STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Town of Arcadia Lakes, Robert L. Jackson, Linda Z. Jackson, Robert E. Williams, Barbara S. Williams, Elizabeth M. Walker, Louis E. Spradlin, Mary Helen Spradlin, Thomas Hutto Utsey, Tony Sinclair, Aaron Small, Bette Small, Gene F. Starr, M.D., Elaine J. Starr, Sanford T. Marcus, Ruth L. Marcus, and Steven Brown, Petitioners, vs. South Carolina Department of Health and Environmental Control and Roper Pond, LLC, Respondents.	Docket No. 09-ALC-07-0069-CC **ORDER FOR ATTORNEYS' FEES AND COSTS AND FOR SANCTIONS PURSUANT TO SCALC RULE 72**

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SC Court of Appeals

This matter comes before the South Carolina Administrative Law Court ("ALC" or "Court") on the Third Amended Petition for Attorneys' Fees and Costs and for Sanctions Pursuant to SCALC Rule 72 ("Petition") filed by Respondent Roper Pond, LLC ("Roper Pond") on November 30, 2015. Roper Pond seeks an award of attorneys' fees and costs from Petitioner Town of Arcadia Lakes ("Town") pursuant to S.C. CODE ANN. § 15-77-300, which provides, *inter alia*, that fees will be awarded against a political subdivision of the State in a civil action when the political subdivision acted without substantial justification in pressing its claims. Roper Pond also requests the Court to issue sanctions against the Town pursuant to SCALC Rule 72.

By order dated August 3, 2015, the Court bifurcated the issues regarding fees and sanctions to first determined whether they were proper and then, if necessary, determine the amount to be awarded. On March 15, 2017, the Court issued an order finding that Roper Pond is entitled to an award of attorneys' fees and costs and that sanctions against the Town are proper. On April 3, 2017, Roper Pond filed its Supplemental Brief in Support of Respondent Roper Pond, LLC's Third Amended Petition for Fees, Costs and Sanctions. On April 21, 2017, the Town filed Town of Arcadia Lakes' Response to Roper Pond's Supplemental Brief. A hearing on determination of the amount of fees, costs, and sanctions to be awarded was held on May 30,

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2017. For the reasons set forth below, the Court finds that Roper Pond is entitled to an award of attorneys' fees and costs under S.C. CODE ANN. § 15-77-300 in the amount of $205,283.84 and that sanctions against the Town pursuant to SCALC Rule 72 in the amount of $200,000.00 are proper, but payable to the Clerk of this Court.

I. ATTORNEYS' FEES AND COSTS

Having determined that Roper Pond is entitled to an award of attorneys' fees and costs under S.C. CODE ANN. § 15-77-300 ("State Action Statute"), the Court must determine the amount to be awarded to Roper Pond. Section 15-77-300(B) establishes the following factors to be applied in making this determination:

(1) the nature, extent, and difficulty of the case;

(2) the time devoted;

(3) the professional standing of counsel;

(4) the beneficial results obtained; and

(5) the customary legal fees for similar services.

S.C. CODE ANN. § 15-77-300(B). This provision of the State Action Statute further provides that the Court "must make specific written findings regarding each factor listed above in making the award of attorney's fees." *Id.* The Town argues that the lodestar method is the proper method for determining the amount of reasonable attorneys' fees under the State Action Statute and cites to the Supreme Court holding in *Layman v. State*, 376 S.C. 434, 658 S.E.2d 320 (2008), in support of this argument. Although the *Layman* court applied the lodestar method in determining an award of attorneys' fees under the State Action Statute, at that time the State Action Statute did not include the factors to be applied as now set forth in S.C. CODE ANN. § 15-77-300(B). In 2010, two years after the *Layman* decision, the General Assembly amended the State Action Statute to establish these specific factors. 2010 S.C. Act. No. 125. Therefore, the factors set forth in the State Action Statute—not the lodestar method—are now applicable to determining the amount of reasonable attorneys' fees under Section 15-77-300.

The Town also cited to *Maybank v. BB&T Corp.*, 416 S.C. 541, 787 S.E.2d 498 (2016), to support its argument that the lodestar method should be applied in determining the award of fees in this matter. In *Maybank*, the court applied the lodestar method for the determining reasonable attorneys' fees; however, the award of attorneys' fees in that case was made pursuant to the South Carolina Unfair Trade Practices Act, S.C. CODE ANN. §§ 39-5-10 et seq. ("UTPA").

