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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT
John D. McLeod, Administrative Law Judge

Appellate Case No. 2017-001554

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 Hutton 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,

Of Which Town of Arcadia Lakes is the Appellant/Respondent,

vs.

South Carolina Department of Health and Environmental Control, Respondent, and Roper Pond, LLC, Respondent/Appellant.

PETITION FOR WRIT OF SUPERSEDEAS

TO: THE COURT OF APPEALS AND THE RESPONDENTS

PLEASE TAKE NOTICE that the Town of Arcadia Lakes ("the Town"), by and through its undersigned attorneys, hereby moves the Court, pursuant to S.C. Appellate Court Rule 241(c), for an order imposing a supersedeas of matters decided in the Order for Attorneys' Fees and Costs and for Sanctions Pursuant to SCALC Rule 72 (the "Order"), which is on appeal from the administrative tribunal. The Town seeks to stay its obligation to pay $405,283.84 in sanctions, fees, and costs to Respondent Roper Pond LLC ("Roper Pond"), pending resolution of the appeal of that award. Such supersedeas is necessary in order to prevent: substantial and irreparable prejudice to the Town; diminishment of the Court's ability to award meaningful relief; and

distortion of the procedural rules applicable to appeals of this type of judgment.

Introduction

The Administrative Law Court has imposed $200,000 in sanctions and $205,283.84 in fees against the Town, based on the purported lack of justification and improper motives of the Town in bringing this case, despite the fact that: the Town was but one of seventeen petitioners making the same claims and arguments in this case; the Town, preceding trial, secured two independent legal assessments confirming the merits of its claims and arguments; the ALC requested proposed orders from both parties at the end of trial and required a twenty-nine page order to explain its rejection of the Town's claims; the Supreme Court subsequently granted discretionary certiorari to the Town and denied costs to Roper Pond; and Roper Pond submitted only an non-annotated list of hours, without any description of how the time was purportedly spent, in support of its fee petition. (Order of June 14, 2017, attached as Exhibit A). Not only that, but the Administrative Law Court has subsequently denied the Town a stay of its payment obligation pending appeal and has denied the Town the right to deposit the award funds with the ALC pending appeal, as is broadly authorized under Rule 67 of the South Carolina Rules of Civil Procedure. (Order of August 22, 2017, attached as Exhibit B). In sum, the ALC has commanded the Town to immediately turn over this substantial award directly to Roper Pond, a private development company, for use at its complete discretion, despite the fact that both the Town and Roper Pond are appealing the Order through which the award was imposed.

The imposition of fees under the State Action Statute, S.C. Code § 15-77-300 et seq., and even more so the imposition of sanctions, are truly extraordinary remedies, especially in the public interest environmental litigation context, as case law research reveals. Further, as will be

explained fully in the Town's initial brief, imposition of these extraordinary remedies under the circumstances of this case required the ALC to pass judgment on legally untested or uncertain inquires, including those related to the involvement of the non-sanctioned petitioners, the administrative nature of the underlying proceedings, the applicable method of award calculation, the information required for carrying out that calculation, and the question of "fees on fees." For the reasons that follow, the Town should not be forced to suffer the fiscal calamity that would come with paying $405,283.84 to Roper Pond, until such time as this Court has an opportunity to consider whether the ALC reached the appropriate result in imposing these extraordinary remedies in legally untested circumstances.

I. Immediate Payment of Money Award is a Threat to Court's Jurisdiction.

Without the Court's intervention, the monetary award at issue in this appeal will be within the control of Roper Pond for the entirety of the appeal. As explained herein, that unusual outcome threatens the Court's ability to render an effective remedy in this case.[1]

A. Exception to Rule 241 Automatic Stay is Ill-Suited for This Appeal.

South Carolina Appellate Court Rule 241 governs the effectiveness of a lower court order on appeal. As a general rule, matters under appeal to this Court are automatically stayed, so as to preserve the effectuality of this Court's jurisdiction. See SCACR Rule 241(a) ("As a general rule, the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the

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[1]Such consideration is central to the Court's supersedeas analysis: "the appellate court should consider whether such an order is necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot." See SCACR Rule 241(c)(2) (emphasis added). The Supreme Court has held that "the general rule is that the effect of a supersedeas or stay is to suspend proceedings and preserve the status quo pending the determination of the appeal or proceeding in error" and to prevent a case from becoming moot. Melton v. Walker, 209 S.C. 330, 336, 40 S.E.2d 161, 164 (1946) (citing 4 C.J.S., Appeal and Error §§ 626, 662.).

order, judgment, decree or decision on appeal, and to automatically stay the relief ordered in the appealed order, judgment, or decree or decision. This automatic stay continues in effect for the duration of the appeal unless lifted by order of the lower court, the administrative tribunal, appellate court, or judge or justice of the appellate court."). However, Rule 241(b) also provides exceptions, which are matters not automatically stayed on appeal, and appeals from administrative tribunals are among that list. See SCACR Rule 241(b)(11). Thus, the automatic stay provision in the Appellate Court Rules, at least on its face, does not apply to this matter. However, the Town submits that, under the unusual circumstances of this appeal, the Court's consideration of Rule 241 cannot stop here.

While this appeal originates from the ALC, the legal remedies at issue here have nothing to do with the ALC's administrative function. Rather, this appeal involves a monetary award, which is highly unusual territory for the ALC, and is more typical of civil trial courts for which the automatic stay would apply. Under South Carolina's Administrative Procedures Act, the ALC is an "agency" authorized to hear "contested cases," which are proceedings including "ratemaking, price fixing, and licensing." S.C. Code § 1-23-505. The typical function of the ALC is to consider permitting or licensing appeals from within executive department agencies, just as the ALC did in this underlying case.[2] In short, monetary awards do not come out of the ALC, absent some extraordinary circumstance like the one involved here.[3]

[2]Prior to the fees and sanctions proceedings, this case involved a challenge to stormwater authorizations issued by the Department of Health and Environmental Control. The ALC affirmed those authorizations in a decision that all of the Petitioners then challenged through the appellate courts.

[3]Indeed, appeals from the Workers' Compensation Commission, which are a class of administrative cases that do involve monetary awards, are specifically excluded form the Administrative Law Court's jurisdiction. S.C. Code § 1-23-600(A)(4).

Given that this appeal involves a monetary award, the logical and legal basis for Rule 241's "administrative tribunal" exception to the automatic stay simply does not hold up. With the typical license or permit appeal coming out of the ALC, immediate action on the ALC's judgment in no way diminishes this Court's ability to render effective relief. For example, a nurse whose license is suspended by the Department of Labor, Licensing and Regulation and the ALC can simply have that license reinstated if ever this Court determines that such outcome is appropriate. In other words, for a typical contested case appeal, immediate action on the ALC judgment is the sensible alternative. Certainly it is not a stretch to deduct that this inherent nature of contested case appeals was the driving force behind the creation of Rule 241's administrative tribunal exception. However, when the ALC leaves the territory of licenses and permits and enters the realm of monetary awards, an entirely different set of considerations are implicated. Any other type of civil court in the state could award fees under the State Action Statute or could impose sanctions on the basis of a case being brought for improper motives, just as the ALC has done here, and there is no reasonable basis for treating this award differently, just because it arises from an administrative forum.

