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 **AMENDED ORDER VACATING ORDER ON RESPONDENTS' PETITION FOR ATTORNEYS' FEES AND COSTS AND FOR SANCTIONS DATED SEPTEMBER 1, 2016**

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 seeks sanctions against the Town pursuant to SCALC Rule 72, in the form of an award of attorneys' fees and costs and the cost of delay of Roper Pond's proposed development. By order dated August 3, 2015, the issues for determination on Roper Pond's Petition were bifurcated with the first phase to determine whether Roper Pond is entitled to fees and costs under S.C. CODE ANN. § 15-77-300 and sanctions under SCALC Rule 72, and the second phase to determine the amount of any award of fees and costs and/or sanctions granted in the first phase. The Town filed its Amended Response to Respondent Roper Pond, LLC's Third Amended Petition for Fees, Costs, and Sanctions on February 5, 2016, and Roper Pond filed a reply on February 16, 2016. The Court heard arguments on the first phase determinations on Roper Pond's

Petition on May 9, 2016. 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. Sanctions against the Town pursuant to SCALC Rule 72 are also proper.

PROCEDURAL HISTORY

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 ("Construction 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 ("Proposed Project"). On December 30, 2009, Petitioners the Town, 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 (collectively, the "Petitioners") requested that the South Carolina Board of Health and Environmental Control ("Board") review the issuance of the authorization to discharge under the Construction General Permit. By letter dated January 14, 2009, the Clerk of the Board notified Petitioners that the Board had decided not to conduct a review conference as requested. On February 16, 2009, Petitioners filed a Request for Contested Case Hearing, asserting numerous grounds for its appeal of the Department's decision in this matter. At the hearing on the merits, Petitioners' case-in-chief focused almost exclusively on the potential biological impacts of the excavation and lowering of the Pond and allegations that Roper Pond did not have a valid federal permit for the Proposed Project. On January 21, 2010, this Court issued an order finding that the Petitioners lacked standing, but ruling on the merits of the case. The order affirmed the Department's decision to authorize coverage under the Construction General Permit and rejected Petitioners' arguments that Roper Pond failed to obtain the necessary U.S. Army Corps of Engineers' permits and DHEC 401 water quality certification for the Proposed Project.

On February 1, 2010, Petitioners filed a Motion to Reconsider and for Stay. On March 23, 2010, the Court held a hearing to consider Petitioners' Motion to Reconsider and for Stay, and on April 1, 2010, the Court issued an order denying Petitioners' Motion to Reconsider and for Stay. On April 19, 2010, Roper Pond filed a Petition for Attorneys' Fees and Costs and for Sanctions

Pursuant to SCALC Rule 72. On April 20, 2010, Petitioners filed and served a Notice of Appeal of the Court's decision. On May 11, 2010, the Court issued an order holding the Petition for Attorneys' Fees and Costs and for Sanctions Pursuant to SCALC Rule 72, in abeyance pending the resolution of Petitioners' appeal. On March 6, 2013, the Court of Appeals issued a decision upholding this Court's ruling on standing and the merits of the case. On June 12, 2013, the Court of Appeals withdrew its March 6, 2013 Opinion and substituted a new Opinion, again affirming this Court's Final Order and Decision on standing and the merits of the case.

On July 12, 2013, Petitioners filed a petition for writ of certiorari with the Supreme Court. The Supreme Court granted the writ on August 22, 2014. On March 18, 2015, the Supreme Court heard oral arguments. By order dated April 9, 2015, the Supreme Court dismissed the writ of certiorari as moot. The Order stated that "construction activities subject to and authorized by the state-wide general permit have been completed, Roper's coverage under the state-wide general permit has now terminated." The Supreme Court therefore dismissed the matter as moot "as it is now impossible for this Court to grant any redress in the context of the issues as framed and litigated below (i.e., modify or revoke authorization for Roper's construction activities under the state-wide permit)." On May 13, 2015, Roper Pond filed a motion for costs pursuant to Rule 222, SCACR. On June 17, 2015, the Supreme Court issued an order which provided in its entirety: "The Motion for Costs filed on behalf of respondent, Roper Pond, LLC, in the above entitled matter is denied."

FACTUAL BACKGROUND

On September 24, 2008, Roper Pond filed a notice of intent to discharge stormwater associated with the construction of the Proposed Project under the Construction General Permit. A storm water pollution prevention plan ("SWPPP") was submitted with the notice of intent as required by the General Permit and S.C. CODE ANN. REGS. §§ 72-300 *et seq.* ("Stormwater Regulations"). Roper Pond submitted the notice of intent and SWPPP to Richland County for review of the Stormwater Regulations. However, prior to the conclusion of Richland County's review, DHEC requested transfer of the review to the Department because of "concerns that had been raised by citizens about the project." In reviewing a SWPPP, the reviewing entity assesses the proposed Best Management Practices ("BMPs") to determine whether those measures are adequate to meet the requirements of the Stormwater Regulations and of the General Permit. With respect to any potential deficiencies in the SWPPP or the BMPs detailed in the SWPPP, Jill

Stewart, a licensed professional engineer in South Carolina and Manager of the DHEC'S Stormwater Permitting Section, testified the SWPPP for any proposed project can be revised as needed to incorporate the appropriate combination of BMPs and implementation procedures necessary to meet the requirements of the General Permit.

During DHEC's review of Roper Pond's request for coverage under the Construction General Permit, citizens of the Town were provided the opportunity to comment on Roper Pond's SWPPP, including meetings with DHEC and other governmental representatives to discuss concerns regarding the Proposed Project. The Town was involved in communications with DHEC and other governmental representatives regarding the Proposed Project. Brian Bates and Daniel Hill, both professional engineers and residents of the Town, assisted the Town in its review of the SWPPP and its opposition to the Proposed Project. In an October 2, 2008 email, Richard Thomas, Mayor of the Town, advised Mr. Bates as follows:

> Thank you again . . . wish us luck Monday . . . Joel has received a copy of a letter DEHEC sent to the developer telling him that they had pulled the developer's application and want him to provide all documentation for additional review. Is the first flush requirements a possible application killer that would require them to reapply. If we could get to that point, we may have [a] chance to get them under the new rules if they approved before they have a chance to reapply. . . RT

On October 3, 2008, Mr. Hill emailed Mr. Thomas a summary of concerns identified in his review of Roper Pond's SWPPP. The concerns raised by the Town's consultants were addressed in DHEC's letter to Roper Pond following the Department's review of the SWPPP. In an October 29, 2008 email, Mr. Thomas forwarded the Department's review letter for the SWPPP to Mr. Bates and requested that Mr. Bates advise him "if we in Arcadia Lakes need to ask for more." Mr. Bates advised Mr. Thomas as follows:

> Told you that "waters of the state for water quality" thing had teeth. They now have to show how they are going to collect, and hold for 24 hours, the first inch of runoff from the entire site, which will be approximately 36,000 cubic feet or 271,000 gallons. For visualization purposes, that would be a pond (like the one that was built for those 4 or 5 lots down Trenholm Road) that would be 3-ft. deep and 110-ft. X 110-ft. square or about the volume of the Rockbridge Club swimming pool. To account for that outside of the wetlands boundary, they are going to have to significantly revise the site plans.
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> **I suggest we wait until they try to address this and then bring up the interpretation that this water must be segregated from all of the other runoff.** To do that on dense site is an impractical endeavor at best and not

> usually required due to its complexity. However, a strict interpretation of the regulations indicates that it is required. (emphasis added).

Mr. Thomas responded: "Thanks again for your continued expertise in this matter." Although DHEC was addressing the technical issues raised by the Town, Mr. Bates advised the Town to withhold comments on other potential issues regarding the regulatory sufficiency of the SWPPP.

The Town adhered to this advice when Roper Pond's consultant revised the SWPPP to address the issues raised in DHEC's review letter. In a November 6, 2008 email, Mr. Thomas requested that Mr. Bates and Mr. Hill attend a meeting with DHEC in Senator Joel Lourie's office to "review the revised set of BP Barber plans for the Roper Property." Mr. Bates advised Mr. Thomas as follows:

> Yes I can attend a meeting at that time. As for your phone message about BP Barber, I don't care if they are there, but letting them know our position on their design (assuming we find flaws) that quickly will just expedite their response. I would think that every day that this thing is not resolved is another day it isn't being built. Going through the system is a more formal, civil, and slower method in my opinion. I would rather them keep guessing what our next move is instead of confronting them. Just my thoughts.

Upon receipt of the following email message, Mr. Thomas responded: "I agree with you . . . I will let Joel know that You Danny and I can be there." (ellipses in original). Mr. Thomas thereafter forwarded the email to Senator Lourie, advocating Mr. Bates' recommendation to exclude B.P. Barber and Roper Pond from the meeting. There is nothing in the record to indicate that the Town submitted further comments on the revised SWPPP following the November 14, 2008 meeting with DHEC and Senator Lourie.

The Department issued its decision to grant coverage to Roper Pond on December 15, 2008. On December 17, 2008, Mr. Thomas sent an email to Brian Bates regarding the appeal of the Department's decision. Mr. Thomas wrote:

> We have until December 30 (15 days) to file an appeal to the DEHEC Board. We need to review the approval and the revised plans to determine if we have a reason or cause to appeal to the Board, **and if not, can we still send in a blanket appeal to the DEHEC Board and delay the actual decision for 60 days.** We need to get our hands on the plans. (emphasis added).

Mr. Thomas thus acknowledges that the Town had not reviewed the final SWPPP approved by DHEC for the Proposed Project. Still, without reviewing the final SWPPP, the Town determined that it should file an appeal of the DHEC decision. At the close of the December 17, 2008 email,

Mr. Thomas wrote: "**Let me know where you think we can go to delay and/or stop this project.**" (emphasis added).

