STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

RECEIVED
JUN 08 2018
SC Court of Appeals

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 Pelsey, 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.

BRIEF OF APPELLANT/RESPONDENT
TOWN OF ARCADIA LAKES

Michael Gary Corley
PO Box 5761
Greenville SC 29606
Attorney for Appellant/Respondent

Amy E. Armstrong
South Carolina Environmental Law Project
Mailing address: Post Office Box 1380
Pawleys Island, SC 29585
Telephone (843) 527-0078

Terry E. Richardson, Jr.
Richardson, Patrick, Westbrook & Brickman
Mailing address: Post Office Box 1368
Barnwell, SC 29812
Telephone (803) 541-7860

Attorneys for the Appellant/Respondent

Georgetown, South Carolina

June 7, 2018

TABLE OF CONTENTS

Page

Table of Cases, Statutes and Other Authorities iii

Statement of the Issues on Appeal vi

Statement of the Case 1

ARGUMENT 2

I. The ALC Erred in Holding the Town Liable Under the State Action Statute 4

A. The Individual Petitioners Preclude Application of the State Action Statute 5

B. The Town Acted with Substantial Justification 8

i. The ALC Erred in Striking Evidence of Substantial Justification 14

C. Roper Pond did not Provide Enough Information to Satisfy the Minimum Statutory Requirement for an Award Under the State Action Statute 18

D. Roper Pond is Not a Prevailing Party 20

II. The ALC Erred in the Amount of Fees and Costs it Awarded to Roper Pond 25

A. The Lack of Information Provided by Roper Pond Warrants a Substantial Reduction in the ALC's Fee Calculation 25

B. The ALC Erred in Awarding Full Costs and Fees Against a Single Petitioner 31

C. The ALC Erred in Awarding Costs and Fees Incurred During Administrative Proceedings 34

D. The ALC Erred in Awarding "Fees on Fees" 38

III. The ALC Erred in Finding and Concluding that the Town Sought Relief Solely for the Purpose of Delay in Awarding Sanctions to Roper Pond 40

A. The Evidence Does Not Support a Conclusion that the Town Brought the

Case Solely for Purposes of Delay 41

B. The ALC Improperly Attributed Positions and Statements to the Town 46

C. The ALC Improperly Equated the Town's Opposition to the Apartments with Improper Purpose in the Case 51

IV. The ALC Erred in the Amount of Sanctions it Awarded to Roper Pond 54

A. The ALC Abused its Discretion in Awarding More Than Full Fees and Costs 54

B. The ALC's Justification for the Amount of its Sanction Award is Inadequate . . 58

C. The Sanction Award is Untenable in This Non-Frivolous Case 61

CONCLUSION 62

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

Cases:

Baird v. Charleston Cty., 333 S.C. 519, 511 S.E.2d 69 (1999) 11

Bear Enterprises v. Cty. of Greenville, 319 S.C. 137, 459 S.E.2d 883 (Ct. App. 1995) . 47, 48, 49

District of Columbia v. Heller, 554 U.S. 570 (2008) 52

City of Charleston v. Masi, 362 S.C. 505, 609 S.E.2d 301 (2005) 21, 22, 23, 24

Cornelius v. Oconee Cty., 369 S.C. 531, 633 S.E.2d 492 (2006) 22

Culbertson v. Clemens, 322 S.C. 20, 471 S.E.2d 163 (1996) 4

Daly v. Hill, 790 F.2d 1071 (4th Cir. 1986) 29, 30

Dawkins v. Fields, 354 S.C. 58, 580 S.E.2d 433 (2003) 14

Douan v. Charleston Cty. Council, 373 S.C. 384, 645 S.E.2d 241 (2007) 20, 21, 23, 24

ECOS, Inc. v. Brinegar, 671 F. Supp. 381 (M.D.N.C. 1987) 28

Ex parte Bon Secours-St. Francis Xavier Hosp., Inc., 393 S.C. 590,
713 S.E.2d 624 (2011) 55, 56

Ex parte Gregory, 378 S.C. 430, 663 S.E.2d 46 (2008) 54, 57

Ex parte Megna, 2015 WL 576683 (S.C. Ct. App. Feb. 11, 2015) 55

Father v. S.C. Dep't of Soc. Servs., 353 S.C. 254, 578 S.E.2d 11 (2003) 54. 55. 58