The monetary award on appeal here would be automatically stayed if it was coming from any other court. Such conclusion flows directly and inevitably from this Court's analysis in Woodside v. Woodside, in which the Court "agree[d] with the trial court that the provision for attorney fees was stayed by the appeal." 290 S.C. 366, 378, 350 S.E.2d 407, 414 (Ct. App. 1986). Considering attorney fees that were awarded to the prevailing party in family court, the Court of Appeals concluded that fee awards do not fall under any of the automatic stay exceptions in Rule

241[4]:

> Supreme Court Rule 41, Section 1(A) provides that subject to the exceptions listed in Section 1(B), every appeal taken to the Supreme Court shall automatically operate as a stay of proceedings in the court below. Nothing in Section 1(B) expressly precludes attorney fees from the operation of the general rule stated in Section 1(A). Arguably, however, attorney fees are money judgments and are excepted under provisions of Section 1(B)(1). Historically, in this state **an order for attorney fees has not been treated as a judgment that can be executed upon until it has at least been settled on appeal.** Until then, it is more in the nature of a disbursement.

Id. (emphasis added). An identical analysis is applicable here: fee awards are not expressly covered in any of automatic stay exceptions listed in Rule 241(b), and our appellate courts have very clearly held that fee awards are not "judgments," so as to be captured by Rule 241(b)(1).[5]

The Woodside case stands as a strong precedent in favor of staying the monetary award on appeal in this case. Indeed, it would be entirely appropriate for this Court to read the Woodside case as taking such award outside the bounds of the administrative tribunal exception altogether. In other words, an alternative to the Court granting supersedeas is for the Court to simply affirm that the automatic stay applies to the monetary award. Application of Rule 241 to these particular circumstances generates inconsistent outcomes, in that appeals of fee awards are automatically stayed under Woodside, but appeals of fee awards from administrative tribunals are not. As described above, the monetary award's origination in an administrative tribunal is very much secondary to the independent legal standards under which such award was ordered,

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[4]Woodside references Supreme Court Rule 41, sections 1(A), 1(B) and 1(B)(1), which are the same as current Rule 241(a), (b) and (b)(1).

[5]The same logic applies to the sanctions portion of the monetary award. Sanctions are not covered in any of the Rule 241 exceptions, and the same logic from Woodside applies as to why sanctions cannot be considered judgments.

and the Court therefore should read the Woodside logic as controlling.[6] Fee and sanction awards, like the one at issue here, cannot be executed upon until it has been settled on appeal.

Whether upon explicit finding that the automatic stay applies here, or upon recognition that the administrative tribunal exception is misplaced here and should be lifted, a stay of the monetary award is necessary and appropriate in order to ensure that such funds are available if this Court eventually grants reversal or reduction.

B. ALC's Ruling on SCRCP Rule 67 Highlights Risk to Town and Jurisdiction.

Remarkably, before the Town even sought leave from the ALC to deposit the award with the court pursuant to Rule 67 of the South Carolina Rules of Civil Procedure, for safe keeping during this appeal, the ALC preemptively denied the Town use of that process. (See Exhibit B, pp. 9-10). Consequently, this widely used mechanism through which a judgment debtor can satisfy an award, while ensuring the award funds remain available pending the outcome of appeal, is not available to the Town. Without relief from this Court, the monetary award will go directly from the Town to Roper Pond, with no assurances that the funds will remain available should the Court grant reversal or reduction.

Rule 67 provides an appellant with a process for safely paying the monetary award that has been assessed against it at the trial level, without undue risk that the funds will disappear

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[6]Further for such conclusion can be derived from the particular language of the administrative tribunal exception, which specifically excepts: "Appeals from administrative tribunals **as provided in S.C. Code Ann. § 1-23-380(A)(2) and § 1-23-600 (G)(5)**." (Emphasis added). Less than an exception for any and all appeals arising from the ALC, this exception only applies to appeals arising from ALC decisions in the framework of subsections 380(A)(2) and 600(G)(5). Reviewing those subsections, it is clear that they both describe the ALC's administration of its primary jurisdiction, in considering contested case challenges to permitting and licensing decisions and the like, which of course the monetary award on appeal here is not a part. Both Woodside and the plain language of the administrative tribunal exception advise that an exception to the automatic stay should not even apply here.

during the appeal of that award:

> In an action in which any part of the relief sought is a judgment for a sum of money or the disposition of a sum of money or the disposition of any other thing capable of delivery, a party, **upon notice to every other party, and by leave of court, may deposit with the court all or any part of such sum or thing**, whether or not that party claims all or any part of the sum or thing. Money paid into the court under this rule shall be deposited as directed by the court in any bank or institution authorized to receive public funds, and shall be withdrawn only upon the check of the clerk of court in favor of the party to whom the order of the court directs.

SCRCP Rule 67. Note that Rule 67 broadly authorizes use of this process, in that the party owed money is not even entitled to object or oppose deposit of the funds. A party seeking to use Rule 67 must only give "notice to every other party" and secure "leave of court." Because of this broad authorization, Rule 67 has been used liberally to protect monetary awards on appeal. Indeed, our Supreme Court has endorsed Rule 67 as reflecting sound policy: "[s]uch a rule encourages the debtor to pay the judgment and assures the judgment creditor the funds will be available at the conclusion of the appeal." Russo v. Sutton, 317 S.C. 441, 444, 454 S.E.2d 895, 896 (1995). While the Rule requires "leave of court" to deposit funds, precedent suggests that this language is primarily a requirement for coordination between the depositing party and the court, meant to facilitate accurate and efficient transfer of funds, rather than an invitation for the court to arbitrarily close off Rule 67. Indeed, it appears that the only time a South Carolina court has denied an award debtor access to Rule 67 is when a conflicting statutory obligation applied (as in eminent domain actions, see Renaissance Enterprises, Inc. v. Ocean Resorts, Inc., 334 S.C. 324, 513 S.E.2d 617 (1999)).

Yet, here, the ALC went out of its way to deny the Town access to Rule 67, as part of its

order denying the Town a stay of its payment obligation. (Exhibit B, pp. 9-10).[7] The Rule 67 process was mentioned by the Town's attorney during the hearing on the Town's motion to stay, only to illustrate by comparison that the stay was a mutually beneficial alternative for the parties involved. At no time did the Town request leave under Rule 67, and Roper Pond's attorney did not voice any opposition to Rule 67 during the hearing. The Town submits that, as a consequence of the ALC being unaccustomed to administering monetary awards, the ALC substantially misapprehended the role of Rule 67 and its availability.