On December 30, 2008, the deadline for filing for Board review, Petitioner Linda Jackson forwarded a draft appeal letter to Mr. Thomas. The draft letter raised a number of issues regarding the planned development of the property, but did not identify a single defect in the Department's grant of coverage under the Construction General Permit. The draft letter included the following claims:

> Mr. Mundy, who signed the Notice of Intent for this project, has claimed for months that he is not the current owner of the land upon which the project is to be built. The current owner of record is Roper Pond, LLC of which Mr. Mundy was a member. According to Mr. Mundy, Roper Pond, LLC was sold to Capital Development, LLC in January of 2008, however, there is no deed of record to reflect a transfer of interest in the referenced real property. From what we know, the only member of Capital Development, LLC is Charles Mikel who lives in Greenville. This information may or may not have any impact on the decision to issue the stormwater permit, but we believe that the Board need to be informed about who is truly responsible in this situation.
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> What is significant in this matter is that Mr. Mundy came to the Arcadia Lakes community in May of 2004 with a plan for the subject property to be developed with high end, single-family patio homes with a transition-type design which moved from patio homes to multi-family condominium units, along with a clubhouse and other recreational areas. The original plan for the property was based on a density of approximately four (4) units per acre. The new plan for development of the property presented in early August of this year by Mr. Mundy has no provision for a transition, and in fact has total of eight (8) multi-family apartment buildings with an overall density of approximately sixteen (16) units per acre. We feel that this drastic change in the plans for the property was misleading to adjacent property owners and the local neighborhood in general. Had we not been presented a plan four years ago that was basically satisfactory to the neighborhood, we never would have allowed the County rezoning process to move forward unchallenged. Essentially, the community was duped.

Although the Petitioners filed a different letter requesting Board review, this earlier draft by Ms. Jackson summarizes the actual concerns regarding the Proposed Project, none of which relate to the approval of the SWPPP and coverage under the Construction General Permit.

Prior to filing the request for a contested case hearing, counsel for Petitioners conferred with Gene McCall, an environmental consultant and attorney, regarding potential bases for challenging DHEC's decision to grant Roper Pond coverage under the Construction General Permit. Mr. McCall withdrew from the case because of a conflict but offered to "get with Brian

Bates and we will come up with several names of potential engineering expert witnesses." In their request for a contested case hearing, Petitioners identified the following alleged defects in the SWPPP:

> A. Upon information and belief, Roper Pond, LLC, submitted incorrect and incomplete information to DHEC. Roper Pond, LLC's Stormwater Pollution Prevention Plant (SWPPP) is deficient and DHEC should not have issued a Construction NPDES Permit for this site:
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> (1) There are significant defects in the construction and post construction portions of Roper's SWPPP. The silt fence show on drawing C2 is placed inside the Wetlands Buffer, too close to the wetlands, and in some areas through the wetlands. The Wetlands Buffer area must remain undisturbed to be effective.
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> (2) The September 2, 2008 Richland County conditional approval states that the maximum driveway width be 24 feet. The Roper drawing C4 shows a 26 foot width. This adds significant impervious area which would cause additional stormwater runoff and additional pollutants. The County conditional approval requires "Preservation of trees in the green area next to the pond." Based on the existing condition shown on drawing C1 and the Site Planting Plan, it appears that no trees are being preserved in the green area around the pond. Grubbing existing trees in the area around the pond defeats the usefulness of a Wetlands Buffer and will cause sediment to enter the pond.
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> (3) Roper Pond, LLC's documents note that zinc is a problem in Cary Lake, but incorrectly states that no zinc will come from its development. It is well documented that zinc is discharged from roof drains or large buildings and from large parking lot areas.
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> (4) DHEC is not authorized to issue an NPDES Construction Permit where such construction or post construction condition would "cause or contribute" to impairment of the receiving water body, unless, the MS4 is in compliance with its Stormwater Management Plan (SWMP). On its website, Richland County states, "Q. Why is Richland County proposing new stormwater regulations, to include buffers? A. Because Richland County is in violation of the clean water act and has been cited by DHEC . . . And as a result of this violation, we have agreed to change our regulations to address the cited deficiencies. These changes would help Richland County improve the water quality in our community for our residents." Therefore DHEC cannot issue a new construction permit until the County adopts and applies the improved ordinance.
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> (5) Roper Pond, LLC's calculated trapping efficiency for the post construction water quality devices (i.e., Best Management Practices (BMPs)) is flawed. First, the calculations do not properly and adequately address capture of the "first flush" stormwater runoff volume that would come from the site; and thus, the devices are not of adequate size to

> capture what is documented to be the most significant portion of a runoff event for transporting pollutants to the receiving water. Second, Roper Pond, LLC, assumes an even distribution of particles, 20% for each of the five particle sizes. This assumed particle distribution is incorrect and yields an inaccurate and incorrect particle trapping efficiency for these BMPs. Also, no oil and grease trapping efficiency was calculated. Leaking vehicle crankcase and transmission oils in parking lots would contain and transport zinc if not properly captured. DHEC should not have approved the Construction NPDES Permit because of these significant deficiencies.

Despite the alleged deficiencies raised by the Town prior to DHEC's December 15, 2008 approval of Roper Pond's SWPPP and the alleged deficiencies asserted in Petitioners' Request for Contested Case Hearing, and contrary to the recommendation of Mr. McCall, Petitioners failed to offer an engineering expert witness to testify at the hearing on the merits. Moreover, Petitioners failed to present any evidence at the hearing on the merits in support of its allegations that the SWPPP and the BMPs proposed in the SWPPP were not sufficient to meet the regulatory requirements. *Town of Arcadia Lakes v. S.C. Dep't of Health & Envtl. Control and Roper Pond, LLC*, ALC Docket No. 09-ALJ-07-0069-CC, 2010 WL 6782535, (Jan. 21, 2010). Petitioners' only expert witness admitted that he did not review the General Permit, the SWPPP, or the BMPs to be implemented under the SWPPP and admitted that he was not able to offer an opinion regarding the sufficiency of such measures. The Town's claims regarding the sufficiency of Roper Pond's SWPPP and the BMPs proposed in the SWPPP were therefore abandoned as a basis for challenging the Proposed Project.

During the 30(b)(6) deposition of the Town, Mr. Thomas, the Town's mayor and designated deponent, failed to identify a factual basis for challenging the sufficiency of the SWPPP. On July 29, 2009, Roper Pond noticed the deposition of the Town pursuant to Rule 30(b)(6), SCRCP. The notice of deposition included the following matters on which the Town was to designate an individual to testify:

> 2. Actual or threatened harm from the activities authorized under the 2006 NPDES General Permit for Storm Water Discharges from Large and Small Construction Activities ("General Permit") for 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 ("Proposed Project").
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> * * *

4. The specific manner in which the land-disturbing activities authorized under the General Permit will violate the terms and conditions of the General Permit and/or DHEC Regulations.

The Town designated Mr. Thomas as its sole witness for the Rule 30(b)(6) deposition of the Town. Mr. Thomas holds a master's degree in engineering with a focus on structures of mechanics and environmental engineering. As an engineer licensed by the State, Mr. Thomas has affixed his seal to drawings which include the design of water retention structures. Mr. Thomas is aware of the requirements for the management of stormwater at an improved site. Mr. Thomas testified that he has seen the design drawings for the Proposed Project. Mr. Thomas testified that he would be competent to prepare and seal such drawings. However, Mr. Thomas was unable to testify regarding the topics identified by Roper Pond in its notice of deposition to the Town.

When counsel for Roper Pond asked Mr. Thomas to identify any alleged deficiencies in the SWPPP approved by the Department for the Proposed Project, Mr. Thomas responded that any deficiencies were identified by its attorney in the pleadings in this matter:

Q: All right. Let's talk about that. Tell me—well, let me back up. The current plan.

Tell me what in the current plan you think presents a possibility or probability of harm to Cary Lake.

A: I outlined those before. It will possibly do harm to the water flowing through the project and under North Trenholm Road into Cary Lake.

Q: What is the deficiency in the BP Barber drawings that may lead to the possibility?

A: They're outlined in our petition.

Q: Point them out to me.

A: You want me to read you the document?

Q: No, sir. I want to know what the town's –

A: I'll defer that to Mr. Chandler because he's the legal expert.

Q: He is not my witness, Mr. Thomas. You are my witness and you are the town.

Tell me what facts the town has as we sit here today that allows you to opine that there's a possibility of harm if the BP Barber plan is implemented.

A: Based on what we have been told and led to believe by Mr. Chandler, who is the expert in the legal side of this, there are violations in this plan with regard to the project. The plans and its permitting with DHEC and the U.S. Corp of Engineers.

Q: I want you to step aside and put aside anything Mr. Chandler may have told you. In the absence of Mr. Chandler's comments, is the town aware of any fact upon which it could base an opinion that there is a deficiency in the BP Barber drawings permitted by DHEC?

A: We have hired Mr. Chandler as our spokesman on the legal issues in this case. We believe the case has merit.

Q: Step aside what Mr. Chandler tells you—if Mr. Chandler becomes a witness, we'll deal with this case differently.

What information does the Town of Arcadia Lakes have that, outside of Mr. Chandler's comments to you, leads you to the conclusion that there are deficiencies in the BP Barber design approved by DHEC?

A: We lean on Mr. Chandler's filings and his documentation as the basis for our—

Q: Is Mr. Chandler's complaint the sole source of facts, for the Town of Arcadia Lakes, for it to present a position that the BP Barber drawings are in some way insufficient?

A: I can repeat. Mr. Chandler's pleadings and his filings speak to the case that the town and the petitioners—not speaking for them, but as far as the town is concerned—where we are in our position on this project.

Mr. Thomas further testified regarding an allegation of a technical deficiency in the SWPPP:

Q: I assume that you are asserting that that's something wrong with the plans?

A: If Mr. Chandler says that's something wrong, then I agree with Mr. Chandler.

Q: What information did Mr. Chandler rely upon to come to that conclusion?

A: You'd have to talk to Mr. Chandler, because I do not know.

Q: Do you know of any witness on behalf of the Town of Arcadia Lakes, outside of Mr. Chandler, who can tell me how that conclusion was arrived at?

A: Not to my knowledge.

Despite Mr. Thomas's education in environmental engineering, his experience in the design of stormwater retention structures, and his familiarity with the SWPPP, he was unable to identify a single factual allegation related to the purported defects in the SWPPP independent of the filings in this matter.

Although the Town did not present evidence of deficiencies in the SWPPP, the Town identified a number of concerns with the Proposed Project unrelated to DHEC's decision to grant Roper Pond coverage under the Construction General Permit. Mr. Thomas testified at length about the Town's numerous concerns and complaints about the planned development of the Roper Pond property as an apartment complex. Mr. Thomas testified that there was no opposition to the previous plan to construct condominiums on the Roper Pond property. Specifically, Mr. Thomas testified regarding a request from Roper Pond to annex the property into the Town and the support for the development of the property as condominiums and patio homes:

Q: All right. Arcadia Lakes has its own zoning ordinance administered by its own zoning board?

A: That's correct.

Q: Why did you not suggest that he make an appeal to your zoning board?

A: It was easier—we thought it was easier for them to do it the other way. I don't remember what the context was then.