Specifically, Section 39-5-140 of the UTPA provides that "[u]pon the finding by the court of a violation of this article, the court shall award to the person bringing such action under this section reasonable attorney's fees and costs." S.C. CODE ANN. § 39-5-140(a). However, unlike the State Action Statute, the UTPA does not codify factors to be evaluated in determining reasonable attorneys' fees. Therefore, the application of the lodestar method in *Maybank* does not mandate the application of the lodestar method for an award under the State Action Statute.

Additionally, in *South Carolina Dept. of Transp. v. Revels*, 411 S.C. 1, 766 S.E.2d 700 (2014), our Supreme Court addressed the applicability of the lodestar method to a fee-shifting statute which contains express factors to be consider in determining reasonable attorneys' fees. In *Revels*, the Court analyzed an award of attorneys' fees under the South Carolina Eminent Domain Procedure Act, S.C. CODE ANN. §§ 28-2-10 *et seq.* ("Eminent Domain Act"). Section 28-2-510 of the Eminent Domain Act prescribes that the following be provided in a prevailing landowner's application for attorneys' fees: "The application shall show that the landowner has prevailed, state the amount sought, and include an itemized statement from an attorney or expert witness representing or appearing at trial in behalf of the landowner stating the fee charged, the basis therefor, the actual time expended, and all actual expenses for which recovery is sought." S.C. CODE ANN. § 28-2-510(B)(1). In *Revels*, the Supreme Court held that the Court of Appeals erred in finding that *Layman* governed the award of attorneys' fees and further held that the terms of Section 28-2-510 govern the determining of attorneys' fees to be awarded:

> Having found that *Layman* is not controlling, we direct our attention to the express terms of section 28-2-510. As we interpret section 28-2-510, we conclude the General Assembly intended for attorneys' fees to be awarded based on **a constellation of factors**. Specifically, section 28-2-510(B)(1) mandates that in order for a prevailing landowner to recover reasonable attorneys' fees he or she must submit an application for fees "necessarily incurred." S.C. CODE ANN. § 28-2-30(14) (2007) (defining "litigation expenses" for prevailing landowner). This application must contain an "itemized statement" from the landowner's attorney, which includes: (1) "the fee charged;" (2) the basis for the fee charged; (3) "the actual time expended;" and (4) "all actual expenses for which recovery is sought." *Id.* § 28–2–510(B)(1).

411 S.C. at 10–11, 766 S.E.2d at 705 (emphasis added). Like Section 28-2-510 of the Eminent Domain Act, the General Assembly enacted an amendment to the State Action Statute to include the "constellation of factors" to be evaluated in determining an award of attorneys' fees.

Therefore, the lodestar method is inapplicable to a determination of reasonable attorneys' fees under the State Action Statute.

In determining the amount of reasonable attorneys' fees to be awarded to Roper Pond, the Court addresses each of the factors in the State Action Statue below.

A. The nature, extent, and difficulty of the case.

By letter dated December 15, 2008, Respondent South Carolina Department of Health and Environmental Control ("Department" or "DHEC") granted Roper Pond coverage under the 2006 NPDES General Permit for Storm Water Discharges from Large and Small Construction Activities ("State General Permit"), authorizing land-disturbing activities on 9.6 acres in association with construction of a multi-family residential housing development to be located off Trenholm Road in Richland County. Although this contested case was brought to challenge a basic DHEC authorization for coverage under the State General Permit for storm water discharges associated with construction activities, Petitioners raised numerous legal theories in this contested case, many of which Roper Pond argued were outside of the subject matter jurisdiction of this Court. Petitioners' Request for Contested Case Hearing, filed on February 16, 2009, included more than five pages, reciting eleven grounds for appeal, several of which included multiple sub-parts. The grounds raised by Petitioner included alleged violations of South Carolina Regulations 61-9, 61-68, and 61-101. Petitioners also argued that an individual permit under Section 404 of the Clean Water Act was required.

