

**STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS**

Appeal from the Administrative Law Court  
ALC Docket No. 25-ALJ-07-0420-CC  
Appellate Case No. 2026-001905

Robert Litzenberger, Appellant,

v.

South Carolina Department of Environmental Services  
and Branden Baker, Respondents.

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**INITIAL BRIEF OF APPELLANT**

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**RECEIVED**

**Oct 26 2026**

**SC Court of Appeals**

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The Honorable Samuel L. Johnson, Administrative Law Judge  
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## **ISSUES PRESENTED**

- I. Whether the ALC erred by treating Appellant's nonresponse as independently sufficient to grant summary judgment notwithstanding the moving party's burden under Rule 56.
- II. Whether the ALC misconstrued the 2021 CGP's secondary-permittee requirements by treating the previously approved Talons Larger Common Plan (LCP) and completed infrastructure as dispositive of eligibility without fully applying the lot-specific approved-plan conditions.
- III. Whether the summary-judgment materials established compliance with the approved disturbance scope, lot-specific 0.12-acre footprint, stream-buffer and drainage requirements without a material factual dispute.
- IV. Whether any properly preserved discovery ruling resulted in material prejudice warranting further proceedings.

## **STATEMENT OF THE CASE**

The Department approved the Talons subdivision's stormwater coverage in 1996, for a 59.7-acre, 28-lot development with 9.0 acres of planned disturbance. The July 10, 2026 Order Granting Summary Judgment ("Order") states that 1.9 acres were allocated to roads and the remaining 7.1 acres divided among 28 lots. (Order pp. 1–2, 11 n.12.) On December 16, 2025, SCDES approved Branden Baker's IL-NOI as a secondary permittee for Lot 28, authorizing 0.12 acre of disturbance. (Order pp. 2–3.)

The ALC assigned the case January 15, 2026; denied a discovery extension April 1; and noticed a July 21 hearing. SCDES moved for summary judgment June 22, supported by an affidavit of Stormwater Division director John A. Poole. Appellant filed no written opposition. The ALC granted judgment July 10, before the scheduled hearing. Appellant served notice of appeal July 13. (Order pp. 3–5, 13–14.) No jury or monetary judgment is involved. The Order's December 30, 2026 date for the contested-case request appears clerical and is not an independent ground of appeal. (Order p. 3.)

## **STANDARD OF REVIEW**

Under Rule 56(c), SCRCP, summary judgment requires no genuine issue of material fact and entitlement to judgment as a matter of law. Reasonable inferences from evidence are construed against the movant. *Byers v. Westinghouse Electric Corp.*, 310 S.C. 5, 425 S.E.2d 23 (1992); *Kitchen Planners, LLC v. Friedman*, 440 S.C. 456, 892 S.E.2d 297 (2023). Administrative review is governed, where applicable, by S.C. Code Ann. § 1-23-380.

### **ARGUMENT I — PROCEDURAL NONRESPONSE DID NOT ITSELF ESTABLISH ENTITLEMENT**

The ALC concluded that nonresponse constituted consent under Rule 7(B), SCALCR, and described it as an independent basis for judgment. (Order p. 4.) Rule 56(e), SCRCP, permits summary judgment following nonresponse only “if appropriate.” SCDES therefore still needed a legally sufficient showing. Appellant acknowledges that the ALC independently addressed the merits (Order pp. 5–13); this argument must be considered together with the claimed errors in that merits analysis, not as a standalone ground for reversal.

### **ARGUMENT II — THE COURT’S “SOLE INQUIRY” FORMULATION RISKS OMITTING SECONDARY-COVERAGE CONDITIONS**

The ALC stated that the Department’s “sole inquiry” under the CGP concerned whether primary coverage terminated before the authorized infrastructure was completed. (Order p. 13.) The quoted CGP provision permits secondary coverage under a previously approved LCP even where primary coverage terminated if infrastructure was completed. But that continuation rule does not, by itself, establish that a later lot-specific applicant complied with the primary permittee’s approved OS-SWPPP, individual-lot controls and drainage provisions. The Order itself recognizes Baker’s undertaking to follow those conditions. (Order pp. 2–3, 8–10.)