Q: Were you concerned that the citizens would oppose that kind of zoning?

A: No. As a matter of fact from the condo standpoint, out of the 15 or 20 small zero lot line patio homes, we had as many as 10 that were spoken for by town's people that wanted to retire and no longer do yard work and still be in the town.

Our town is a very close town. We have almost 900 residents and we are a very, very close [k]nit town. People don't want to move out of the town once they move in.

There are a lot of amenities in the town that are very, very good. For instance, there's no taxes. We don't have any town taxes. We deal off of County taxes, revenue sharing, franchise fees, business licenses. Those type of things. We run the town off of a very lean budget.

Q: So you, for whatever reason, suggested that rather than annexing him in and changing your zoning—

A: We couldn't do that. It was my understanding at that time that that was not an option.

Q: For what reason?

A: If we annexed him in, then he would be annexed in as the existing zoning. And he didn't want the existing zoning, which was residential, light commercial. He wanted multifamily.

Q: So to solve that you suggested he get the County to change it, and then you can bring him in, grandfather him in, or bring him in subject to that zoning?

A: Correct.

Q: And you thought that would work?

A: With the plans that he had then, everyone was very much in favor of those. The plans were very high-end condos, low density, a lot of amenities, and fit in with the -- --

Q: Understanding that we're talking hindsight, but the feeling at the time was that if he had gone forward with that project of patio homes to condominiums, it would have been supported by the town and you could have brought it in, annexed it in, subject to the County zoning?

A: --with the plans that were presented to us at that time, we did not have any major problems with those plans at that time that I can recall.

Q: You would have recommended bringing it into the city by annexation?

A: Correct.

Q: And you had citizens in the town who were in favor of it and who actually wanted to live in the patio homes?

A: That's correct.

The opposition to the development began upon learning that the property would be developed as an apartment project. Mr. Thomas testified:

Q: As of October 2nd, was one of your reasons for opposing this project as mayor of the Town of Arcadia lakes, the potential for individual unit owners to have their property values depressed?

A: Yes. That was one of the reasons we wanted an economic study done to determine that.

Q: Is that one of the reasons you wanted to stop this project?

A: That was one of the reasons for our opposition to the project as it was presented.

Q: And do I understand you to say that as it was presented, the primary concern was the additional density over and above what was presented to you in 2004?

A: No. It was also the economic impact. It was also the character of the neighborhood.

Q: Well, you did not oppose the townhouses, patio homes, condominiums, correct? You personally wanted to buy one.

A: True.

Q: What factor, other than the density of the apartments, led you to believe there would be a depression in economic value for certain homeowners in Arcadia Lakes?

A: Safety to you, to the transient nature of the folks renting the property, light intrusion into the actual property adjoined, potential overflow of the sewer system due to the fact—did it actually—was it sized properly to handle an additional 204 units. I mean, the town only has 890 people living in the town. You're adding another 4-500 residents to the system, traffic. All those had—all those come together—all of that has to do with the density.

Q: All of those factors arise out of the increase density, right?

A: That's the way I see it.

The Town believed that the developers of the Proposed Project had misled the Town to obtain support for the rezoning of the property. For example, in an August 23, 2008 email, Mr. Thomas wrote:

> I believe that the town was misled and deceived in the initial meetings 3+ years ago when the same developer came to us for our support and the support of the adjacent neighborhood to rezone and then used the rezoning to restructure his plans for monetary gain. Per conversation with Mr. Carter Ellis, the same was told to the property owners on the north side of the Roper Property to get their blessing for the rezoning. The town should use all necessary means to go before the Richland County Planning Commission and appeal the August 21 Planning Committee recommendation (on numerous reasons of environmental impact, faulty traffic studies and NPDES requirements that have not been studied or met concerning flood control) and to resend [sic] the past zoning change on the grounds of misrepresentation and breach of verbal contract.

In addition to the appeal of DHEC's decision to grant Roper Pond coverage under the Construction General Permit for the Proposed Project, the Town opposed other governmental authorizations for the Proposed Project. For example, Mr. Thomas contacted a politician and others to assist the Town in holding up South Carolina Department of Transportation approval for the Proposed Project. Additionally, at its October 2, 2008 council meeting, the Town adopted a resolution to the Richland County Planning Commission regarding development plans submitted to the County for the Proposed Project. The Resolution advised the Commission of the Town's belief that the proposed development, multifamily high density apartments, was "out of character and totally incongruous for the entire town, its neighborhoods, contiguous community and the intended zoning use as originally presented." The resolution further requested that "an economic impact study be performed to determine the loss of property value to the homes in the adjacent Kaminer Station Subdivision, and homes directly affected across Trenholm Road and by adjacent nearby lakes, due to the proposed 204 apartments . . ."

In affirming this Court's ruling on the Town's lack of standing, the Court of Appeals held:

> The ALC found the Town did not satisfy the first element required to establish standing, namely, that it had a personal stake in the litigation. *Quoting Glaze v. Grooms*, 324 S.C. 249, 255, 478 S.E.2d 841, 845 (1996), the ALC referenced the general rule that "a municipality must allege an infringement of its own proprietary interests or statutory rights to establish standing." In response to this statement, Appellants advocate a broad interpretation of the term "proprietary interest" in determining whether the Town has demonstrated an injury in fact sufficient to confer standing. In the present case, Appellants argue "proprietary interests" include: (1) the Town's interest in protecting the environmental quality of Cary Lake, which lies partly within the Town borders; (2) the Town's ability to comply with federal law, such as NPDES regulations; (3) the Town's interest in maintaining its character and desirable attributes, including its aesthetic appeal:

> and (4) the diminution of property values within the Town and other adverse effects of a nearby apartment complex on such concerns as security and traffic congestion. We hold that none of these professed interests, whether "proprietary" or not, are sufficient to confer standing on the Town in this case.
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> As to the first two concerns, Town Mayor Richard Thomas testified in a deposition that the Town had no ownership interest in Cary Lake. Mayor Thomas gave a brief statement that under NPDES regulations, the Town was responsible for water that flowed out of Cary Lake, but provided no supporting authority for this assertion. Moreover, he acknowledged the Town is not responsible for the maintenance of Cary Lake, has never allocated funds for this purpose, and has never incurred any fines under NPDES regulations despite alleged problems in the past with water flowing into Cary Lake. He also stated that Cary Lake is the "bottom lake," that is, the final lake into which the remaining six lakes flow. We also find significant the absence of any evidence from Appellants that the BMPs to be implemented under the SWPPP were inadequate to prevent sediment from leaving the construction site; thus, Appellants have also failed to show their alleged injuries are "fairly traceable" to the challenged action in this case. Similarly, Appellants authorization of coverage to Roper for land-disturbing activities under the State General Permit and either of their two remaining concerns. Therefore, pursuant to section 1-23-610, we affirm the ALC's determination that the Town lacks standing.

Town of Arcadia Lakes v. South Carolina Dep't of Health and Envtl. Control, 404 S.C. 515, 529-31, 745 S.E.2d 385, 393 (Ct. App. 2013). In affirming this Court's ruling, the Court of Appeals noted the "absence of any evidence from Appellants that the BMPs to be implemented under the SWPPP were inadequate to prevent sediment from leaving the construction site; thus, Appellants have also failed to show their alleged injuries are 'fairly traceable' to the challenged action in this case." *Id.* at 531, 745 S.E.2d at 393. The Court of Appeals recognized that the challenged action in this case is the sufficiency of the BMPs to be implemented under the SWPPP and that Petitioners failed to present evidence on this issue.

Instead of presenting evidence on the sufficiency of the SWPPP, the Petitioners presented expert testimony that the excavation and lowering of the pond would negatively impact the biological composition of the pond and therefore should have been considered in connection with filling of 0.075 acres of wetlands under Nationwide Permit 29 ("NWP 29"). More specifically, Petitioners argued that there was no valid Nationwide Permit for filling the 0.075 acres of wetlands because the 401 water quality certification issued in 2007 for Nationwide Permits, including NWP 29, included a general condition for consideration of the "overall project proposed or accomplished by a single owner/developer" for any activities covered by a

Nationwide Permit. That argument was rejected by this Court. *Town of Arcadia Lakes v. S.C. Dep't of Health & Envtl. Control and Roper Pond, LLC*, ALC Docket No. 09-ALJ-07-0069-CC, 2010 WL 6782535, *16 (Jan. 21, 2010). Additionally, the Court of Appeals found this general condition to be inapplicable because there was no contention that the excavation of the pond "would result in a discharge into a navigable water." *Town of Arcadia Lakes*, 404 S.C. at 534, 745 S.E.2d at 395). Significantly, in their Proposed Order submitted to this Court on December 3, 2009, Petitioners proposed this argument as a conclusion of law, but failed to cite to any legal authority supporting this argument.

Roper Pond incurred increased costs as a result of the delay in the construction of the Proposed Project. The DHEC decision, which was challenged in this contested case, was issued to Roper Pond by letter dated December 15, 2008. A request for a contested case was filed on February 16, 2009. This Court issued its Final Order and Decision on January 21, 2010. Petitioners thereafter filed a Motion to Reconsider and for Stay on February 16, 2010. The Court denied that Motion on April 1, 2010. As such, the DHEC decision was stayed for not less than thirteen months. Additionally, this delay required Roper Pond to re-apply for certain County permits which had expired during the pendency of the contested case and thus resulted in further delay. Roper Pond claims specific increased costs for the Proposed Project as a result of this delay.

DISCUSSION

I. ATTORNEYS' FEES AND COSTS UNDER S.C. CODE ANN. § 15-77-300

Roper Pond seeks an award of attorneys' fees and costs from the 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. Section 15-77-300 ("State Action Statute") provides in relevant part as follows:

> (A) In any civil action brought by the State, any political subdivision of the State or any party who is contesting state action, unless the prevailing party is the State or any political subdivision of the State, the court may allow the prevailing party to recover reasonable attorney's fees to be taxed as court costs against the appropriate agency if:
>
> > (1) The court finds that the agency acted without substantial justification in pressing its claim against the party; and

(2) The court finds that there are no special circumstances that would make the award of attorney's fees unjust.

* * *

(C) The provisions of this section do not apply to civil actions relating to the establishment of public utility rates, disciplinary actions by state licensing boards, habeas corpus or post conviction relief actions, child support actions, except as otherwise provided for herein, and child abuse and neglect actions.