As a consequence of the ALC's ruling on Rule 67, neither the ALC, this Court, nor the Town have any mechanism to ensure that the award funds will remain available at the end of this appeal and will be returned to the Town should the Court reverse or reduce the award. Rule 67 is set up to address the inherent friction in a party paying a monetary award while simultaneously contesting the validity of that award on appeal. Without the protection of Rule 67, this Court's consideration of supersedeas takes on a heightened importance. If the Town is to be assured availability of the remedy it seeks in this appeal, which is reversal and return/retention of the fees and sanctions award, the only remaining mechanism for providing such assurance is supersedeas. Failure to impose supersedeas jeopardizes this Court's ability to

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[7]While detailed treatment of the ALC's rationale for rejecting Rule 67 is beyond the scope of this petition, it is worth briefly outlining the ALC's reasoning, which entirely lacks a legal basis. The ALC gave three reasons why the Town could not deposit funds with the Court under Rule 67: "because the Respondent did not have an adequate opportunity to respond"; because the Respondent (Roper Pond) stopped short of consenting; and because the Town did not make "a timely motion for relief under Rule 67, SCRCP." (Exhibit B, p. 9). Obviously Roper Pond's ability to respond to Rule 67 and its consent to use of Rule 67 are entirely irrelevant, given that Roper Pond is only entitled to *notice* of deposit. Further, the idea of a "motion" under Rule 67 is a misnomer, as is the question of timeliness. Precedent and common sense dictate that so long as a court grants leave for deposit prior to that deposit actually being made with the court, timeliness is not an issue.

effectuate its jurisdiction.

II. Immediate Payment of Money Award is a Substantial Hardship on the Town.

Unlike a larger municipality or governmental entity that might sustain the loss of $405,283.84 from a much larger budget, the payment of this sum by the Town of Arcadia Lakes will be significantly disruptive and detrimental to the Town's operation. Indeed the monetary award significantly exceeds the Town's entire annual budget. (Mayor Hugely Affidavit attached as Exhibit C, p. 2). The Town simply should not be forced to endure such hardship until this Court has an opportunity to consider whether the ALC reached the appropriate result in imposing these extraordinary remedies in legally untested circumstances.

Our courts have considered hardship implications and have weighed them heavily in considering whether to stay imposition of relief that is on appeal. See Riverwoods, LLC v. Cty. of Charleston, 349 S.C. 378, 383, 563 S.E.2d 651, 654 (2002) (citing the hardship on the County and potential for reversal on appeal, the Supreme Court affirmed the trial court's writ of supersedeas staying enforcement of its ordered relief); Lake City Coll. Preparatory Acad. v. S.C. Pub. Charter Sch. Dist., No. 2014-002372, 2016 WL 3944731, at *3 (S.C. Ct. App. July 19, 2016) (a party may move before the ALC for imposition of a stay on the grounds that an unusual hardship will result from the execution of the decision.).

The Town's mayor, Mark Hugely, has testified as to the hardship that would flow from its immediate payment of the $405,283.84 award, explaining flatly that the Town's payment of a "large award would be hugely destabilizing." (Affidavit attached as Exhibit C, p. 2). While the Town may be well known in the Columbia area, it has only 900 residents and very limited commercial property. (Id. at p. 1). The town pays two part-time employees and relies on its

elected officials, including Mayor Hugely, to respond to typical residential issues like blocked drains and noise complaints. (Id.) Overall, the Town operates frugally and cannot provide many of the services typical of a municipality, like a police force. (Id. at 2).

More specific to the Town's financial situation, the Town is not authorized to collect property taxes, so it lacks this important recurring source of income enjoyed by other municipalities. (Id. at 2). Because the monetary award significantly exceeds the Town's annual budget, the funds necessary to pay that award obviously will not be able to come out of normal revenue streams. Rather, as explained by Hugely, the bulk of the award would have to come out of the fund the Town has been saving for decades in order to construct a town hall. (Id. at 4). Municipal functions for the Town presently operate out of a small rental space. (Id. at 4). The monetary award is nearly half of the funds the Town has managed to save for a Town Hall over these years. (Id. at 4). Mayor Huguely explains that "loss of the reserve is a loss of funds over thirty years in the making, setting the Town back to its financial position in the 1990s and preventing any capital improvements for decades to come." (Id.) Mayor Hugely expects an increase in the costs of services the Town provides for residents and cancellation of other services, if the Town is forced to pay the full award. (Id. at 3).

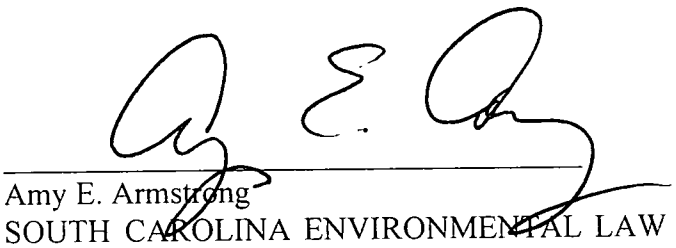
If this Court affirms the ALC's $405,283.84 fees and sanctions award, then the Town of Arcadia Lakes and its residents will have to endure the consequences described in Mayor Hugely's affidavit and adjust their vision for the future of the Town. However, there is no reason to force these consequences onto the Town before it has a chance to pursue judicial review in this Court of what is truly an extraordinary remedy. The Town faces the prospect of paying $405,000 – nearly half of its emergency reserve funds – prior to obtaining meaningful

judicial review in the Court of Appeals. The resulting hardship could not be completely remedied, even by a favorable ruling from this Court.

In contrast to the Town, Roper Pond would not be prejudiced by a delay of payment until after the appeal. After all, Roper Pond has itself appealed the ALC's Order, presumably on the basis that the ALC's monetary award is not in the correct amount. Further, as Roper Pond could have had no expectation that it would be able to recover attorneys fees, costs or sanctions, it cannot be prejudiced by the inability to immediately receive payment of same. Finally, while the Town is small, Mayor Hugely's affidavit and its attachments demonstrate that it has available funds and the ability to generate other revenue. The Town has a successful fiscal track record, since its founding in 1959, in contrast to Roper Pond, which, upon information and belief, was created solely for the purposes of developing the apartment complex at issue in the underlying case. In short, should this Court affirm the ALC's Order, the Town would still have access to these same revenue streams and could render payment at that time.

Conclusion

For the reasons stated herein, the Town requests an order imposing a supersedeas of matters decided in the Order for Attorneys' Fees and Costs and for Sanctions Pursuant to SCALC Rule 72, which is on appeal from the administrative tribunal. **Further, the Town requests that the deadline specified by the ALC for rendering payment of the award be held in abeyance while the Court considers the matters raised in this Petition.** If the Town is forced to pay Roper Pond while this Petition is pending, such Petition could be rendered moot.



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September 12, 2017

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT
John D. McLeod, Administrative Law Judge

Appellate Case No. 2017-001554

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 Hutton 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,

Of Which Town of Arcadia Lakes is the Appellant/Respondent,

vs.