Roper Pond filed a motion to dismiss Petitioners' claims related to the 401 water quality certification and authorization under a United States Corps of Engineers ("Corps") Nationwide Permit. (Respondent Roper Pond, LLC's Motion to Dismiss dated April 6, 2009). On June 17, 2009, the Court issued a Consent Order on Roper Pond, LLC's Motion to Dismiss, dismissing the claim challenging the 401 water quality certification and Corps authorization under Nationwide Permit No. 39. However, numerous legal theories were advanced by Petitioners throughout the contested case. Moreover, counsel for the Town acknowledged that certain of those legal theories were "somewhat novel." (Email attached to Affidavit of W. Thomas Lavender, Jr., dated April 27, 2017). At the conclusion of the hearing on the merits, this Court requested that Petitioners provide a post-hearing filing outlining the issues presented at the hearing on the merits. On October 9, 2009, Petitioners filed an outline of issues which detailed more than six pages of issues to be determined by the Court.

This Court issued a 29-page Final Order and Decision following the contested case hearing. Although the authorization challenged by Petitioners is governed by DHEC regulations, Petitioners' claims in this contested case include authorizations under programs administered by DHEC and the Corps. While those claims were found to be without merit, the issues raised by Petitioners involved the complex interplay of state and federal statutes and regulations. The Court finds that the nature, extent, and difficulty of this case support an award of attorneys' fees in the amount Roper Pond has requested.

B. The time devoted.

Petitioners filed their request for contested case hearing on February 16, 2009. The Petitioners filed a notice of appeal of this Court's decision to the Court of Appeals on April 20, 2010. On June 12, 2013, the Court of Appeals issued a decision affirming this Court's Final Order and Decision. Petitioners appealed the Court of Appeals decision to the Supreme Court, which granted Petitioners' writ for certiorari on August 22, 2014. The Supreme Court heard oral arguments on March 18, 2015, and issued an order dismissing the case as moot on April 9, 2015. On April 28, 2015, the Clerk of the Supreme Court remitted the case to this Court along with a copy of a the Supreme Court's dismissal and the decision of the Court of Appeals. Counsel for Roper Pond offered an affidavit with a list of the daily time worked by each Nexsen Pruet attorney in this litigation from February 11, 2009, through March 18, 2015, the date of oral arguments before the Supreme Court. (Affidavit of Joan W. Hartley dated July 16, 2015).

During the contested case before this Court, Nexsen Pruet billed Roper Pond a total of 397.4 hours for time expended through the filing of the Notice of Appeal to the Court of Appeals on April 20, 2010. Approximately 73 percent of this total time was billed by Joan Hartley at a substantially lower hourly rate based on her years of practice. The nature of the case required counsel for Roper Pond to work with Roper Pond's engineer and wetlands consultant to address Petitioners' claims. Counsel for Roper Pond also coordinated with counsel for South Carolina Department of Health and Environmental Control on matters related to discovery and in preparation for the hearing on the merits. (Affidavit of W. Thomas Lavender, Jr. dated April 3, 2017, ¶¶ 5, 6). The parties identified more than 50 proposed exhibits prior to the hearing on the merits. (Hrg. Tr., pp. 4-7). Counsel for Roper Pond also drafted a proposed order following the hearing on the merits and responded to a motion for reconsideration and for a stay following this Court's issuance of the Final Order and Decision on January 21, 2010.

During the appeal to the Court of Appeals and the Supreme Court, Nexsen Pruet billed Roper Pond a total of 304.7 hours. Again, approximately 72 percent of this time was billed for Joan Hartley at the lower hourly rate. Although the Supreme Court dismissed the grant of certiorari in this matter as moot, this dismissal was issued following oral argument. Therefore, Nexsen Pruet's representation of Roper Pond on appeal included completion of the appeal before the Court of Appeals and the Supreme Court.

The Town argues that counsel for Roper Pond must provide detailed time entries describing each task performed by counsel for Roper Pond in this matter and that failure to provide such detail is fatal to Roper Pond's request for attorneys' fees. The Supreme Court recently addressed this argument in the *Maybank* case, which as noted above, involved an award of attorneys' fees pursuant to the UTPA.[1] In *Maybank,* the Supreme Court held that such detailed time entries were not required for the court to determine the amount of attorneys' fees to be awarded under the statute:

> Appellants argue the affidavit of attorneys' fees and costs submitted by Maybank's counsel was inadequate and lacked the necessary detail that would enable Appellants to respond. They suggest Maybank failed to provide detailed billing statements to identify how the billed hours correlated to the claims alleged, especially since Maybank prevailed on only five of his eleven claims, and the Trust lost on all its claims. Moreover, Appellants suggest the insufficiency in the billing statements make it difficult to ascertain and delineate the work completed in furtherance of the UTPA claim—which is the only claim upon which attorneys' fees and costs may be awarded.
>
> We find all of Maybank's claims shared the same common facts and required combined efforts throughout the litigation process. The trial court's reduction of fees by twenty percent accounts for a distinction in the claims and the time allotted to defend claims unrelated to the UTPA. We find this to be a reasonable estimation. *Cf. Haley Nursery Co. v. Forrest*, 298 S.C. 520, 524, 381 S.E.2d 906, 909 (1989) (finding a reduction in fees and costs reflected that the fees and costs sought were not solely from the UTPA action).