S.C. CODE ANN. § 15-77-300(A), (C). The parties do not dispute that the Town is a political subdivision of the State. Additionally, attorneys' fees and costs incurred in an action originating in the ALC are subject to an award under S.C. CODE ANN. § 15-77-300. *See Video Gaming Consultants, Inc. v. South Carolina Dep't of Revenue*, 358 S.C. 647, 651-52, 595 S.E.2d 890, 892 (Ct. App. 2004) (reviewing an award of attorneys' fees pursuant to S.C. CODE ANN. § 15-77-300 for fees associated with an appeal originating in the ALC, although the awarding of attorneys' fees occurred in circuit court, an appellate court in the original case, and not the ALC).[1] Therefore, an action brought by the Town before the ALC is subject to the State Action Statute.

In order to recover under the State Action Statute, a party must establish that: "first, the contesting party must be the 'prevailing party;' second, the court must find 'that the agency acted without substantial justification in pressing its claim against the party; and third, the court must find 'that there are no special circumstances that would make an award of attorney's fees unjust.'" *Heath v. County of Aiken* (*Heath II*), 302 S.C. 178, 182, 394 S.E.2d 709, 711 (1990) (quoting *Heath v. Aiken County* (*Heath I*), 295 S.C. 416, 420, 368 S.E.2d 904, 906 (1988)). As discussed below, the Court finds that Roper Pond has established each of the three elements required for an award of attorneys' fees and cost under Section 15-77-300.

A. Prevailing Party

On January 21, 2010, this Court issued an order finding that Petitioners lack standing to bring this action and affirming the Department's grant of coverage to Roper Pond under the

[1] Section 15-77-300(C) of the State Action Statute expressly excludes other actions which are within the jurisdiction of the Administrative Law Court. *See* S.C. CODE ANN. § 40-1-160 (2001) (providing that an appeal from the decision of a state licensing board is filed in the ALC); S.C. CODE ANN. § 1-23-310(3) (Supp. 2009) (defining contested case as "a proceeding including, but not restricted to, ratemaking, price fixing, and licensing, in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing"). "The enumeration of exclusions from the operation of a statute indicates that the statute should apply to all cases not specifically excluded." *Stewart v. Richland Memorial Hosp.*, 350 S.C. 589, 594, 567 S.E.2d 510, 513 (Ct. App. 2002) (citation omitted).

Construction General Permit. "The key factor in determining whether a party is a prevailing party is the degree of success obtained by the party seeking attorney's fees." *Douan v. Charleston County Council*, 373 S.C. 384, 386, 645 S.E.2d 241, 243 (2007). The South Carolina Supreme Court has held that "a party need not be successful as to all issues in order to be found to be a prevailing party" under the State Action Statute. *Heath II* at 182, 394 S.E.2d at 711. In *Heath II*, the Court defined "prevailing party" as "'[t]he one who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not to the extent of the original contention [and] is the one in whose favor the decision or verdict is rendered and judgment entered.'" *Id.* at 182-83, 394 S.E.2d at 711 (quoting *Buza v. Columbia Lumber Co.*, 395 P.2d 511, 514 (1964)). This Court's Final Order found that Petitioners, including the Town, lacked standing in this matter; however, the Court also considered the merits of the issues raised by Petitioners and affirmed the Department's decision to grant Roper Pond coverage under the Construction General Permit. Upon the denial of the Motion to Reconsider, Roper Pond was a prevailing party in this matter. Additionally, the Court of Appeals affirmed this Court's decision on standing and the substantive ruling on the Department's decision to grant Roper Pond coverage under the Construction General Permit. *Town of Arcadia Lakes v. South Carolina Dep't of Health and Envtl. Control,* 404 S.C. 515, 745 S.E.2d 385 (Ct. App. 2013).

The Town argues that Roper Pond is not a prevailing party under Section 15-77-300. As a threshold consideration, Section 15-77-300 provides in relevant part: "In any civil action brought by the State, any political subdivision of the State or any party who is contesting state action, **unless the prevailing party is the State or any political subdivision of the State,** the court may allow the prevailing party to recover reasonable attorney's fees . . ." S.C. CODE ANN. § 15-77-300(A) (emphasis added). The Town makes no claim that the Town and the other Petitioners were the prevailing parties, and there is no basis for such claim. This Court found that the Town lacked standing to bring this contested case and further ruled that Petitioners failed to meet the burden of proof that DHEC improperly issued Roper Pond coverage under the Construction General Permit. The Court of Appeals affirmed this Court's ruling on standing and the merits of the case. The Supreme Court dismissed the matter as moot. Therefore, the Town is subject to the award of attorneys' fees and costs under Section 15-77-300 because it is <u>not</u> a prevailing party. This Court ruled in favor of DHEC and Roper Pond in the contested case. The Court of Appeals affirmed this Court's decision, and the Supreme Court's dismissal of the matter

as moot allowed the Court of Appeals' decision to stand. Therefore, Roper Pond is a prevailing party in this case.

The Town argues that Roper Pond is not a prevailing party in this matter because the Supreme Court did not affirm the lower court opinions. This argument imposes a requirement that a ruling be affirmed on appeal in order to entitle the prevailing party to an award of fees and costs under Section 15-77-300. The State Action Statute imposes no such requirement. The award of fees and costs under the State Action Statute is made at the trial court level, and according to the case law, such determination can be made following a ruling/judgment by the trial court prior to any appeal. *See, e.g., Brown v. City of N. Charleston*, 314 S.C. 298, 442 S.E.2d 633 (Ct. App. 1994) (affirming the trial court order granting summary judgment to plaintiffs and reversing the trial court's denial of attorney fees under Section 15-77-300); *Cornelius v. Oconee County*, 369 S.C. 531, 633 S.E.2d 492 (2006) (affirming trial court's order granting summary judgment to plaintiff and awarding attorney fees under Section 15-77-300). The Supreme Court's failure to affirm the Court of Appeals' decision does not affect Roper Pond's status as a prevailing party in this matter.

Similarly, the Town asserts that "the Supreme Court's decision to dismiss the case as moot does not evidence an intent to allow the Court of Appeal's decision to stand." In dismissing the matter as moot, the Supreme Court recognized that the coverage under the Construction General Permit had been terminated because the construction activities for the Proposed Project had been completed. The Court thus held that that the matter was moot "as it is now impossible for this Court to grant any redress in the context of the issues as framed and litigated below (i.e., modify or revoke authorization for Roper's construction activities under the state-wide permit)." Simply stated, the Supreme Court could not remand the case for modification or revocation of the authorization under the Construction General Permit because the authorization had been terminated. However, in the order dismissing the matter as moot, the Supreme Court did not reverse or vacate the Court of Appeals' decision upholding this Court's final order in the case. The Supreme Court took no action on the Court of Appeals' decision. Had the Supreme Court intended to vacate the lower courts' rulings, the Supreme Court could have taken such action in the Order. *See, e.g., Friends of McLeod, Inc. v. City of Charleston*, 384 S.C. 438, 682 S.E.2d 488 (2009) (dismissing appeal as moot and vacating the Court of Appeals opinion in the matter); *McDill v. Nationwide Mut. Ins. Co.*, 368 S.C. 29, 627 S.E.2d 749 (Ct. App. 2005) (finding that

decision in separate tort action rendered insurance coverage litigation moot and vacating the trial court's order). Similarly, the Supreme Court has issued published opinions dismissing the grant of certiorari and requiring the Court of Appeals to depublish its opinion in the case. *See., e.g., Rivera v. Newton*, 413 S.C. 26, 773 S.E.2d 913 (2015) (dismissing the writ of certiorari as improvidently granted and directing the Court of Appeals to depublish its opinion and stating that the opinion no longer have any precedential effect); *Horton v. City of Columbia*, 413 S.C. 25, 773 S.E.2d 912 (2015) (dismissing the writ of certiorari as improvidently granted and directing the Court of Appeals to depublish its opinion and stating that the opinion no longer have any precedential effect); *Keeter v. Alpine Towers Int'l, Inc.*, 410 S.C. 445, 766 S.E.2d 375 (2014) (dismissing the writ of certiorari as improvidently granted and directing the Court of Appeals to depublish its opinion and stating that the opinion no longer have any precedential effect). In this matter, the Supreme Court's dismissal of the appeal as moot does not affect the validity of this Court's Final Order or the Court of Appeals' decision affirming that Order. The Supreme Court's order does not reverse or vacate the Court of Appeals' decision affirming this Court's Final Order and Decision. The decision of the Court of Appeals stands as a published opinion affirming this Court's Final Order and Decision. *Town of Arcadia Lakes v. South Carolina Dep't of Health and Envtl. Control,* 404 S.C. 515, 745 S.E.2d 385 (Ct. App. 2013).

Moreover, despite the completion of the project, the Supreme Court could have reversed or vacated all or part of the Court of Appeals' decision under one of the exceptions to mootness. "Two exceptions in which the court may address an issue despite mootness are 1) when the issue raised is capable of repetition, yet evading review, and 2) when the question considers matters of important public interest." *Sloan v. Friends of Hunley, Inc.*, 369 S.C. 20, 26-27, 630 S.E.2d 474, 478 (2006). The Court could have applied one of the exceptions to the mootness rule and corrected the alleged errors in the standing holding of this Court and the Court of Appeals. However, the Supreme Court did not take such action.

The Town argues that "[t]he fact that the Supreme Court dismissed this case as moot after hearing arguments and indicated a concern that meaningful judicial relief was no longer possible, and without affirming the Court of Appeals, takes 'prevailing party' status off the table." However, the cases cited by the Town in support of this argument are easily distinguished as the mootness determinations in those cases were made prior to the trial court's decision on the merits of each case. In *City of Charleston v. Masi*, 362 S.C. 505, 609 S.E.2d 301 (2005), the Supreme

Court held that the trial court properly declined to award attorney's fees under the State Action Statute where the trial court held the action to be moot by the Supreme Court's decision in another matter. The Supreme Court thus upheld the trial court's denial of attorney's fees, finding that "[t]he District is not a prevailing party because its degree of success is nonexistent given that the circuit court did not specifically find for either party and because this case is being dismissed as moot." 362 S.C. at 510, 609 S.E.2d at 304. As such, since there was no decision by the trial court, there could be no prevailing party for purposes of the State Action Statute. That is not the case here. This Court issued a Final Order and Decision which was affirmed by the Court of Appeals.