South Carolina Department of Health and Environmental Control, Respondent, and Roper Pond, LLC, Respondent/Appellant.

CERTIFICATE OF SERVICE

I hereby certify that on this date I served Respondents Roper Pond, LLC and SCDHEC with Appellant's Petition for Writ of Supersedeas by placing copies of same in the U.S. Mail addressed to:

Stephen Hightower, Esquire
DHEC Office of Counsel
2600 Bull Street
Columbia, SC 29201

Joan Hartley, Esq. & Tommy Lavendar, Esq.
Nexsen Pruet, LLC
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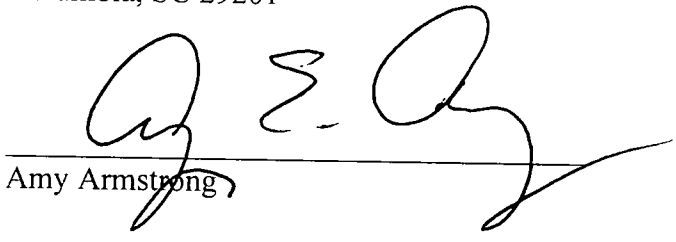


Amy Armstrong

Georgetown, South Carolina

September 12, 2017

Exhibit A

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

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

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

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

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

I. ATTORNEYS' FEES AND COSTS

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

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

(2) the time devoted;

(3) the professional standing of counsel;

(4) the beneficial results obtained; and

(5) the customary legal fees for similar services.

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

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

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

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

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

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

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

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

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

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

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

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

B. The time devoted.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. The professional standing of counsel.

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

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

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

D. The beneficial results obtained.

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

E. The customary legal fees for similar services.

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

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

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

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

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

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

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

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

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

II. THE DETERMINATION OF AMOUNT OF SANCTIONS.

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

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

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

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

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

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

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

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

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

ORDER

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

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

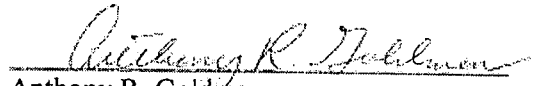
AND IT IS SO ORDERED.

John D. McLeod
Administrative Law Judge

June 14, 2017
Columbia, South Carolina

CERTIFICATE OF SERVICE

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



June 14, 2017
Columbia, S.C.

Anthony R. Goldman
Judicial Law Clerk

Exhibit B

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 L. Marcus, and Steven Brown, Petitioners, vs. South Carolina Department of Health and Environmental Control and Roper Pond, LLC Respondents.	Docket No. 09-ALJ-07-0069-CC **ORDER DENYING MOTION TO STAY**

This matter comes before the Administrative Law Court (ALC or Court) pursuant to a Motion to Stay Order for Attorney's Fees and Costs and for Sanctions (Motion) filed by the Town of Arcadia Lakes (Petitioner or Town) on July 14, 2017. The Petitioner has appealed orders issued by this Court dated January 25, 2016, March 17, 2017, and June 14, 2017, to the South Carolina Court of Appeals. The Court's June 14, 2017, order required the Petitioner to pay $205,283.84 in attorneys' fees and costs to the Respondent, Roper Pond, LLC (Respondent or Roper) pursuant to S.C. Code Ann. § 15-77-300 and the sum of $200,000 in sanctions under SCALC Rule 72 to the Clerk of Court of the Administrative Law Court (Clerk), for a total payment of $405,283.84, on or before August 15, 2017. Petitioner's Motion seeks to stay the obligation for the payment of money until its appeal has been decided. On August 1, 2017, the Respondent filed its response to the Motion objecting to the relief sought by the Petitioner.[1]

The Court convened a hearing on August 8, 2017, to hear arguments on the Motion. The Petitioner was represented by Michael Corley, Esquire, and Respondent was represented by Joan

[1] Roper Pond has filed a cross appeal challenging the March 15, 2017, March 24, 2017, and June 14, 2017, orders issued by the Court. Roper Pond does not, however, join in Petitioner's Motion.

Hartley, Esquire. Given that the issues raised in the Petitioner's Motion did not affect it, the Department of Health and Environmental Control waived its appearance. On August 14, 2017, this Court issued an order holding the August 15, 2017, payment deadline "in abeyance until further notice." This order constitutes such notice.

A. Automatic Stay Under Rule 241, SCACR

The Petitioner argues that Rule 241, SCACR, automatically stayed its obligation to pay attorneys' fees and costs as of the time it filed its notice of appeal.[2] While the Petitioner recognizes Rule 241's exceptions to the automatic stay, it contends they do not apply in the instant situation. As a general rule, Rule 241(a) provides, "[t]he service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order, judgment, decree or decision on appeal, and to automatically stay the relief ordered in the appealed order, judgment, or decree or decision." Rule 241(b), however, carves out numerous exceptions to Rule 241(a)'s automatic stay based on statutes, court rules and case law. The pertinent exceptions here fall under Rule 241(b)(1) and (b)(11).

1. Rule 241(b)(11), SCACR, exception.

The exception listed in Rule 241(b)(11), SCACR, precludes the automatic stay under Rule 241(a), SCACR. Subsection (b)(11) excludes from Rule 241(a)'s automatic stay "[a]ppeals from administrative tribunals as provided in S.C. Code Ann. § 1-23-380(A)(2) and § 1-23-600 (G)(5)." The current version of S.C. Code Ann.§ 1-23-600(G)(5) - § 1-23-600(H)(5) - provides that a "final decision issued by the Administrative Law Court in a contested case may not be stayed except by order of the Administrative Law Court or the court of appeals."[3] Because the Court's June 14, 2017, order constitutes a "final order in a contested case", its effect is not automatically stayed under Rule 241(a) by the filing of Petitioner's notice of appeal.

Nevertheless, the Petitioner seems to argue that Rule 241(b)(11) does not apply because the ALC order here is not a "typical" ALC order. While ALC orders requiring the payment of

[2] Although the Petitioner seeks to stay the payment of the $200,000 in sanctions to the Clerk, it acknowledges that this award is not automatically stayed under Rule 241(a), SCACR, because it falls into one of the exceptions under Rule 241(b), SCACR.