Maybank, 416 S.C. at 580, 787 S.E.2d at 518. The defendants in *Maybank* argued that the UTPA claim was the only claim for which the plaintiff was entitled to attorneys' fees, but the case had involved eleven total claims. The defendants therefore argued that detailed time entries were

[1] The Town cites to a number of federal cases in support of its argument that actual time records must be submitted for an award of attorneys' fees under federal statutes. However, since the South Carolina Supreme Court has addressed this issue in *Maybank*, there is no basis for looking to other jurisdictions for guidance.

needed to determine which time was devoted to the UTPA. The Supreme Court held that the trial court's 20 percent reduction in the award of attorneys' fees sufficiently accounted for the time expended on other claims since "all of Maybank's claims shared the same common facts and required combined efforts throughout the litigation process." *Id.* The basis for the reduction in the award of attorneys' fees in *Maybank* is inapplicable in this case. Under the State Action Statute, Roper Pond is entitled to an award of attorneys' fees as to all claims pressed by the Town, and Roper Pond prevailed on all of those claims. Therefore, there is no basis for requiring detailed time entries for the time expended by counsel for Roper Pond in this case. Moreover, even if there were, the Supreme Court has rejected that argument in *Maybank*. The list of daily time expended by each Nexsen Pruet attorney in this case is sufficient to support an award of attorneys' fees under the State Action Statute.

The Town further argues that Roper Pond is not entitled to an award of attorneys' fees for all of the attorneys' fees incurred in this matter because the Town was only one of 17 petitioners in this case. The Supreme Court addressed this argument in the *Layman* case. In *Layman*, the defendants argued that the award of attorneys' fees should be reduced because the plaintiffs offered an affidavit with "the hours spent on the litigation of the case (designated on the chart below as 'Total Hours Expended'), with no distinction between the time associated with the TERI participants' claims giving rise to the instant case, and time associated with the Working Retirees' claims, which were remanded." The Supreme Court rejected this argument:

> Although the record indicates that Working Retirees constituted roughly one-third of the class of plaintiffs in *Layman*, we do not find it necessary to adjust the total hours expended by this proportion in order to arrive at a reasonable fee in this case. Not only were the same legal theories advanced on behalf of both the TERI participants and the Working Retirees, making their claims virtually indistinguishable, but more importantly, guiding jurisprudence explicitly holds that "a party need not be successful as to all issues in order to be found to be a prevailing party" for purposes of awarding attorneys' fees under the state action statute.[8] *Heath*, 302 S.C. at 182, 394 S.E.2d at 711. Only in an abundance of caution, however, do we reduce the number of total hours expended by three percent (3%), rounded down to the nearest tenth, in order to account for any time devoted solely to the Working Retirees' claims, thereby arriving at what we view as a "reasonable" number of hours expended on the TERI participants' claims (appearing as "Net Hours Expended" in the chart below). *See Edmonds*, 658 F.Supp. at 1135 n. 18, 1147 n. 44 (performing a lodestar analysis and adjusting the time devoted to litigating the underlying case by two to three percent in order to account for the fact that "some hours may not be properly compensable").

Layman, 376 S.C. at 459–60, 658 S.E.2d at 333–34 (footnote omitted). While the Supreme Court adjusted the actual time expended by the attorneys in that class action by 3%, this adjustment was made "[o]nly in an abundance of caution" because the claims of a group within the class had been remanded. *Layman*, 376 S.C. at 359-60, 658 S.E.2d at 333-34. However, no such adjustment is warranted in this case because all of the petitioners advanced the identical claims. There was no factual or legal distinction between the claims of the Town and those of the other petitioners.