Similarly, in *Douan v. Charleston County Council*, 373 S.C. 384, 645 S.E.2d 241 (2007), the plaintiff challenged the County's action alleging that a proposed ordinance and referendum violated state law. Prior to the trial court's decision in that case, the Supreme Court issued a decision in a related case against the county election commission which rendered the action before the trial court moot. Since the trial court did not rule of the merits of the case, the Supreme Court held that the trial court properly held that the plaintiff was not a prevailing party in that action and therefore not entitled to attorneys' fees under the State Action Statute. 373 S.C. at 387, 645 S.E.2d at 243.[2] Again, this Court issued a Final Order and Decision which was affirmed by the Court of Appeals. Therefore, the holdings in *Masi* and *Douan* do not preclude this Court's finding that Roper Pond is a prevailing party in this matter.

The Town further cites to *Session v. Withers*, 327 S.C. 409, 488 S.E.2d 888 (Ct. App. 1997), in support of its argument that there can be no "prevailing party" when a matter is dismissed as moot on appeal. In that case, the trial court awarded costs to the plaintiff as the prevailing party pursuant to Rule 54, SCRCP, upon a jury verdict in the amount of $600. The plaintiff thereafter entered into a settlement with the liability insurer under which she agreed to mark the judgment obtained satisfied. 327 S.C. at 417, 488 S.E.2d at 892. Since Rule 54, SCRCP, required that any costs taxed be included in the judgment, the plaintiff could not make claim to such costs since she was contractually obligated not to execute on the judgment. The Court of

[2] *See, also, Jasper County Bd. of Educ. v. Jasper County Grand Jury*, 303 S.C. 49, 51-52, 398 S.E.2d 498, 499-500 (1990) (holding that party was not a "prevailing party" entitled to recover attorney's fees under Section 15–77–300 where case was dismissed for lack of jurisdiction and thus there was never a resolution on the merits); *Richland County v. Kaiser*, 351 S.C. 89, 97, 567 S.E.2d 260, 264 (Ct. App. 2002) (holding that party was not prevailing party upon reversal of decision in party's favor at the Court of Appeals).

Appeals thus held that the appeal related to the attorney's fees was rendered moot. *Id.* at 417, 488 S.E.2d at 893. It was the inability to execute the judgment which included the costs that rendered the issue moot. Such is not the case here. This Court's Final Order and Decision stands, and there is no contractual impediment to Roper Pond's executing a judgment on this Court's award of attorney's fees under the State Action Statute.

Additionally, the Town argues that the Supreme Court order denying Roper Pond's motion for costs under Rule 222, SCACR, precludes Roper Pond's status as a prevailing party in this action. The Town concedes that "Rule 222 contains no standard for determining whether an award of costs is warranted." Moreover, Rule 222, SCACR, does not refer to "prevailing party" in determining the award of costs. Therefore, the Court's denial of Roper Pond's motion for costs does not affect Roper Pond's status as a prevailing party in this action. Additionally, the Supreme Court recently held that its ruling on a motion for costs under Rule 222, SCACR, has no bearing on a trial court's authority to grant attorney fees under a statute. In *Austin v. Stokes-Craven Holding Corp.*, 406 S.C. 187, 750 S.E.2d 78 (2013), the Supreme Court held that an appellate court's authority to award discretionary appellate attorneys' fees and a circuit court's authority to award appellate and post-appellate attorneys' fees pursuant to South Carolina Regulation of Manufacturers, Distributors, and Dealers Act were not mutually exclusive:

> Notably, it is within this Court's discretion whether to award fees and costs under Rule 222. *See* Rule 222(a), (e), SCACR (identifying circumstances for which an appellate court may tax costs on appeal). In contrast, section 56–15–110(a) states that a party who prevails under the Dealer's Act "**shall recover** double the actual damages by him sustained, and the cost of suit, including a reasonable attorney's fee." (Emphasis added.) This is a fundamental distinction as a denial of fees under a discretionary rule cannot eliminate a statutory mandate. Thus, we hold that this Court's summary denial of Austin's request for attorney's fees under Rule 222 was not dispositive of his right to seek statutory fees in the circuit court. Moreover, this conclusion is consistent with our jurisprudence interpreting Rule 222 wherein our appellate courts have found that a decision under this rule does not preempt an award of attorney's fees to which one is otherwise entitled, *i.e.*, statutorily authorized. *See Taylor v. Medenica*, 332 S.C. 324, 504 S.E.2d 590 (1998) (awarding Respondents a $1,000 attorneys' fee and $81.66 for costs as allowed by Rule 222 and holding that Respondents could seek additional attorneys' fees in the circuit court under the UTPA, which provides for reasonable attorneys' fees and costs); *Muller v. Myrtle Beach Golf & Yacht Club*, 313 S.C. 412, 416, 438 S.E.2d 248, 250 (1993) (finding Appellant waived right to recover appellate costs and fees under Rule 222 as he failed to file an itemized statement of costs prior to the Court's issuance of the remittitur, but holding that Appellant could seek appellate costs in the circuit court based on his statutory right under

> section 29–5–10 (authorizing costs incurred for the enforcement of a mechanic's lien) as "Rule 222 does not preempt an award of attorney's fees to which one is otherwise entitled" (citation omitted)); ***McDowell v. S.C. Dep't of Soc. Servs.*, 304 S.C. 539, 543, 405 S.E.2d 830, 833 (1991) (holding that an award of attorney's fees under Supreme Court Rule 38 (precursor to Rule 222) did not "preempt an award of attorney's fees to which one is otherwise entitled" and, thus, Appellant could seek an award of attorney's fees pursuant to section 15–77–300, which permits an award of fees for a party prevailing in an action against a state agency)**; *see also Parker v. Shecut*, 359 S.C. 143, 597 S.E.2d 793 (2004) (recognizing, in a partition action, that whether Respondents were entitled to appellate attorney's fees pursuant to section 15-61-110 was a determination for the circuit court). Accordingly, we find the Court's denial of Austin's Rule 222 motion had no preclusive effect on his attempt to seek statutory attorney fees in the circuit court, including appellate fees and the post-appellate fees incurred in enforcing the judgment against Stokes–Craven.

406 S.C. at 199-200, 750 S.E.2d at 84-85 (second emphasis added). This ruling cites to *McDowell v. S.C. Dep't of Soc. Servs.*, 304 S.C. 539, 543, 405 S.E.2d 830, 833 (1991), which expressly references Section 15-77-300 of the State Action Statute. This ruling affirms that the Supreme Court's denial of costs under Rule 222, SCACR, has no effect on this Court's authority to award attorneys' fees and costs to Roper Pond under Section 15-77-300. Roper Pond is therefore a prevailing party and as will be seen hereafter is entitled to fees and costs under the State Action Statute.

B. Without Substantial Justification

Roper Pond asserts that the Town acted without substantial justification because Petitioners failed to offer evidence at the hearing on the merits to support its allegations that DHEC acted in conflict with established regulations and the relevant case law. "An agency action supported by substantial justification is one which has a reasonable basis in law and fact." *McDowell*, 304 S.C. at 542, 405 S.E.2d at 832 (citing *Pierce v. Underwood*, 108 S. Ct. 2541 (1988)). In *Heath II*, the South Carolina Supreme Court held that "substantial justification," for the purposes of S.C. CODE ANN. § 15-77-300, means "justified to a degree that could satisfy a reasonable person." 302 S.C. at 183, 394 S.E.2d at 712 (quoting *Pierce*, 108 S. Ct. at 2250). However, the South Carolina Supreme Court interprets the State Action Statute to hold state agencies and political subdivisions to a higher standard than other litigants. "[A] court need not go so far as to brand a claim 'frivolous' in order for it to be found to be without substantial justification." *Id.* (citing *Pierce*, 108 S. Ct. at 2251). In *Heath II*, the Court held that the county

council acted without substantial justification because "[t]he statute construed in [the case] was unambiguous, and coupled with the relevant precedent clearly established that the Council's claims were without merit." *Id.* at 184, 394 S.E.2d at 712. Therefore, the substantial justification standard in Section 15-77-300 requires a court to examine the established body of law in determining whether a state agency or political subdivision acted "without substantial justification" in pressing a claim. The holding in *Layman v. State*, 376 S.C. 434, 658 S.E.2d 320 (2008), further clarifies "substantial justification" for the purposes of S.C. CODE ANN. § 15-77-300:

> Substantial justification for purposes of the state action statute means "justified to a degree that could satisfy a reasonable person." *Heath v. County of Aiken*, 302 S.C. 178, 183, 394 S.E.2d 709, 712 (1990) (quoting *Pierce v. Underwood*, 487 U.S. 552, 564, 108 S.Ct. 2541, 101 L.Ed.2d 490 (1988)). Therefore, in deciding whether a state agency acted with substantial justification, the relevant question is whether the agency's position in litigating the case had a reasonable basis in law and in fact. *McDowell v. S.C. Dept. of Soc. Servs.*, 304 S.C. 539, 542, 405 S.E.2d 830, 832 (1991). Although an agency's loss on the merits does not create a presumption that its position was not substantially justified, *Video Gaming Consultants, Inc. v. S.C. Dept. of Revenue*, 358 S.C. 647, 650, 595 S.E.2d 890, 892 (Ct. App. 2004), **the substance and outcome of the matter litigated is nevertheless relevant to the determination of whether there was substantial justification in pressing a claim.** *Heath*, 302 S.C. at 183, 394 S.E.2d at 712.

Layman v. State, 376 S.C. 434, 445, 658 S.E.2d 320, 325-26 (2008) (emphasis added). The substance of the Town's case and the ruling on the evidence presented must be examined in determining whether the Town acted "without substantial justification."

In the Request for Contested Case Hearing, Petitioners cited a number of state and federal statutes and regulations which the Department's decision in this matter allegedly violated. The DHEC decision, which was challenged in this matter, was the grant of coverage to Roper Pond under the Construction General Permit. The Department's decision was based on its review and approval of SWPPP prepared for the Proposed Project. However, at the hearing on the merits, Petitioners offered no evidence that the SWPPP approved by the Department was technically deficient. *Town of Arcadia Lakes v. S.C. Dep't of Health & Envtl. Control and Roper Pond, LLC*, ALC Docket No. 09-ALJ-07-0069-CC, 2010 WL 6782535 (Jan. 21, 2010). The Court of Appeals affirmed this Court's finding on that issue: "We also find significant the absence of any evidence from Appellants that the BMPs to be implemented under the SWPPP were inadequate to prevent

sediment from leaving the construction site." *Town of Arcadia Lakes*, 404 S.C. at 530-31, 745 S.E.2d at 393 (Ct. App. 2013).