[3] Section 1-23-600(H)(5) is applicable to contested case hearings involving "decisions by departments governed by a board or commission authorized to exercise the sovereignty of the State." S.C. Code Ann. § 1-23-600(H)(1). The Department of Health and Environmental Control is governed by such a board. S.C. Code Ann. § 44-1-20.

attorneys' fees and costs and SCALC Rule 72, sanctions may be rare, it cannot be argued that this Court is without the authority to decide these matters. Moreover, the language of § 1-23-600(H)(5) does not contain any qualification based on the uniqueness, novelty or typicality of the issue before the ALC. Instead, the statutory language is plain and straightforward – an ALC final decision in a contested case may only be stayed by the issuing administrative law court or the court of appeals. Id.[4]

2. Rule 241(b)(1), SCACR, exception

Rule 241(b)(1) creates an exception to the automatic stay for "[m]oney judgments as provided in S.C. Code Ann. § 18-9-130." The Petitioner argues that this exception does not apply because the Court's costs and attorneys' fee award is not a money judgment under Woodside v. Woodside, 290 S.C. 366, 350 S.E.2d 407 (Ct. App. 1986). In Woodside, the Court of Appeals ruled that an award of attorneys' fees in a family law case was stayed by the filing of an appeal:

> [S]upreme Court Rule 41, Section 1(A) provides that subject to the exceptions listed in Section 1(B), every appeal taken to the Supreme Court shall automatically operate as a stay of proceedings in the court below. Nothing in Section 1(B) expressly precludes attorney fees from the operation of the general rule stated in Section 1(A). Arguably, however, attorney fees are money judgments and are excepted under provisions of Section 1(B)(1). Historically, in this state an order for attorney fees has not been treated as a judgment that can be executed upon until it has at least been settled on appeal. Until then, it is more in the nature of a disbursement.
>
> Attorney fees in divorce actions ordinarily mean the money necessary to enable a spouse to carry on or defend the matrimonial action, and are awarded to insure the spouse an efficient preparation of the case and a fair and impartial trial. *Keena v. Keena,* 245 So.2d 665 (Fla.App.1971). Under our divorce statute, attorney fees are termed "suit money". Section 20-3-120. Moreover, Section 20-3-125 provides that enforcement shall be by petition to the family court to enforce payment of such fees, which enforcement is ordinarily by contempt. We hold that attorney fees awarded in domestic actions are subject to the automatic supersedeas provision of Supreme Court Rule 41, Section 1(A).

[4] See also, S.C. Code Ann. § 1-23-610(A)(2) which provides in pertinent part: "[e]xcept as otherwise provided in this chapter, the serving and filing of the notice of appeal does not itself stay enforcement of the administrative law judge's decision...Upon motion, the administrative law judge may grant, or the court of appeals may order, a stay upon appropriate terms."

290 S.C. at 378-79, 350 S.E.2d at 414-15 (emphasis added). When asked whether Woodside's holding should be limited to domestic relations cases, the Petitioner points to the court's observation that "[h]istorically, in this state an order for attorney fees has not been treated as a judgment that can be executed upon until it has at least been settled on appeal", to assert that the payment of attorneys' fees traditionally have been stayed upon filing an appeal in South Carolina. Id.

Respondent counters by citing Parker v. Shecut, 359 S.C. 143, 597 S.E.2d 793 (2004), for the proposition that an award of attorney's fees is to be "treated like any other money judgment of the trial court." Specifically, the Court in Parker allowed post-judgement interest to accrue on a judgement awarding attorneys' fees:

> S.C. Code Ann. § 34-31-20(B) (1976 as amended) provides that "[a]ll money decrees and judgments of court enrolled or entered shall draw interest according to law." A party need not plead for such interest; it is due as a matter of course. Calhoun v. Calhoun, 339 S.C. 96, 102, 529 S.E.2d 14, 17 (2000). An award of attorney's fees may be considered part of a monetary judgment and draw interest accordingly. Christy v. Christy, 317 S.C. 145, 152, 452 S.E.2d 1, 5 (Ct.App.1994).

359 S.C. at 153, 597 S.E.2d at 799 (emphasis added).

The Court believes that the rationale in Parker should control here. Although Woodside might otherwise seem to be more directly on point, the Court of Appeals limited its reach to family law cases. See Woodside, 290 S.C. at 379, 597 S.E.2d at 415 (holding that attorney fees awarded in domestic actions are subject to the automatic supersedeas provision of Supreme Court Rule 41, Section 1(A).) Further, other than its citation to Woodside itself, the Petitioner offers no authority for Woodside's proposition that "[h]istorically, in this state an order for attorney fees has not been treated as a judgment that can be executed upon until it has at least been settled on appeal." Parker is a more recent decision where the Supreme Court undercuts Woodside with its pronouncement that "attorney's fees may be considered part of a money judgment and draw interest accordingly." 359 S.C. at 153, 597 S.E.2d at 799. Accordingly, the Court finds that the award of attorneys' fees and costs in its June 14, 2017, order is a "money judgment" within the meaning of Rule 241(b)(1), SCACR, such that no automatic stay arose at the filing of Petitioner's notice of appeal.[5]

[5] The applicability of Parker is not without some difficulty, however. In Parker, the issue was limited solely to whether the award of attorneys' fees – the payment of which was effectively stayed until the parties' house could be sold to generate funds – was subject to the accrual of post-judgment interest. The Court in

B. Supersedeas Under Rule 241(c), SCACR

Having thus determined that the automatic stay under Rule 241(a) does not apply, the Court must evaluate the Petitioner's request for a stay of its obligations to pay costs and attorneys' fees to Roper and sanctions to the Court pending the outcome of its appeal. Neither S.C. Code Ann. § 1-23-600(H)(5) nor § 18-19-130 – the statute addressing the effect of notice of appeals on "money judgements" – give any standards for the Court to use in evaluating whether to grant a stay.[6] Nevertheless, the Court believes that Rule 241(c), SCACR, provides the appropriate guidance when considering whether to stay a final ALC decision.[7] Rule 241(c), Supersedeas or Lifting of Automatic Stay, provides in pertinent part:

> 1) After service of notice of appeal, any party may move for an order lifting the automatic stay in cases which involve the general rule. In a case subject to an exception, any party may move for an order imposing a supersedeas of matters decided in the order, judgment, decree or decision on appeal after service of the notice of appeal. The effect of the granting of a supersedeas is to suspend or stay the matters decided in the order, judgment, decree or decision on appeal and, where a prior order or decision was in effect at the time the appealed order, judgment, decree or decision was filed, to revive the terms of the prior order or decision.
>
> (2) In determining whether an order should issue pursuant to this Rule, the lower court, administrative tribunal, appellate court, or judge or justice of the appellate court should consider whether such an order is necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot.

Parker did not specifically address whether the payment of fees was stayed by the filing of an appeal. In Christy v. Christy, 317 S.C. 145, 152, 452 S.E.2d 1, 5 (Ct. App.1994), the case cited by the Supreme Court for the proposition that attorney's fee awards are subject to interest, there is no indication that the attorney's fees at issue were paid during the appeal. Christy, like Woodside, was a family court case. Nevertheless, whether Rule 241(b)(1), SCACR applies or not, the exception in Rule 241(b)(11), SCACR, is applicable.

[6] In pertinent part, § 18-19-130, reads:" (A)(1) A notice of appeal from a judgment directing the payment of money does not stay the execution of the judgment unless the presiding judge before whom the judgment was obtained grants a stay of execution." Similarly, §1-23-600(H)(6) provides that "[n]othing contained in this subsection constitutes a limitation on the authority of the Administrative Law Court to impose a stay as otherwise provided by statute or rule of court."