The question presented is not whether SCDES had to reopen the 1996 subdivision approval or require a fresh subdivision-wide hydrological application. It is whether the court’s construction gave effect to the distinct conditions applicable to the November 2025 Lot 28 IL-NOI under CGP § 2.2.2. If the “sole inquiry” was used to excuse proof of those conditions, that is a material legal error requiring application of the correct test to the properly submitted evidence.

## **ARGUMENT II — CONTINUED: CUMULATIVE DISTURBANCE AND APPROVED PLAN**

The Order relies on the 9.0-acre subdivision allocation, including 1.9 acres for roads and approximately 0.25 acre per lot, while treating the 0.12-acre Lot 28 approval as within that allocation. (Order pp. 1–2, 11–12 & n.12.) Appellant disputed whether actual cumulative disturbance from houses, driveways, roads and associated construction remained consistent with the approved LCP and drainage scheme. The approved allocation is a planning baseline, not proof of the amount actually disturbed over time. Nor does an allegation of exceedance alone prove the 9.0 acres constituted an immutable lifetime cap.

The legally material question is whether the record before the ALC contained competent evidence of deviations from the approved plan, whether approved amendments accounted for them, and whether any such deviation affected Lot 28's eligibility to use the approved individual-lot controls. The ALC rejected the issue in part as an untimely collateral attack on the 1996 approval. (Order pp. 11–13.) Appellant challenges the legal treatment of a present 2025 eligibility question as necessarily identical to reopening the 1996 permit. Reversal on a factual dispute requires actual supporting evidence in the ALC record; Appellant does not ask this Court to find an exceedance from allegation alone.

## **ARGUMENT III — THE LOT-SPECIFIC EVIDENTIARY SHOWING AND WATER FEATURES**

The ALC found that the stamped plat depicted more than 30 feet between proposed disturbance and the western tributary and accepted the 0.12-acre approved footprint. (Order pp. 2–3, 11–12.) The court also relied on Poole's affidavit. (Order p. 3.) Those are specific evidentiary findings that must be tested against the actual submitted plat, certifications, drainage narrative and any contrary evidence properly before the ALC, not presumed erroneous solely because no field inspection occurred.

Appellant challenged the blue-line stream bordering Lot 28, an allegedly separate dry tributary or drainage channel, a waterfall and concentrated flow toward Lake Keowee. These features do not automatically share one buffer standard or establish federal jurisdiction. The pertinent question is whether the submitted plans correctly located each feature protected by the applicable 2021 CGP and approved OS-SWPPP, and measured the applicable buffer from the legally required point. (Order pp. 2, 8, 11–12.)

### **ARGUMENT III — CONTINUED: RELIANCE ON APPLICANT SUBMISSIONS**

Appellant has described an acknowledgment by SCDES counsel that the Department relied on Baker's submissions rather than independently inspecting Lot 28. The absence of a site inspection is not independently alleged to violate a mandatory inspection requirement. To the extent that acknowledgment was properly before the ALC, it identifies the documentary basis of the Department's approval and makes any material inconsistency or omission in those documents important. The appellate court should not be asked to treat counsel's reported statement as a sworn admission or as established record evidence without its actual record source.

Appellant previously questioned different proposed disturbance figures, including 0.12 and 0.16 acre. The figures could be material if competent documents in the ALC record describe the same regulated construction footprint and cannot be reconciled. But their existence in different communications, without a record-supported comparison of what each measures, is insufficient. Rule 56(c), SCRCP; *Doe ex rel. Doe v. Batson*, 345 S.C. 316, 548 S.E.2d 854 (2001). Appellant seeks review of the legal sufficiency of the actual summary-judgment submissions, not findings based on unverified contradictions or later construction events.

### **ARGUMENT IV — DISCOVERY AND PRESERVATION**

The ALC noted that Appellant emailed a July 3 motion to compel but did not formally file it, did not address summary judgment, and submitted it after the discovery deadline. (Order p. 4 n.4.) Appellant does not claim the email stayed proceedings. Relief depends on a preserved request, adverse ruling and material prejudice established by the record.

### **CONCLUSION**

Appellant respectfully requests reversal of the July 10, 2026 summary judgment and remand for application of the proper Rule 56 standard to the preserved issues of secondary-permittee eligibility, the approved LCP and lot-specific conditions, and the competent evidence properly before the ALC; alternatively, such narrower relief as is lawful. This appeal does not seek findings of post-judgment violations under the 2026 CGP.

Respectfully submitted,

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October 11, 2026