Additionally, since the nature of any deficiencies in the SWPPP would involve technical or specialized knowledge outside of the common knowledge and experience of a trier of fact, it would be expected that Petitioners would have offered an expert to assist the Court in assessing any alleged deficiencies. Rule 702, SCRE. Until Mr. McCall was conflicted out of this case, Petitioners claimed that he offered his expert opinion on these alleged deficiencies. Upon notifying the Town that he could not participate in this litigation, Mr. McCall offered to confer with Brian Bates and recommend other engineering experts to the Petitioners. However, no expert witness was offered for this purpose. Petitioners' only expert witness offered in this matter admitted that he had not reviewed the SWPPP prepared on behalf of Roper Pond. Therefore, Petitioners failed to present evidence on DHEC's alleged failure to satisfy the fundamental regulatory requirements on which its decision in this matter was based.

Additionally, Petitioners' case-in-chief was focused almost exclusively on the dredging of the Pond; however, Petitioners' expert at trial admitted at trial that he was not qualified to opine on this matter. Petitioners' expert testified that he has no prior experience in assessing the potential impacts of excavation of a water body. Moreover, while Petitioners' expert initially opined that the proposed excavation of the pond "will simply destroy the ecosystem that is now present," he later withdrew that opinion because, as he stated, "I was trying to restrict myself to what I actually knew as opposed to my conjectures." With respect to the testimony of Petitioners' expert, the Court of Appeals stated as follows:

> Although Reice admitted he previously opined that the proposed excavation of the Pond would have disastrous consequences, he now admitted this was only conjecture. Furthermore, Reice's primary interest was sedimentation, and he admitted he had no direct experience with excavation. When asked if he believed the land-disturbing activities conducted in conjunction with Roper Pond Apartments would have an adverse impact on Roper Pond, Reice stated only that "[i]t doesn't sound good" and he would "be surprised if they didn't," but declined to offer an expert opinion about the probable results. On cross-examination, Reice also stated he was not provided copies of Roper's SWPPP and except for what he heard at the hearing, had no knowledge of the BMPs that Roper intended to follow in order to minimize the impact of its construction activities.

Town of Arcadia Lakes, 404 S.C. at 526, 745 S.E.2d at 391.

Instead of presenting evidence on alleged deficiency in the SWPPP, Petitioners argued that Roper Pond did not have the required federal permit for impacts resulting from excavation of the pond on the property. However, the federal law is clear and well-settled that a federal permit is required for excavation of a water body only when such activity is to be conducted in a "navigable water of the United States" under Section 10 of the Federal Rivers and Harbors Act, 33 U.S.C. §§ 401 *et seq.* ("Rivers and Harbors Act"). 33 U.S.C. § 403. This Court found that "Petitioners neither claimed nor presented any evidence that the Pond is a navigable water of the United States under Section 10 of the Rivers and Harbors Act." *Town of Arcadia Lakes v. S.C. Dep't of Health & Envtl. Control and Roper Pond, LLC*, ALC Docket No. 09-ALJ-07-0069-CC, 2010 WL 6782535, *19 (Jan. 21, 2010). Moreover, Petitioners failed to identify any other federal or state law which required a permit for excavation of the Pond. Instead, Petitioners claimed that a federal permit for excavation of the Pond, which was not required under federal law, was nonetheless required as a general condition of the 401 water quality certification for the Nationwide Permits. Specifically, Petitioners argued that there was no valid Nationwide Permit for filling the 0.075 acres of wetlands because the 401 water quality certification issued in 2007 for Nationwide Permits, including NWP 29, included a general condition for consideration of the "overall project proposed or accomplished by a single owner/developer" for any activities covered by a Nationwide Permit. That argument was rejected by this Court. *Town of Arcadia Lakes v. S.C. Dep't of Health & Envtl. Control and Roper Pond, LLC*, ALC Docket No. 09-ALJ-07-0069-CC, 2010 WL 6782535, *16 (Jan. 21, 2010). Additionally, the Court of Appeals found this general condition to be inapplicable because there was no contention that the excavation of the pond "would result in a discharge into a navigable water." *Town of Arcadia Lakes*, 404 S.C. at 534, 745 S.E.2d at 395. Moreover, in their Proposed Order submitted to this Court, Petitioners failed to cite to any legal authority supporting this argument.

Petitioners' failure to cite relevant case law or other legal authority for their claims supports a demonstration of "without substantial justification." Although Petitioners' claims might be characterized as novel, the fact that a political subdivision of the State has raised novel issues in an action does not mean that the political subdivision was substantially justified in bringing such action. *Cornelius v. Oconee County*, 369 S.C. 531, 539-40, 633 S.E.2d 492, 497 (2006) (finding that citizen who initiated declaratory judgment action against a county was entitled to attorneys' fees because the fact that novel issues were raised does not mean the county

was substantially justified in opposing the citizen in the declaratory judgment action). The substantial justification standard under Section 15-77-300 requires more than a plausible legal theory on which to bring the contested case. In *Cornelius*, the Supreme Court upheld the award of attorney fees in a declaratory judgment action brought by a county citizen against the county for a wastewater treatment facility funding scheme which violated a county referendum. The county argued that the award of attorney fees under Section 15-77-300 was improper because, *inter alia*, the county "acted with 'substantial justification' because there are no preexisting judicial precedents on these issues, merely attorney general opinions." *Id.* at 538-39, 633 S.E.2d at 496. In upholding the award of attorney fees, the Supreme Court held:

> The trial court can award attorneys' fees under the statute only if it finds the State "agency acted without substantial justification in pressing its claim. . . ." § 15–77–300(1). An agency acts with "substantial justification" within the meaning of the statute when its position has a "reasonable basis in law and fact." *McDowell v. SCDSS*, 304 S.C. 539, 542, 405 S.E.2d 830, 832 (1991). Contrary to County's contention, **the fact that novel issues were raised does not mean County was substantially justified in opposing Cornelius**. Declaratory judgment actions by their very nature often present novel questions. *See, e.g. Eargle, supra* (authority of county administrator to suspend elected official's employees); *United Oil Marketers, supra* (constitutionality of license tax incentive statute for gas/ethanol blend); *Heath v. County of Aiken*, 302 S.C. 178, 394 S.E.2d 709 (1990) (to define relationship between sheriff's office and county council). Moreover, **County cited no viable authority supporting its position that it was no longer bound by the Referendum's terms**. We agree with the circuit court that County acted without substantial justification, and no special circumstances render the attorneys' fee award unjust.

Id. at 539-40, 633 S.E.2d at 496-97 (emphasis added). As such, the fact that there were no prior rulings directly on point as to the claims raised by the county did not preclude a finding that the county acted without substantial justification. Such is the case here. Petitioners advanced a legal theory for which there was no precedential basis in federal or state law. Moreover, despite the wealth of case law interpreting the Clean Water Act, the Rivers and Harbors Act, and the permitting programs established under those Acts, Petitioners continued to press their claim that a 401 Certification issued for a Nationwide Permit in 2007, two years prior to the DHEC decision at issue in this case, required the Department to consider the impacts of the excavation of Roper Pond. The Court of Appeals rejected all of Petitioners' arguments regarding the sufficiency of the 401 certification and the alleged error in the Department's failure to consider the impacts of the dredging of the Pond:

> Appellants further argue the 401 certification issued by DHEC was insufficient to satisfy the requirements Roper needed to fulfill to obtain a 404 permit because: (1) the 401 certifications that DHEC issued for projects authorized under NWP 29 or NWP 39 could not apply to the excavation of the pond because that activity was not disclosed when Roper applied to the Corps for a 404 permit; (2) the project did not comply with certain general conditions applicable to all NWPs, specifically that DHEC consider the impacts to all land within a project boundary and to adjacent bodies of water or wetlands; (3) DHEC never issued a formal certification that the project met the conditions under NWP 29 for water quality certification; and (4) DHEC failed to conduct the required review for compliance with certain water quality regulations. We hold none of these allegations warrant reversal of the ALC's finding that Roper had an effective 401 certification for its proposed project.

Town of Arcadia Lakes, 404 S.C. at 533-34, 745 S.E.2d at 395. The Court of Appeals also affirmed this Court's ruling that a 404 permit was not required for coverage under the Construction General Permit:

> Finally, Appellants take issue with the finding that Roper was entitled to coverage under the State General Permit. They submit two arguments in support of their position. We reject both arguments.
>
> First, Appellants reiterate their previous argument that Roper was not entitled to coverage because the 401 certification was inadequate for a 404 permit, which in turn was a prerequisite for coverage under the State General Permit. We have already determined that the 401 certification that DHEC issued was sufficient for Roper to obtain coverage under NWP 29.
>
> Appellants further contend that the excavation of the pond and lowering of its surface would make the pond a water control structure and would therefore require, under the terms of the State General Permit, a 404 permit from the Corps, which in turn would require a 401 certification. The ALC did not specifically address the question of whether the use of the pond as a water control structure required a 404 permit, and Appellants did not request a ruling in their motion to reconsider. The issue, then, has not been preserved for appellate review, and it would be improper for us to address it now. *See Shealy v. Aiken Cnty.*, 341 S.C. 448, 460, 535 S.E.2d 438, 444–45 (2000) (holding an issue was not preserved for appeal because the trial judge's general ruling was insufficient to preserve the specific issue for appellate review and the appellant did not move to alter or amend the judgment pursuant to Rule 59(e), SCRCP); *Hendrix v. Eastern Distribution, Inc.*, 320 S.C. 218, 218, 464 S.E.2d 112, 113 (1995) (vacating an opinion by this court "to the extent it addressed an issue which was not preserved").

Id. at 536, 745 S.E.2d at 396. Petitioners' presentation of novel legal theories in an attempt to create a 404 permitting requirement where none existed in the well-settled and substantial body

of law was rejected by this Court and the Court of Appeals. Therefore, despite Petitioner's novel legal theories, the Town acted without substantial justification in bring this action.

The Town argues that there was substantial justification to bring this action because "the Town's decision to file the request for contested case hearing was made solely and completely on reliance of the advice of counsel." This argument suggests a showing of "substantial justification" would only require a party to overcome the frivolous filing standard under Rule 11, SCRCP, or the Frivolous Civil Proceedings Sanctions Act, S.C. CODE ANN. § 15-36-10 et seq. ("FCPSA"). *Father v. South Carolina Dep't of Soc. Servs.*, 345 S.C. 57, 72, 545 S.E.2d 523, 531 (Ct. App. 2001) (finding the standard for sanctions under Rule 11 to be essentially the same as that under the FCPSA). The South Carolina Supreme Court has expressly held that a finding of "without substantial justification" does not require a showing that the claims asserted were frivolous. *Heath II*, 302 S.C. at 183, 394 S.E.2d at 712 (holding that "a court need not go so far as to brand a claim 'frivolous' in order for it to be found to be without substantial justification"). As such, a party's reliance on legal advice that it has claims which can be expected to survive a motion for sanctions under Rule 11, SCRCP, or the FCPSA does not shield a party from a finding of "without substantial justification" under Section 15-77-300.