Additionally, even if an adjustment were warranted, it would not be necessary because counsel for Roper Pond discounted its bills in this matter by approximately ten percent. According to the detail of time expended by Nexsen Pruet attorneys on this matter, the value of the time actually expended on this matter totals $217,048.50. (Affidavit of Joan W. Hartley dated July 16, 2015). However, Nexsen Pruet billed Roper Pond a total of $195,068 in attorneys' fees from February 11, 2009 through March 18, 2015. Nexsen Pruet thus provided Roper Pond with a reduction of $21,980.50 on the billing in this matter. Therefore, the value of actual time expended in this litigation has already been adjusted by approximately ten percent. Given that adjustment, Roper Pond is entitled to the total time actually billed by Nexsen Pruet in this matter.

The Town argues that the detailed time entries must be submitted because the exclusion of hours that are excessive, redundant, or otherwise unnecessary is required by the lodestar method. The South Carolina appellate courts have cited the factor on time expended as "the time necessarily devoted to the case" in applying the lodestar method. *See, e.g., Layman,* 376 S.C. at 458, 658 S.E.2d at 333; *Hunkler v. Frey*, 2012 WL 10862808, *3 (S.C. Ct. App. Oct. 3, 2012). However, as discussed above, the lodestar method is not applicable to an award of attorneys' fees under the State Action Statute. Additionally, when the General Assembly amended the State Action Statute in 2010 to include the factors to be considered, this factor was stated as "the time devoted." S.C. CODE ANN. § 15-77-300(B)(2). Unlike the lodestar method, the State Action Statute does not include the "necessary" requirement for determining the reasonable time expended on the litigation.

The Town further argues that Roper Pond is only entitled to attorneys' fees for the time expended for the appeal to the Court of Appeals and Supreme Court and is not entitled to attorneys' fees for the time before this Court. In support of this argument, the Town cites to the South Carolina District Court decision in *Just v. Spartanburg Community College*, No. 3:12-CV-03115-JFA, 2013 WL 3833063 (D.S.C. Jul. 23, 2013). In *Just*, the federal district court

interpreted "civil action" in the State Action Statute to exclude a hearing before the South Carolina State Ethics Commission. Citing to *McDowell v. S.C. Dep't of Soc. Servs.*, 304 S.C. 539, 405 S.E.2d 830 (1991), the District Court stated that "the South Carolina Supreme Court has already decided than an administrative proceeding is not a civil action within the meaning of §15-77-300." *Just*, 2013 WL 3833063 at *4. Both *Just* and *McDowell* can be distinguished from this case. In *Just*, the State Ethics Commission initiated the agency decision at issue when it filed formal charges against the plaintiff. There was no "agency decision" prior to the actions of the State Ethics Commission. In this case, the issuance of the authorization under the State General Permit by DHEC is the agency decision.

Similarly, in *McDowell*, the plaintiff appealed the denial of her food stamp application by the South Carolina Department of Social Services ("DSS"). The Supreme Court held that she was not entitled to attorneys' fees under the State Action Statute for the hearing before DSS because "at this point the agency was not 'pressing its claim' in litigation against appellant but was merely functioning as an administrative decision-maker." *McDowell*, 304 S.C. at 543, 405 S.E.2d at 833. The Court held that DSS was pressing its claim without substantial justification when the agency "relied on an erroneous legal conclusion in defending its decision in proceedings before the circuit court and Court of Appeals." *Id.* at 542-43, 405 S.E.2d at 833.

In this case, the comparable administrative proceeding to the DSS hearing in *McDowell* would be a final review conference before the South Carolina Board of Health and Environmental Control ("Board"). If a party appealed a DHEC agency decision following a final review conference before the Board and that party prevailed in this Court, the party could seek attorneys' fees against DHEC under the State Action Statute, but the attorneys' fees for the final review conference before the Board would be excluded under *McDowell*. However, the attorneys' fees incurred for the contested case before this Court could be awarded if at that point, DHEC was litigating the agency decision without substantial justification. Moreover, pursuant to S.C. CODE ANN. § 44-1-60, a decision of the Board following a final review conference is the "final agency decision." S.C. CODE ANN. § 44-1-60(F)(2) ("After the final review conference, the board, its designee, or a committee of three members of the board appointed by the chair shall issue a written final agency decision based upon the evidence presented. . . . Within thirty calendar days after the receipt of the decision an applicant, permittee, licensee, or affected person desiring to contest the final agency decision may request a contested case hearing before the

Administrative Law Court, in accordance with the Administrative Procedures Act."). Unlike the DSS hearing in *McDowell*, in a contested case, this Court is not "merely functioning as an administrative decision-maker." *McDowell*, 304 S.C. at 543, 405 S.E.2d at 833.

