *See* Market Hall's Initial Brief at 9. **(R. pp.)**. Market Hall relies exclusively on *State v. McCall* to argue the Department is barred from seeking enforcement of the Second Revised Summons under the doctrine of judicial estoppel. However, a careful reading of *McCall* reveals that it provides no support for Market Hall's waiver/judicial estoppel argument.

As *McCall* explains, the judicial estoppel "precludes a party from adopting a position in conflict with one earlier taken in the same or related litigation." *State v. McCall*, 364 S.C. 205, 612 S.E.2d 453 (Ct. App. 2005). Generally, judicial estoppel in South Carolina "applies only to inconsistent statements of fact, not inconsistent positions of law." *Id.*

> The elements of judicial estoppel are as follows: (1) two inconsistent positions taken by the same party or parties in privity with one another; (2) the positions are taken in the same or related proceedings involving the same party or parties in privity with one another; (3) the party taking the position must have been successful in maintaining that position and received some benefit; (4) the inconsistency must be part of an intentional effort to mislead the court; and (5) the two positions must be totally inconsistent. *Cothran v. Brown*, 357 S.C. 210, 215-16, 592 S.E.2d 629, 632 (2004).

Id. at 209.

Here, the Department has not taken any inconsistent positions of fact, and Market Hall points to no such inconsistencies. Consent to a stay involves no position of fact; that is a procedural position

[11] Market Hall also argues that consent to the stay and the lack of response to the Petition for Rehearing constitute a waiver of arguments on appellate jurisdiction—that argument is addressed fully in Section (I)(C)-(D) of this Brief.

on a pending motion. Legal arguments in favor of enforcement of the Second Revised Summons are, by definition, positions of law. Both the consent to stay and the arguments for enforcement are positions of law and therefore are not subject to judicial estoppel. Furthermore, there is no contradiction between consenting to the lower court's stay of enforcement while the appellate court determines if enforcement is appropriate in the first instance. In fact, the Administrative Procedures Act specifically notes that although the filing of an appeal "does not itself stay enforcement of the administrative law judge's decision," the ALC may (upon motion) "grant a stay upon appropriate terms." S.C. Code Ann. § 1-23-610(A)(2). Thus, the Department was merely agreeing (as a procedural matter) to pause enforcement of the Second Revised Summons until the final resolution of this appeal—in which the Department has clearly taken the position that the summons is valid and should be enforced. Consenting to a stay is no more a complete waiver of that position than consenting to the continuance of a hearing on a Motion to Dismiss constitutes a waiver of the legal claims or defenses at issue in the Motion itself.

CONCLUSION

Market Hall's failure to comply with the ALC Rules deprives this Court of appellate jurisdiction. Therefore, the Department respectfully requests this Court dismiss this action with prejudice. Alternatively, the Department has clear statutory authority to issue the Summons, Market Hall has not complied with the Second Revised Summons, and the ALC did not err in rejecting Market Hall's arguments for noncompliance with the Second Revised Summons. For the reasons explained above, the Department respectfully requests this Court affirm the ALC's Order Enforcing Summons.

Respectfully submitted,

s/ Thomas C. Hughes, *Esq.*

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