[7] SCALC Rule 68 makes the South Carolina Rules of Civil Procedure and the South Rules of Appellate Procedure applicable "in the discretion of the presiding administrative law court judge...to resolve questions not addressed by these rules."

(emphasis added).

Petitioner's Motion must therefore be evaluated as a motion for supersedeas. Rule 241(c)(2), SCACR, sets forth two bases for consideration of Petitioner's request: 1) whether supersedeas is necessary to preserve jurisdiction of the appeal or 2) whether supersedeas is necessary to prevent a contested issue from becoming moot. The Court finds that neither of the two conditions for granting supersedeas under Rule 241(c), SCACR, exist here. This is not a case where supersedeas is necessary to preserve appellate jurisdiction. Payment of the attorneys' fees, costs and sanctions by the Petitioner will not deprive the Court of Appeals of jurisdiction over this matter.

Similarly, the Petitioner's payment of these monies will not cause the issues under appeal to become moot. In Berry v. Ianuario, 281 S.C. 21, 314 S.E.2d 308 (1983), the Supreme Court granted a father's petition for supersedeas while he appealed a family court decision terminating his parental rights over his child and allowing for the adoption of the child by a stepparent. The family court order was not immediately stayed by the notice of appeal. Id. However, the Court granted the writ because allowing the relief in the family court order – termination of parental rights and adoption -- would render the case moot. Id. The Petitioner has not shown that the issue here will become moot if the payment of attorneys' fees and costs is made to Roper Pond or the sanctions are paid to the Clerk. In the event the Court of Appeals were to reduce or modify either of these awards, the recipient would simply be required to repay money to Petitioner.

C. Other Grounds for Relief.

Although the Court believes that the only grounds for granting supersedeas in this matter are set out in Rule 241(c), SCACR,[8] the Petitioner has set forth additional reasons that it believes justify the proposed action. Most notably, the Petitioner argues that payment of the funds will create "an immediate significant hardship to the Town" as it will deplete its reserves. (Mot., p. 1). In his supporting affidavit, the Town's Mayor suggests the Town will be forced to curtail services provided to its residents. (Ex.1 to Mot., p. 6). The Court has considered these arguments and finds them to be unavailing. The Court evaluated this same hardship/ability to pay argument in its June

[8] "In determining whether an order should be issued pursuant to Rule 241(c), SCACR, the lower court, administrative tribunal, appellate judge, justice or appellate court must consider whether such an order is necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot." Rule 241(c)(2), SCACR. Toal, et al, Appellate Practice in South Carolina, 3rd ed.) (2016) (emphasis added).

14, 2017, order. Part of the calculus in issuing the order on sanctions, which by necessity, considered the award of attorneys' fees and costs, was the Petitioner's ability to pay. In this regard, the following excerpt from the June 14, 2017, order is instructive here:

> In support of that argument, Roper Pond provided a copy of the Town's Basic Financial Statements and Supplementary Information for the year ending December 31, 2014 ("2014 Financial Statement"). (Exhibit 1, Affidavit of Joan W. Hartley dated April 3,2017). While this was the only Financial Statement available on the Town's website, Roper Pond also provided the October 6, 2016, Council Meeting Minutes which included information on Town Council's review of the 2015 financials and stated that "Mayor Hugley said there had been three exceptional good years in terms of surplus." (Exhibit 2, Affidavit of Joan W. Hartley dated April 3, 2017). The 2014 Financial Statement indicates that the Town has an unrestricted net assets in the amount of $1,059,203 and $1,093,433 in "Cash and Cash Equivalents." (2014 Financial Statement, pp.7 and 9). Additionally, the 2014 Financial Statement identifies Roper Pond's Third Amended Petition in this case as a contingent liability, concluding that "[t]he amount of costs or damages, if any, that may result from the settlement of this case, cannot presently be determined." (2014 Financial Statement, p. 20). Roper Pond argues that the amount of sanctions to be ordered should be determined based on the fact that the Town has more than $1 million in unrestricted liquid assets.
>
> The Town argues that only nominal sanctions are warranted because the Town has a small population of approximately 900 citizens and a substantial award of sanction would have a debilitating impact on the Town. The Town rents a small space for Town Hall and has one part-time employee who serves as both the Town clerk and treasure. The Town also has a part-time bookkeeper, but no other employees and no municipal department. The reserves established by the Town are to be used for emergencies and capital projects, including a planned construction of a Town Hall. The Town argues that a significant sanction would come from this reserve which would have a debilitating impact of the Town's ability to address its residents and the surrounding community's needs and to carry out planned improvements.
>
> The Town acknowledges that its citizens do not pay taxes to the Town. The Town's sources of revenue are sales tax, insurance tax, brokers tax, telecommunications tax. Local business license tax, South Carolina Local Government Fund, and utility franchise fees. Therefore, any sanctions ordered would not be paid by the citizens of the Town. Moreover, the sanctions will not affect the services

> provided by the Town to its citizen. The only traditional municipal service which the Town provides its citizens is municipal solid waste collection and disposal at no charge. In 2016, the Town's revenue totaled $320,046 and it expended $129,562 on the waste services provided to its citizens. Accordingly, any sanctions ordered against the Town will not impact services provided to its citizens.

June 14, 2017 Order, pp. 13 – 15.

The factual findings in the June 14, 2017, order belie the Petitioner's arguments regarding hardship. The Petitioner has presented nothing which suggests that these findings are without support. Petitioner also asserts that this Court ought to issue the supersedeas to maintain the status quo. (Mot., p. 3).[9] The Petitioner has not shown, however, the need for the maintenance of its version of the status quo. (The Respondent asserts that the status quo here is actually the requirement that the attorneys' fees and costs award be paid). The Petitioner has not shown that it cannot be made fully whole in the event an appellate court should reverse or otherwise modify the Court's June 14, 2017, order. While the Petitioner expresses fear that Roper Pond, a privately-owned company in existence within the state for 13 years, "could very likely sell all of its assets, go out of business, or declare bankruptcy before this appeal is heard," the Petitioner has provided no evidence which tends to make this anything more than speculation. (Mot., p. 9).

Finally, the Petitioner argues that requiring it to pay attorneys' fees, costs and sanctions prior to its appeal being decided will deprive it of the "right to meaningful review." (Mot., p. 8). By virtue of its timely notice of appeal, the Petitioner will have a full and fair opportunity to brief and argue its challenges to the Court's orders before the Court of Appeals. Petitioner has not shown that enforcing the requirement to pay the ordered attorneys' fees, costs and sanctions will adversely affect its ability to do so.

The Petitioner began its oral argument in support of the Motion by offering a set of practical alternatives to staying payment of the attorneys' fees, costs and sanctions – depositing the challenged monies with the Court until the appeal is decided or simply allowing the Town to retain and invest the funds during the pendency of the appeal subject to the accrual of interest under S.C.