Additionally, a hearing before DSS is an informal hearing before a hearing officer or hearing committee which issues the "final administrative determination by the Department." S.C. CODE REG. § 114-130(J)(2). Again, the DSS hearing in *McDowell* is comparable to a final review conference before the DHEC Board. In contrast, a contested case hearing before this Court follows the issuance of a final agency decision by DHEC. S.C. CODE ANN. § 44-1-60 (G). While the ALC is part of the executive branch, the Court is a "a **court of record** within the executive branch of the government of this State." S.C. CODE ANN. § 1-23-500 (emphasis added). A contested case is subject to the South Carolina Rules of Procedure for the ALC, which includes rules on formal discovery, motions, evidence, and other procedures comparable to a trial before the state circuit court and incorporates the South Carolina Rules of Civil Procedure and South Carolina Appellate Court Rules to "be applied to resolve questions not addressed by these rules." SCALC Rule 68. It would be contrary to the public policy considerations manifest in the State Action Statute to exclude attorneys' fees before this Court under the *McDowell* ruling. In particular, the *McDowell* case was decided in 1991, two years prior to the creation of the ALC in 1993. S.C. CODE ANN. § 1-23-500. Additionally, the *McDowell* case involved continued litigation by the agency which issued the agency decision being challenged. In this case, the Town was not the agency issuing the final agency decision on appeal. Nor was the Town subject to the final agency decision on appeal to this Court. The Town is a third party which became a party to this contested case only because it chose to challenge DHEC's authorization to Roper Pond under the State General Permit. For all of these reasons, the *McDowell* decision does not preclude an award of attorneys' fees to Roper Pond for the contested case before this Court.

Finally, the Town argues that the total hours expended by Nexsen Pruet from February 11, 2009 through March 18, 2015 improperly includes the time expended for Roper Pond's Petition for Fees and Costs. The Town cites to *McDowell* in support of this argument. However, in *McDowell*, the Supreme Court held that the "appellant is entitled to attorney's fees under § 15-77-300 for this litigation and appeal seeking to secure such fees." 304 S.C. at 544, 405 S.E.2d at 833. Therefore, a party may recover attorneys' fees for work required to secure fees under the State Action Statute. However, even if that were not the case, Nexsen Pruet discounted its fees by

$21,980.50, which is more than sufficient to cover the fees for preparing the original petition for fees in 2010.

C. The professional standing of counsel.

W. Thomas Lavender, Jr., had primary responsibility for representing Roper Pond in this litigation. Mr. Lavender received his juris doctorate from the University of South Carolina Law in 1976 and has been licensed to practice law in South Carolina since 1976. He is admitted to practice before all South Carolina Courts, the Federal Court for the District of South Carolina, the Fourth Court of Appeals and the United States Supreme Court. His practice has primarily focused on environmental and regulatory matters, including litigation in state and federal court and before the ALC. (Exhibit A, Affidavit of W. Thomas Lavender, Jr., ¶ 3). Mr. Lavender has regularly appeared before the ALC since its creation. This Court is familiar with his work product, preparation, and general ability in representing clients in matters of this nature.

Joan Hartley has practiced under Mr. Lavender's supervision for more than ten years. Ms. Hartley received her juris doctorate from the University of South Carolina Law School in 2004. She has been licensed to practice law in South Carolina since 2004 and in North Carolina since 2007. She is admitted to practice before all South Carolina Courts, all North Carolina Courts, the Federal Court for the District of South Carolina, and the Federal Court for the Eastern District of North Carolina. (Exhibit A, Affidavit of W. Thomas Lavender, Jr., ¶ 4). This Court is also familiar with her work product, preparation, and general ability in representing clients in matters of this nature.

Additionally, Roper Pond offered the affidavit of Karen A. Crawford, who is a partner in the law firm of Nelson Mullins Riley & Scarborough, and practices in the areas of environmental law and litigation, toxic torts, and product liability. Ms. Crawford attests that the fees charged by Nexsen Pruet in this matter are "within the range of hourly rates charges by other lawyers with comparable experience for matters of this nature." (Affidavit of Karen A. Crawford). Among other consideration, this statement is based on Ms. Crawford's "experience working with Mr. Lavender and Ms. Hartley on various matters over the years having provided an understanding of their capabilities in such matters." The professional standing of the attorneys representing Roper Pond supports an award of the total hours billed at the hourly rates billed by Nexsen Pruet in this matter.