Georgetown County LWV v. Smith Land Co. Inc., 393 S.C. 350, 713 S.E.2d 287 (2011) 10

Guidry v. Clare, 442 F. Supp. 2d 282 (E.D. Va. 2006) 27

Hatfield v. Van Epps, 358 S.C. 185 (2004) 17

Heath v. County. of Aiken, 302 S.C. 178, 394 S.E.2d 709 (1990) 4, 5, 8, 12, 20

Hensley v. Eckerhart, 461 U.S. 424, 103 S. Ct. 1933 (1983) 28, 30

Holmes v. E. Cooper Cmty. Hosp., Inc., 408 S.C. 138, 758 S.E.2d 483(2014) 54, 61

Horry Tel. Co-op., Inc. v. City of Georgetown, 408 S.C. 348,
759 S.E.2d 132 (2014) 47, 48, 49, 50

Irby v. Lawson, 2012 WL 10864150 (S.C. Ct. App. Oct. 31, 2012) 54

Johnson v. Dailey, 318 S.C. 318, 457 S.E.2d 613 (1995) 4

Just v. Spartanburg Cmty. Coll., No. 3:12-CV- 03115-JFA, 2013 WL 3833063
(D.S.C. July 23, 2013) 34, 37

Layman v. State, 376 S.C. 434, 658 S.E.2d 320 (2008) 6, 7, 9, 18, 26, 32, 33

Liberty Mut. Ins. Co. v. Employee Res. Mgmt., Inc.,176 F. Supp. 2d 510 (D.S.C. 2001) 27

Maybank v. BB&T Corp., 416 S.C. 541, 787 S.E.2d 498 (2016) 19, 20

McDowell v. S.C. Dept. of Soc. Serv., 304 S.C. 539, 405 S.E.2d 830 (1991) 8, 34, 37, 40

Pierce v. Underwood, 108 S.Ct. 2541 (1990) 8, 9, 17

Runyon v. Wright, 322 S.C. 15, 471 S.E.2d 160 (1996) 59

Russell v. Wachovia Bank, N.A., 370 S.C. 5, 633 S.E.2d 722 (2006) 57

Sessions v. Withers, 327 S.C. 409, 488 S.E.2d 888 (Ct. App. 1997) 24

Sloan v. Friends of Hunley, 393 S.C 152, 711 S.E.2d. 895 (2011) 20, 23

Spectre v. DHEC, 386 S.C. 357, 688 S.E.2d 844 (2010) 10

SunTrust Mortg., Inc. v. AIG United Guar. Corp., 933 F. Supp. 2d 762 (E.D. Va. 2013) . 27, 30

Tiller v. Nat'l Health Care Ctr. of Sumter, 334 S.C. 333, 513 S.E.2d 843 (1999) 17

Transportation Ins. Co. & Flagstar Corp. v. S.C. Second Injury Fund, 389 S.C. 422,
699 S.E.2d 687 (2010) 37

Tuten v. Joel, 410 S.C.104, 763 S.E.2d 54 (Ct. App. 2014) 17

Video Gaming Consultants, Inc. v. S.C. Dept. of Revenue, 358 S.C. 647,
595 S.E.2d 890 (2004) 9, 10

Vortex Sports & Entertainment, Inc. v. Ware, 378 S.C. 197 (2008) 17

Zabinski v. Bright Acres Assocs., 346 S.C. 580, 553 S.E.2d 110 (2001) 4

Statutes:

S.C. Code § 1-23-380 35

S.C. Code § 1-23-500 34

S.C. Code § 5-11-30 . . . . 47, 49

S.C. Code § 15-77-300 . . . . 1, 2, 5, 19, 20, 21, 23, 25, 26, 27, 28, 31

S.C. Code § 15-77-330 . . . . 18, 19, 20, 25

S.C. Code § 39–5–140(a) 19

S.C. Code § 44-1-60 36

Other Authorities:

Administrative Law Court Rule 72 . . . . 1, 2, 4, 21, 40, 41, 46, 55, 56, 57, 58, 61, 62

STATEMENT OF ISSUES ON APPEAL

I. Did the ALC Err in Awarding All Attorneys' Fees and Costs Under the State Action Statute Against the Town Where (a) the Town was Only One of Sixteen Petitioners Challenging the Underlying DHEC Permit; (b) the Town Had a Reasonable Basis in Fact and Law for Its Involvement in the Permit Challenge; (c) Roper Pond Failed to Provided the Minimum Information Required to Obtain Fees; and (d) the Supreme Court Dismissed the Underlying Case as Moot?