Additionally, if reliance on the advice of counsel were a shield against a finding of "without substantial justification," Section 15-77-300 would be rendered meaningless. The South Carolina appellate courts have upheld a number of lower court findings that a state agency or political subdivision acted "without substantial justification" under Section 15-77-300, and in every reported case, the state agency or political subdivision was represented by counsel. *See Layman v. State*, 376 S.C. 434, 445, 658 S.E.2d 320, 325-26 (2008) (upholding award of attorney fees in class action by state retirees against the State and the South Carolina Retirement System); *Cornelius v. Oconee County*, 369 S.C. 531, 539-40, 633 S.E.2d 492, 497 (2006) (upholding award of attorney fees to citizen who brought declaratory judgment action against the county); *Tennis v. S.C. Dep't of Soc. Servs.*, 355 S.C. 551, 559-60, 585 S.E.2d 312, 317 (Ct. App. 2003) (reversing the denial of attorney fees in daycare operator action against DSS); *Brown v. City of North Charleston*, 314 S.C. 298, 301, 442 S.E.2d 633, 635 (Ct. App. 1994) (reversing trial court's denial of attorney fees for citizen seeking displacement and relocation costs from the city); *Heath II*, 302 S.C. at 183-84, 394 S.E.2d at 712 (upholding award of attorney fees in declaratory judgment action brought by sheriff against the county). The reliance on the advice of

counsel therefore does not preclude a finding that a state agency or political subdivision of the state acted without substantial justification. Additionally, as discussed below, the Supreme Court has recently addressed reliance on legal counsel in the context of an award of attorneys' fees and costs under Section 15-77-300; however, the Supreme Court addressed this argument under the "special circumstances" element of Section 15-77-300—not the determination of "without substantial justification."

The Town further argues that its claims were justified because "if the Supreme Court believed that the case was frivolous or without merit it would not have exercised its discretion and requested briefing and oral arguments." There is no basis for this contention. The Supreme Court regularly grants certiorari to review a decision of the Court of Appeals and then subsequently dismisses the petition for writ of certiorari as improvidently granted following oral arguments. *See, e.g., York County v. South Carolina Dep't of Health and Envtl. Control,* 408 S.C. 180, 758 S.E.2d 187 (2014) (dismissing writ of certiorari as improvidently granted following May 6, 2014 oral argument); *State v. Scott*, 413 S.C. 24, 773 S.E.2d 912 (2015) (missing writ of certiorari as improvidently granted following April 22, 2015 oral argument); *Estate of Atn Burns Livingston v. Livingston*, 412 S.C. 610, 773 S.E.2d 579, 580 (2015) (dismissing writ of certiorari as improvidently granted following May 5, 2015 oral argument). As such, the fact that the Supreme Court granted the petition for writ of certiorari in this matter cannot be construed as the Supreme Court's "clear acknowledgment of the meritorious claims" as the Town contends. The Town improperly interprets the Supreme Court's decision to grant its writ of certiorari as a statement on the merits of the claims at issue.

The Town acted without substantial justification in bringing this action because the Town lacked standing to bring the action. "[S]tanding is a fundamental prerequisite for instituting a legal action..." *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n,* 407 S.C. 67, 81, 753 S.E.2d 846, 853 (2014). Affirming this Court's Final Order and Decision, the Court of Appeals found that the Town lacked standing because the Town failed to present evidence to show that any of its "professed interests" would result in an injury in fact to the Town or that any alleged injuries "are 'fairly traceable' to the challenged action in this case." *Town of Arcadia Lakes*, 404 S.C. at 531, 745 S.E.2d at 393 (Ct. App. 2013). There is an inherent absence of "substantial justification" for an action where the Town failed to present evidence to establish

standing to challenge the DHEC decision at issue. The Court thus finds that the Town's lack of standing further supports the finding that the Town acted without substantial justification

The Town acted without substantial justification because the Town's primary objective in appealing the Department's decision in this matter was not to challenge the Department's decision to grant Roper Pond coverage under the Construction General Permit, but to stop or delay the construction of an apartment complex on the Roper Pond property. Roper Pond offers the testimony and correspondence of Mr. Thomas, mayor and Rule 30(b)(6) deponent for the Town, as evidence of this intent to stop or delay the Proposed Project. Mr. Thomas testified that there was no opposition to the previous plan to construct condominiums on the Roper Pond property. In an August 23, 2008 email, Mr. Thomas wrote that "the town was misled and deceived in the initial meetings 3+ years ago" by the developer to gain support for rezoning of the Roper Pond property. Mr. Thomas further wrote:

> The town should use all necessary means to go before the Richland County Planning Commission and appeal the August 21 Planning Committee recommendation (on numerous reasons of environmental impact, faulty traffic studies and NPDES requirements that have not been studied or met concerning flood control) and to resend [sic] the past zoning change on the grounds of misrepresentation and breach of verbal contract.

Mr. Thomas acknowledged that the Town opposed the planned development of the property for reasons which had nothing to do with the Department's approval of the SWPPP and authorization under the Construction General Permit. Moreover, Mr. Thomas admitted that the Town had no independent knowledge of facts supporting its appeal of the Department's grant of coverage to Roper Pond under the Construction General Permit.

Upon receipt of the December 15, 2008 DHEC decision at issue in this case, Mr. Thomas sent an email to Brian Bates stating that the Town could "send in a blanket appeal to the DHEC Board and delay the actual decision for 60 days." At the close of this email, Mr. Thomas wrote: "Let me know where you think we can go to delay and/or stop this project." The stated objective of this email is further evidenced by the Town's efforts to oppose governmental authorization for the planned development at every opportunity. For example, Mr. Thomas contacted a politician and others to assist the Town in holding up South Carolina Department of Transportation approval for the Proposed Project. Additionally, at its October 2, 2008 council meeting, the Town adopted a resolution to the Richland County Planning Commission regarding development plans

submitted to the County for the Proposed Project. The resolution advised the Commission of the Town's belief that the proposed development, multifamily high density apartments, was "out of character and totally incongruous for the entire town, its neighborhoods, contiguous community and the intended zoning use as originally presented." The resolution further requested that "an economic impact study be performed to determine the loss of property value to the homes in the adjacent Kaminer Station Subdivision, and homes directly affected across Trenholm Road and by adjacent nearby lakes, due to the proposed 204 apartments . . ." This evidence supports Roper Pond's contention that the Town engaged in an comprehensive effort to delay or stop the Proposed Project.

Similarly, Roper Pond argues that meeting with DHEC and governmental authorities were intended to obstruct the development of the Proposed Project and were not intended to facilitate the correction of deficiencies in the SWPPP prepared by B.P. Barber on behalf of Roper Pond. The Town supported the exclusion of B.P. Barber from a meeting with Senator Joel Lourie as a strategy for further delaying the approval of the SWPPP. Brian Bates and Daniel Hill, the professional engineers assisting the Town in its opposition to the Department's approval of the SWPPP, attended a meeting with Senator Lourie on behalf of the Town. The email correspondence regarding this meeting demonstrates the Mr. Thomas agreed with and promoted Mr. Bates' recommendation that B.P. Barber be excluded from the meeting. In a November 6, 2008 email, Mr. Bates advised Mr. Thomas as follows:

> Yes I can attend a meeting at that time. As for your phone message about BP Barber, I don't care if they are there, but letting them know our position on their design (assuming we find flaws) that quickly will just expedite their response. I would think that every day that this thing is not resolved is another day it isn't being built. Going through the system is a more formal, civil, and slower method in my opinion. I would rather them keep guessing what our next move is instead of confronting them. Just my thoughts.

Upon receipt of the following email message, Mr. Thomas responded: "I agree with you . . . I will let Joel know that You Danny and I can be there." (ellipses in original). Mr. Thomas thereafter forwarded the email to Senator Lourie with his endorsement of the proposed strategy. This evidence supports Roper Pond's claim that the Town's "concerns" about the SWPPP were merely another avenue in to determine "where you think we can go to delay and/or stop this project."

With respect to the Town's concerns regarding the SWPPP for the Proposed Project, the Town was afforded numerous opportunities to raise those concerns prior to the Department's

decision to grant Roper Pond coverage under the Construction General Permit. The Town provided comments to the Department shortly after the Department staff took over the review of the SWPPP. In an October 29, 2008 email, Mr. Thomas forwarded the Department's review letter for the SWPPP to Mr. Bates and requested that Mr. Bates advise him "if we in Arcadia Lakes need to ask for more." Mr. Bates advised Mr. Thomas to "wait until they try to address this and then bring up the interpretation that this water must be segregated from all of the other runoff." Mr. Thomas responded: "Thanks again for your continued expertise in this matter." This email exchange demonstrates that the Town was raising technical issues to the Department staff, and the Department staff was adequately addressing those issues. Additionally, it shows that the Town's real objective in raising these issues was not to ensure that the SWPPP was technically sufficient to control the stormwater runoff on the property, but to identify potential obstacles to the development of the property. As evidenced by Mr. Thomas's email of December 17, 2008, the Town intended to appeal that decision even if there were no grounds for such appeal. At the hearing on the merits, the Town failed to offer any evidence of a technical deficiency in the SWPPP. The evidence of the Town's efforts to delay or stop the Proposed Project further supports this Court's finding that the Town acted "without substantial justification" in bringing this contested case.