D. The beneficial results obtained.

Nexsen Pruet successfully defended the DHEC authorization in this Court and in the appellate courts. Given the defensive posture of Roper Pond in this action, this successful defense is the only "beneficial result" which Roper Pond could obtain in this matter. The beneficial results obtained for Roper Pond in this matter supports an award of attorneys' fees in the amount requested by Roper Pond.

E. The customary legal fees for similar services.

Over the course of the contested case and appeal from 2009 to 2015, the hourly rates for counsel for Roper Pond were:

W. Thomas Lavender, Jr.	$370 - $440 per hour
Henry W. Brown	$300 per hour
Joan Hartley	$220 - $310 per hour

The Town argues that Roper Pond has not established the prevailing market rates in the community. Counsel for Roper Pond attests that the fees billed in this matter at the standard billing rate for those attorneys. In *Layman*, the Supreme Court found that the calculation of fees for lead counsel properly "uses Mr. Lewis's premium hourly rate which he typically reserves for 'difficult' cases. *Layman*, 376 S.C. at 459, 658 S.E.2d at 333. Estates, Inc. ("Estates"), provided development and marketing services for the Roper Pond project. Since 1997 Nexsen Pruet has represented Estates in more than 100 matters, including real estate transactions and financing, employment matters, environmental matters, contract and construction disputes, and related litigation. Estates engaged Nexsen Pruet to represent Roper Pond based on their long-standing relationship with Nexsen Pruet and the prior services provided by the firm attorneys, including Mr. Lavender. Estates is an institutional client of Nexsen Pruet and pays the standard rates for services provided by the firm. The hourly rates charged for this litigation are consistent with those charged to Estates for attorneys of comparable experience in other matters handled by Nexsen Pruet.

Additionally, as noted above, Roper Pond offered the affidavit of Karen A. Crawford. Ms. Crawford attests that the fees charged by Nexsen Pruet in this matter are consistent with the range of hourly rates charges by lawyers in this market. Specifically, Ms. Crawford attests:

> Based on my experience in litigating challenges to authorizations and permits issued by SCDHEC, my experience working with Mr. Lavender and Ms. Hartley

> on various matters over the years having provided an understanding of their capabilities in such matter, and my knowledge of the legal market in South Carolina, the fees charged by Nexsen Pruet, LLC in this contested case and appeal are within the range of hourly rates charged by other lawyers with comparable experience for matters of this nature.

(Exhibit B, Affidavit of Karen A. Crawford). Ms. Crawford further attests that her "current hourly rate on matters of this nature is at least $485 per hour." *Id.* Ms. Crawford's rate is more than that of Mr. Lavender even though he has practiced law five years longer than she.

The Town provided the fees charged by its counsel in this matter, which ranged from $110 to $150 per hour. However, counsel for the Town also stated that South Carolina Environmental Law Project is a 501(c)(3) non-profit organization which is funded by donations and grants. Therefore, the rates charged by counsel for the Town provide no meaningful information on the customary legal fees charged by a for-profit law firm. Given the nature and difficulty of the issues raised by Petitioners in this matter, the hourly rates billed by Nexsen Pruet are reasonable.

Applying the factors set forth at Section 15-77-300(B), Roper Pond is entitled to an award of attorneys' fees in amount of $195,068, the amount billed by Nexsen Pruet at its standard hourly rate for the time expended in this matter. Roper Pond is further entitled to costs in the amount of $10,215.84, the amount billed by Nexsen Pruet for costs in this matter.

II. THE DETERMINATION OF AMOUNT OF SANCTIONS.

In the March 15, 2017 Amended Order Vacating Order on Respondent's Petition for Attorneys' Fees and Costs and for Sanctions dated September 1, 2016, this Court found that sanctions were proper. Additionally, in the Order issued March 24, 2017, this Court held that the determination of the amount of sanctions will be made in accordance with SCALC Rule 72, which provides that "the judge may impose such sanctions as the circumstances of the case and discouragement of like conduct in the future may require." (March 24, 2017 Order, p. 6). The Court further held: "The objective of discouraging like conduct in the future is appropriately achieved by imposing a Rule 72 sanction against the Town. Otherwise, the Town has achieved its stated and improper objective of delaying the Proposed Project by preventing the commencement of construction for not less than thirteen months." (March 15, 2015 Order, pp. 37-38).