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[9] See Dean v. South Carolina law Enforcement Division, 10-ALJ-20-0302-CC, 2011 WL 7119217, at *2 (Sept. 13, 2011) ("The purpose of a supersedeas is to stay proceedings in order to preserve the status quo pending the determination of the appeal and to preserve to appellant the fruits of a meritorious appeal where they might otherwise be lost to him.").

Code Ann. § 34-31-20(B).[10] The Respondent continued to object to the entry of an order for supersedeas, and, while objecting to the proffered alternatives, indicated that depositing the funds with the Court until the appeal was resolved was preferable to allowing the Town to hold the funds.

Because money judgments already accrue post-judgment interest under § 34-31-20(B), the Court believes it must grant supersedeas to allow the Town to hold the funds pending the outcome of the appeal. As discussed earlier, the grounds for supersedeas under Rule 241(c), SCACR, have not been met here.

Nevertheless, the Court believes that the deposit of funds with the Court pending appeal is an alternative to supersedeas. The Petitioner cites Russo v. Sutton, 317 S.C. 441, 454 S.E.2d 895 (1995), in support of this suggested alternative. In Russo, our Supreme Court recognized that "a judgement debtor's deposit of funds into the court pending his own appeal prevents further accrual of interest." Id., 317 S.C. at 444, 454 S.E.2d at 896. Under the facts of Russo, however, the Court ruled that the accrual of interest did not stop because of the debtor's failure to comply with the notice provisions of Rule 67, SCRCP, which require the deposit of funds with the court "upon notice to every other party and by leave of court." Id., 317 S.C. at 444-45, 454 S.E.2d at 897. In Small v. Pioneer Machinery, 330 S.C. 62, 496 S.E.2d 884 (Ct. App. 1998), the Court of Appeals outlined the procedure for deposit of funds under Rule 67, SCRCP:

> A judgment debtor's deposit of funds into the court pending his own appeal prevents further accrual of interest on the judgment. Russo v. Sutton, 317 S.C. 441, 444, 454 S.E.2d 895, 896 (1995). The deposit also benefits the judgment creditor in that it ensures the availability of funds to satisfy the judgment. Id. Respondents complied with the plain language of Rule 67 by giving notice to the other party and obtaining leave of the circuit court before depositing the funds with the clerk of court. Id. at 444, 454 S.E.2d at 897. We find no error.

Id., 330 S.C. at 65, 496 S.E.2d at 885–86. The only motion timely filed with the Court is the Petitioner's Motion to Stay Order for Attorneys' Fees and Costs and for Sanctions. The Petitioner did not move to alternatively deposit the funds into the Court within its written Motion. While the alternative of depositing funds was proffered during the August 8, 2017, hearing, the Court is reluctant to treat this as a timely motion for relief under Rule 67, SCRCP, because the Respondent did not have an adequate opportunity to respond. Although the Respondent suggested that the deposit of funds under Rule 67 would be an acceptable alternative to allowing the Town to retain

[10] The Petitioner expressed a clear preference for holding the funds and investing them.

and invest the funds, the Respondent stopped short of consenting to the proposed action. Accordingly, the Petitioner's alternative of depositing the attorneys' fees, costs and sanctions with the Court is also denied.

Based on the foregoing, the Petitioner's Motion to Stay Order for Attorneys' Fees and Costs and for Sanctions is denied. The Petitioner must comply with its obligations to pay attorneys' fees and costs to Roper Pond and sanctions to the Clerk as set forth in the June 14, 2017, order on or before August 29, 2017.

IT IS HEREBY ORDERED that the Petitioner's Motion to Stay is **DENIED.**

IT IS FURTHER ORDERED that the Petitioner Town of Arcadia Lakes must pay the attorneys' fees and costs ordered payable to Roper Pond, LLC, in the Court's June 14, 2017, order and must pay the sanctions to the Clerk of the Administrative Law Court on or before August 29, 2017, as set out in that order.

AND IT IS SO ORDERED.

August 22, 2017
Columbia, S.C.

Milton G. Kimpson, Judge
South Carolina Administrative Law 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).

Anthony R. Goldman

August 22, 2017
Columbia, S.C.

Anthony R. Goldman
Judicial Law Clerk

Exhibit C

STATE OF SOUTH CAROLINA

ADMINISTRATIVE LAW COURT

Town of Arcadia Lake, 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-ALJ-07-0069-CC **AFFIDAVIT OF MARK W. HUGULEY**

I am the Mayor of the Town of Arcadia Lakes. Arcadia Lakes is a small town with about 900 residents. It is a bedroom community with limited retail business in two areas zoned light commercial. Town government is small and has few resources. Initially operating from a private residence, space is currently rented for a town hall. The Town has one part-time permanent employee, who serves both as the Town clerk and treasurer. There is also a part-time bookkeeper, but there are no other employees and no municipal departments. See Exhibit A, Town Income and Expense Report from 2002-2016, attached.

The Town's governing body is established as a "council" form of municipal government. Because the Town is small, the responsibility for many tasks, ordinarily performed by employees, falls to the mayor or Council members. Therefore, the Council members and I stay busy with Town business, although many residents may believe Council simply meets once per month to decide questions before the body. Usually, this line of reasoning includes having the Council make decisions which are delegated to others for implementation. However, there are not many to whom tasks can be delegated. So it might be a matter of doing it yourself, if it is to get done.

As mayor, I respond to blocked storm drains, obstructed ditches, fox bites, noise complaints and trash collection complaints. I write correspondence and sign checks. Council members hear the same complaints as the mayor, and unlike some legislative bodies we work together for the betterment of the Town. Pulling together and being frugal allowed the Town, founded in 1959, to operate successfully. These services might be described as provided by elected volunteers. (For

example, as mayor I normally net about $245 per month.) See Exhibit A. A big award risks the balance between voluntary and compensated Town services.

However, there are other services provided by the Town through contracts. The Town maintains a contract to provide regular garbage and yard debris collection at no cost to residents. We employ, as needed, someone to help keep streets clean, although the SCDOT primarily maintains the roads and streets. The Town pays for street lights and limited "extra-duty" service from sheriff's deputies. See Exhibit A.

We have no police force of our own and feel certain we are too small for such. Our municipal code has no criminal penalties. We attempt to settle disputes without formal action. With such as a backdrop, I note the Town does not undertake any type of legal action lightly. I can recall only one occasion where the Town used a "cease and desist" order to compel compliance with its ordinances. Voluntary compliance is the norm. But even without formal legal action, the Town must engage its Town Attorney to explain and encourage compliance by some. As a result, attorney fees for routine Town business are a regular expense. See Exhibit A.

Commensurate services cannot be obtained elsewhere for an amount similar to that paid by the Town. As stated, we are frugal. Since we already do much on a voluntary basis, any reduction or elimination of a paid for service, which would result if the Town had to divert funds to a large fee or sanctions award, will be a blow to Town operations. It is likely the Town would be unable to continue the services as currently provided in event of a large award to the defendants. We are such a small town that any award to the defendant will likely harm the Town, but a large award would be hugely destabilizing.