C. Special Circumstances

The Town fails to identify any special circumstances that would make an award under Section 15-77-300 unjust. However, the reliance on advice of counsel has been advanced as a special circumstance in a Section 15-77-300 ruling. In the recent decision in *McNaughton v. Charleston Charter School for Math and Science*, Inc., 411 S.C. 249, 768 S.E.2d 389 (2015), the Supreme Court addressed the defendant school's reliance on the advice of legal counsel in the context of an award of attorney fees under Section 15-77-300. The Supreme Court affirmed the trial court's verdict in favor of McNaughton on her breach of contract claim against the school and award of attorney fees under Section 15-77-300. On appeal, the school argued that the award of attorney fees was unjust because the principal had received the advice of counsel in making a decision prior to terminating McNaughton. The Supreme Court upheld the circuit court's ruling which rejected this argument:

> Appellant also argues that special circumstances exist rendering the award of attorney's fees unjust. *See* S.C. Code Ann. § 15-77-300(B)(2). In particular,

> Appellant relies on the fact that the principal solicited legal advice before terminating McNaughton's employment to ensure that the existence of the contingency clause in her employment agreement did not have legal significance. Appellant also cites the contingency clause itself, its students' math scores, and the letter of recommendation provided to McNaughton as special circumstances making attorney's fees unjust. Appellant contends that because its decision to terminate McNaughton's employment was made in good faith and in pursuit of its students' best interests, the trial court should not have awarded attorney's fees.
>
> The trial court rejected these arguments, and found that no special circumstances existed to make an award of attorney's fees unjust in this case. We find the trial court did not abuse its discretion in making this finding, but instead, carefully considered and applied each of the applicable factors in the statute. See Layman, 376 S.C. at 444, 658 S.E.2d at 325. Accordingly, we affirm the trial court's decision to award McNaughton's attorney's fees under section 15–77–300.

Id. at 267-68, 768 S.E.2d at 399. The Town thus cannot rely on the advice of counsel to shield it from an award of attorneys' fees and costs under Section 15-77-300. There are no special circumstances which would make an award of attorneys' fees and costs unjust. The Court thus finds that Roper Pond is entitled to an award of attorneys' fees and costs pursuant to Section 15-77-300 of the State Action Statute.

II. SANCTIONS PURSUANT TO SCALC RULE 72

Roper Pond seeks sanctions against the Town pursuant to SCALC Rule 72, for the costs of delay of the Proposed Project during the pendency of the automatic stay before this Court. Roper Pond asserts that the Town's primary objective in appealing the Department's decision in this matter was not to challenge the technical sufficiency of the SWPPP, but to stop or delay the construction of an apartment complex on the Roper Pond property. As discussed above, Roper Pond cites to the numerous communications between the Town's mayor and the engineers who assisted the Town during DHEC's review of Roper Pond's SWPPP. In a December 17, 2008 email regarding the appeal of the Department's decision on the State Construction General Permit coverage for Roper Pond, Mr. Thomas wrote: "Let me know where you think we can go to delay and/or stop this project." A December 30, 2009 draft of the request for Board review raised issues regarding the Proposed Project, but did not identify any defect in the Department's grant of coverage under the Construction General Permit.

The Town acknowledges that "the Town wanted to slow the process," but disputes that its actions were "solely for the purpose of delay." The evidence on the record demonstrates that the Town opposed the development of the property as an apartment complex. The Town argues that

the request for contested case hearing was not filed solely for the purpose of delay because the Town had other concerns about the proposed development. The Town claims that the contested case was not brought "solely for the purpose of delay" because there were numerous concerns about zoning, compliance with the county land development ordinance, maintaining the character of the Town, diminution in property values in the Town, and faulty traffic impact studies. However, none of these alleged concerns relate to the DHEC decision at issue in this contested case. Moreover, these concerns should be addressed through local zoning and land use authorities. However, the Roper Pond Property is outside of the corporate limits of the Town. Richland County—not the Town—has jurisdiction over zoning and land use issues affecting the Property. The Court thus finds that the Town availed itself of the appeal process authorized under S.C. CODE ANN. § 44-1-60 and the Administrative Procedures Act, S.C. CODE ANN. §§ 1-23-10 *et seq.* ("APA") in order to redress claims which are properly addressed by and through Richland County zoning and land use authorities.

Additionally, Roper Pond has presented evidence of numerous communications in which the Town's mayor and those acted on the Town's behalf admit that Petitioners were challenging the DHEC decision to issue coverage under the General Permit as a means to stop or delay the proposed development. The fundamental regulatory issue in the DHEC decision at issue in this case was the technical sufficiency of the SWPP submitted to DHEC in support of Roper Pond's request for coverage under the General Permit. However, as this Court and the Court of Appeals held, Petitioners failed to present any evidence regarding any alleged deficiencies in the SWPPP, and neither Petitioner's expert nor any of the Petitioners even reviewed the SWPPP. *Town of Arcadia Lakes* 404 S.C. at 527-33, 745 S.E.2d at 391-94 (Ct. App. 2013). Moreover, with respect to the Town's concerns regarding the SWPPP for the Proposed Project, the Town was afforded numerous opportunities to raise those concerns prior to the Department's decision to grant Roper Pond coverage under the Construction General Permit. Prior to a November 14, 2008 meeting with the Department staff at Senator Lourie's office, the Town and its technical advisors had reviewed the SWPPP and provided comments to the Department staff, which the staff unquestionably addressed. In an October 2, 2008 email, Mr. Thomas advised Mr. Bates as follows:

> Thank you again . . . wish us luck Monday . . . Joel has received a copy of a letter DEHEC sent to the developer telling him that they had pulled the developer's application and want him to provide all documentation for additional review. Is

> the first flush requirements a possible application killer that would require them to reapply. If we could get to that point, we may have [a] chance to get them under the new rules if they approved before they have a chance to reapply. . . RT

It is apparent that the Town provided comments to the Department shortly after the Department staff took over the review of the SWPPP. In an October 29, 2008 email, Mr. Thomas forwarded the Department's review letter for the SWPPP to Brian Bates and requested that Mr. Bates advise him "if we in Arcadia Lakes need to ask for more." Mr. Bates advised Mr. Thomas as follows:

> Told you that "waters of the state for water quality" thing had teeth. They now have to show how they are going to collect, and hold for 24 hours, the first inch of runoff from the entire site, which will be approximately 36,000 cubic feet or 271,000 gallons. For visualization purposes, that would be a pond (like the one that was built for those 4 or 5 lots down Trenholm Road) that would be 3-ft. deep and 110-ft. X 110-ft. square or about the volume of the Rockbridge Club swimming pool. To account for that outside of the wetlands boundary, they are going to have to significantly revise the site plans.
>
> **I suggest we wait until they try to address this and then bring up the interpretation that this water must be segregated from all of the other runoff.** To do that on dense site is an impractical endeavor at best and not usually required due to its complexity. However, a strict interpretation of the regulations indicates that it is required. (emphasis added).

Mr. Thomas responded: "Thanks again for your continued expertise in this matter." This email exchanges demonstrates that the Town was raising technical issues to the Department staff, and the Department staff was adequately addressing those issues. Additionally, it demonstrates that the Town's real objective in raising these issues was not to ensure that the SWPPP was technically sufficient to control the stormwater runoff on the property, but to identify potential obstacles to the development of the property. Otherwise, there would be no suggestion that "we wait until they try to address this and then bring up the interpretation that this water must be segregated from all of the other runoff." Petitioners offered no evidence at the hearing that the concerns raised by the Town and other Petitioners were not fully considered by the Department staff and addressed by Roper Pond's consultant prior to the Department's final decision.

The Town argues that in denying Roper Pond's motion for costs under Rule 222, SCACR, "the Supreme Court implicitly concluded that dismissal on mootness grounds is not a favorable disposition and, after a thorough review of the record, found nothing untoward or evidencing that the case was brought solely for delay such that costs would be warranted." The Town reads too much into the single sentence denying the motion for costs under Rule 222, SCACR. This is

particularly true as it relates to Roper Town's petition for sanctions under SCALC Rule 72. The Supreme Court's Order denying the motion reads as follows: "The Motion for Costs filed on behalf of respondent, Roper Pond, LLC, in the above entitled matter is denied." A review of the record would not provide the Supreme Court with the evidence supporting Roper Pond's claim that the Town brought the contested case solely for the purpose of delay. The record on appeal before the Supreme Court did not include the Mayor's communications prior to bringing the contested case. Additionally, since Roper Pond's April 19, 2010 Petition for Fees, Costs, and Sanctions was held in abeyance during the pendency of the appeal, the parties did not argue this issue in its briefs or oral arguments before the Supreme Court. However, even if such communications were before the Supreme Court, there is no basis for reading the one-sentence order denying Roper Pond's motion for costs as a ruling on the Town's objectives in bringing this action.

The Town argues that sanctions are not warranted because the "appeals process also did nothing to delay the project, as the project went forward to completion regardless." This argument disregards the financial impacts of the substantial delay in the construction of the Proposed Project. The DHEC decision which was challenged in this contested case was issued to Roper Pond by letter dated December 15, 2008. This Court issued its Final Order and Decision on January 21, 2010. Petitioners thereafter filed a Motion to Reconsider and for Stay on February 16, 2010. The Court denied that Motion on April 1, 2010. As such, the DHEC decision was stayed for not less than thirteen months. Additionally, this delay required Roper Pond to re-apply for certain County permits which had expired during the pendency of the contested case and thus resulted in further delay. Accordingly, the Town cannot claim that there was there was no consequence to the delay in the construction of the Proposed Project during the pendency of this contested case.

Roper Pond has presented evidence to demonstrate that the Town availed itself of the contested case procedures established under S.C. CODE ANN. § 44-1-60 and the APA, S.C. CODE ANN. §§ 1-23-10 *et seq.*, for the purpose of stopping or delaying the Proposed Project. SCALC Rule 72, authorizes this Court to impose such sanctions "as the circumstances of the case and discouragement of like conduct in the future may require." SCALC Rule 72. 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. Not only has such action unnecessarily expended valuable judicial resources, it has caused significant economic harm to Roper Pond. The Court therefore finds that sanctions for delay of the Proposed Project are proper.[1]

ORDER

IT IS HEREBY ORDERED that Roper Pond is entitled to an award of attorneys' fees and costs under S.C. CODE ANN. § 15-77-300.

IT IS FURTHER ORDERED that sanctions against Petitioner Town of Arcadia Lakes are proper.

AND IT IS SO ORDERED.

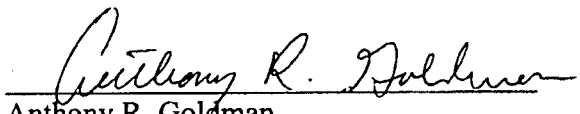
Columbia, S.C.
March 15, 2017

John D. McLeod, Judge
S.C. Administrative Law Court

[1] The Administrative Law Court is not the proper venue in which to seek and recover damages. The type and amount of sanctions is discretionary with the Court.

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).



March 15, 2017
Columbia, S.C.

Anthony R. Goldman
Judicial Law Clerk