Roper Pond argues that a substantial award is warranted to discourage like conduct in the future. In support of that argument, Roper Pond provided a copy of the Town's Basic Financial

Statements and Supplementary Information for the year ending December 31, 2014 ("2014 Financial Statement"). (Exhibit 1, Affidavit of Joan W. Hartley dated April 3, 2017). While this was the only Financial Statement available on the Town's website, Roper Pond also provided the October 6, 2016 Council Meeting Minutes which included information on Town Council's review of the 2015 financials and stated that "Mayor Hugley said there had been three exceptional good years in terms of surplus." (Exhibit 2, Affidavit of Joan W. Hartley dated April 3, 2017). The 2014 Financial Statement indicates that the Town has an unrestricted net assets in the amount of $1,059,203 and $1,093,433 in "Cash and Cash Equivalents." (2014 Financial Statement, pp. 7 and 9). Additionally, the 2014 Financial Statement identifies Roper Pond's Third Amended Petition in this case as a contingent liability, concluding that "[t]he amount of costs or damages, if any, that may result from the settlement of this case, cannot presently be determined." (2014 Financial Statement, p. 20). Roper Pond argues that the amount of sanctions to be ordered should be determined based on the fact that the Town has more than $1 million in unrestricted liquid assets.

The Town argues that only nominal sanctions are warranted because the Town has a small population of approximately 900 citizens and a substantial award of sanction would have a debilitating impact on the Town. The Town rents a small space for Town Hall and has one part-time employee who serves as both the Town clerk and treasure. The Town also has a part-time bookkeeper, but no other employees and no municipal department. The reserves established by the Town are to be used for emergencies and capital projects, including a planned construction of a Town Hall. The Town argues that a significant sanction would come from this reserve which would have a debilitating impact of the Town's ability to address its residents and the surrounding community's needs and to carry out planned improvements.

The Town acknowledges that its citizens do not pay taxes to the Town. The Town's sources of revenue are sales tax, insurance tax, brokers tax, telecommunications tax, local business license tax, South Carolina Local Government Fund, and utility franchise fees. Therefore, any sanctions ordered would not be paid by the citizens of the Town. Moreover, the sanctions will not affect the services provided by the Town to its citizen. The only traditional municipal service which the Town provides its citizens is municipal solid waste collection and disposal at no charge. In 2016, the Town's revenue totaled $320,046 and it expended $128,562

on the waste services provided to its citizen. Accordingly, any sanctions ordered against the Town will not impact the services provided to its citizens.

In some cases a severe sanction may be justified even though the dollar value in issue may be small. Conversely, in other cases a mild sanction may be indicated even though the amount in issue is large.

In this case involving the construction by a lawful owner of a multiunit housing complex, we have not only a significant value involved but also an egregious use of lawful statutes to the harm of the owner and the unnecessary expenditure of the time of the Court.

The sanctions to be imposed must be of significant strength for the "discouragement of like conduct in the future." I find that given the evidence in the record as a whole, including the financial standing of the Town, that a sanction of Two Hundred Thousand Dollars ($200,000.00) is proper. *Cf. Gamble v. Stevenson*, 305 S.C. 104, 111-12, 406 S.E.2d 350, 354 (1991) (A wrongdoers ability to pay is a factor to consider in assessing damages). The sanction shall be payable to the Clerk of the ALC.

ORDER

IT IS HEREBY ORDERED that Roper Pond is awarded attorneys' fees and costs under S.C. CODE ANN. § 15-77-300 in the amount of $205,283.84 payable by the Town to the Clerk of this Court on or before August 15, 2017, to be disbursed by the Clerk to Roper Pond, LLC.

IT IS FURTHER ORDERED that Petitioner Town of Arcadia Lakes is sanctioned, pursuant to SCALC Rule 72, in the amount of $200,000.00 to be paid to the Clerk of this Court on or before August 15, 2017.

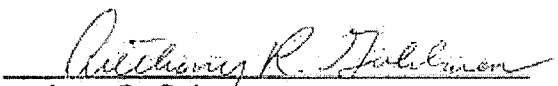
AND IT IS SO ORDERED.

John D. McLeod
Administrative Law Judge

June 14, 2017
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, Anthony R. Goldman, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).



June 14, 2017
Columbia, S.C.

Anthony R. Goldman
Judicial Law Clerk