While the Town has several sources of revenue, it lacks the single source many local governments most heavily rely upon: Property tax. Instead, its sources include: Local Option Sales Tax, Insurance Tax, Brokers Tax, Telecommunications Tax, Local Business License Tax, SC Local Government Fund, and Utility Franchise Fees. As can be seen in the Town's income and expense report, those revenue sources have just barely generated enough income to pay the Town's expenses for the past two years. See Exhibit A.

Notwithstanding prior commitments made to local governments, several of the sources listed are often adversely affected by decisions of the General Assembly to appropriate less than obligated. This condition makes the revenue stream somewhat less stable for local governments without a property tax –like Arcadia Lakes and approximately 50 other municipalities. As disagreeable as some find property tax, it is relatively stable. With an annual budget for 2017, including grant funds, of only $324,222. Not currently having a property tax creates a big financial challenge in raising revenue to pay a large award, if ordered by the Court. The operating budget is insufficient to otherwise cover any award. See Exhibit A.

Unfortunately, the current requirements of state law mean the Town cannot establish a property tax. The practical effect of Act 388 and other laws so restrict local government control over its tax authority that local finances suffer. Instead of raising revenue, the Town must cut services in order to address an emergency fee and sanction award. A probable scenario would see a partial cost of garbage and yard trash collection, possibly one half, passed on to residents. Possibly,

other Town services will be eliminated as the Town must maintain reserve funds for on hand for emergencies. For every dollar raised in establishing a property tax, there must be a dollar offset in monies derived from the local option sales tax. This is because the purpose of the local option sales tax is to provide relief from property tax. Thus, the Town could generate $1.00 from a property tax and owe $1.00 to taxpayer relief. This would mean the Town nets $0.00 but still created a new tax burden. There is no efficacy in such a model.

Municipalities with an established property tax receive the amount greater than the one per cent local option tax. But for Arcadia Lakes to establish a property tax that produces net revenue it requires a millage rate sufficient to accommodate the local option off set and an additional amount. Difficult under any circumstances, but nearly impossible in Arcadia Lakes, which has a small property tax base and a number of properties subject to a special purpose district tax funding the construction of a dam lost to the great flood of 2015.

Instead of raising revenue, the Town must cut services if to fund an award. A probable scenario would see a partial cost of garbage and yard trash collection, possibly one half, passed on to residents. Possibly, other Town services will be eliminated as well.

Last year the Town began beautification projects that have uplifted and enhanced Town appearances. These improvements will stop. An attractive appearance of the Town must certainly benefit both those who reside in the Town as well as properties adjacent to the Town. In other words, an adverse financial impact on the Town's beautification initiatives will see incidental impact on neighboring properties. Communities are not limited by municipal boundaries alone. Indeed, the name of the apartment complex constructed at the site of Roper Pond is "Arcadia's Edge," a clear reference to the Town. To the extent the Town provides or facilitates services for its residents there also is limited benefit to others in the larger community.

There is a cost borne by Town residents by having the denser population of an apartment complex in our community. For example, I live on N. Trenholm. My home is only a short distance from the apartment complex. I am sensitive to any increase in traffic, noise and trash. Without impugning the character of the apartment residents or the quality of the complex, I believe increased populations bring more problems, which have associated costs. Where Roper Pond formerly had a small "watershed", it now has paved surfaces draining to Cary Lake in the Town.

This is a condition that incrementally occurred over the years since Cary Lake was first constructed. At that time, the large area draining to Cary Lake was less developed with far fewer impervious surfaces. But as roads and parking lots were paved, water that used to be absorbed into the ground became storm water runoff added to the water held back by the Cary Lake Dam. This changed the nature and quality of Cary Lake, which is the single most recognized feature in Arcadia Lakes, without consultation with or consent of residents.

Irrespective of volume or other measures unknown to me, this represents storm water runoff introduced into the Cary Lake reservoir and the Gill's Creek Watershed that did not previously exist. The Town shares responsibility for National Pollutant Discharge Elimination System

(NPDES) permitted storm water. There is certainly some cost to the Cary Lake property owners and the Town.

Although these costs are hard to calculate, they are very real. This much is certain, a large award will harm the Town and it will not recover easily. But a large award is likely to have unintended consequences for people residing beyond the Town limits in the surrounding area. Council frugally managed Town operations for several decades to enable the creation of reserve accounts. Essentially, these are savings accounts and have two distinct purposes --emergencies and capital projects.

Beginning in the 1990s, Council began setting aside funds for a Town Hall using the local government investment fund maintained by the state Treasurer. As of March 31, 2017 there was approximately $715,000. There is also approximately $231,000 in a money market account held in a local commercial bank. At the time the savings effort began, Council met in the home of the Town clerk.

Slowly moving toward its own Town Hall, Council transitioned to rented space. This is seen as an intermediate step before constructing and owning its own brick and mortar structure. Other capital projects targeted by Council include enhancing major intersections with brick-like crosswalks and landscaping of rights of way. Working with the Council of Governments, a charrette was developed depicting improvements to major intersections in Arcadia Lakes. It is believed aesthetic improvements will also have a calming effect on traffic, something hugely important to both public safety and the quality of life. See Exhibit B.

The last capital project is a small park. The Town currently has no parks or publically owned space save one small lot. Research has determined parks to be among the most desirable features of any community for young people. Council believes diversity in age is a sign of a healthy community and wants to promote improvements that will attract people from all age ranges. These are the aspirations of our small Town, but without our reserves none will become reality. Arcadia Lakes does not have a tax base to support capital improvement bonds and has no means to finance capital projects except through savings. In sum, loss of the reserve is a loss of funds over thirty years in the making, setting the Town back to its financial position in the 1990s and preventing any capital improvements for decades to come.

FURTHER THE AFFIANT SAYETH NOT.

/Mark W. Huguley

Mark W. Huguley

SWORN to before me this
18th day of April, 2017.

Gregory White (SEAL)
Notary Public for South Carolina

My commission expires: My Commission Expires November 20, 2025

South Carolina Environmental Law Project

Lawyers for the Wild Side of South Carolina

September 12, 2017

a 501c3
non-profit organization

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P. O. Box 11629
Columbia, SC 29211

RE: Town of Arcadia Lakes, et al. v. Roper Pond, LLC, et al.
Appellate Case No. 2017-001554

Dear Ms. Kitchings:

Enclosed for filing, please find the original and seven (7) copies of the Appellant's Petition for Writ of Supersedeas, along with my certificate of service and filing fee.

Please return a clocked-in copy in the enclosed, postage-paid envelop. Thank you for your assistance.

Yours very truly,

Amy Armstrong

cc: Stephen Hightower, Esq.
Joan Hartley, Esq.
Tommy Lavender, Esq.