II. Did the ALC Err in Striking the Town's Affidavits in Support of the Reasonable Basis in Fact and Law Establishing that the Town was Substantially Justified in Challenging the Underlying DHEC Permit?

III. Did the ALC err in failing to (a) require Roper Pond to submit an itemized description of the attorney time for which it sought fees, so as to facilitate exclusion of time that is not properly compensable and (b) exclude excessive, redundant, or otherwise non-compensable time from Roper Pond's fee award?

IV. Did the ALC err in (a) awarding fees and costs incurred during administrative proceedings, when the State Action Statute covers "any civil action" and (b) awarding fees and costs that Roper Pond incurred while pursuing fees and costs?

V. Did the ALC err in Finding that the Only Reason the Town Challenged the Underlying DHEC Permits was for the Purpose of Delay Where (a) no Evidence that the Town's Sole Motivation of Delay Exists; (b) the ALC Attributed Statements to the Town that Were Not Made by the Town; and (c) the ALC Treated the Town's Opposition and Desire to Stop the Project as Designed as an Improper Purpose?

VI. Did the ALC err in granting Roper Pond a post-judgment award significantly in excess of the fees and costs Roper Pond incurred in defending this action?

VII. Did the ALC err in imposing a $200,000 sanction award based merely off the judge's general sense of what was an appropriate figure, without any calculation methodology or explanation?

VIII. Is the ALC's sanction award of $200,000, on top of Roper Pond's full fees and costs, disproportionate to similar awards under South Carolina jurisprudence, especially considering that none of the Town's actions in this case were frivolous?

STATEMENT OF THE CASE

This appeal arises from Orders of Administrative Law Judge John D. McLeod in which he concludes that the Town of Arcadia Lakes ("Town") should be sanctioned and should pay attorneys' fees and costs for challenging the decision of the Department of Health and Environmental Control ("DHEC") to issue a stormwater permit to Roper Pond, LLC ("Roper Pond"). On January 21, 2010, ruling on the underlying merits of this case, the Administrative Law Court ("ALC") affirmed the DHEC permitting decision and ruled that all of the Petitioners lacked standing to challenge the permit. On March 6, 2013, this Court issued an Opinion affirming the ALC's Order. The Petitioners sought rehearing, and on June 12, 2013, the Court of Appeals withdrew its March 6, 2013 Opinion and substituted a new Opinion, still affirming the agency decision and denying standing. (R. pp. 128-145).

The Petitioners then successfully petitioned the South Carolina Supreme Court for a Writ of Certiorari, which was granted on August 22, 2014. After hearing oral arguments on March 18, 2015, the Supreme Court dismissed Petitioners' appeal as moot in an April 9, 2015 Order. (R. pp. 124-126). Roper Pond then filed a Petition for Costs pursuant to South Carolina Appellate Court Rule 222, which was denied by the Supreme Court in a June 17, 2015 Order. (R. pp. 120-121).

In the interim, Roper Pond filed successive Petitions for Attorneys' Fees and Costs and for Sanctions with the ALC on April 19, 2010, May 25, 2015 and November 30, 2015. In its Third Amended Petition, Roper Pond withdrew all claims for fees, costs, and sanctions against the sixteen individual petitioners, but maintained its claim for sanctions against the Town on the basis that the filing of this contested case was "taken solely for purposes of delay" under Administrative Law Court Rule 72 and its claim for fees and costs against the Town under

Section 15-77-300 (the "State Action Statute"). Roper Pond expressly withdrew its claims that the Town's case was frivolous.

On August 3, 2015, the ALC bifurcated the issues of liability under ALC Rule 72 and Section 15-77-300 and, if liability existed, the amount of any award. On January 25, 2016, the ALC granted Roper Pond's motion to strike affidavits submitted by the Town in response to the Petition for Attorneys' Fees and Costs and for Sanctions. On September 1, 2016, the ALC issued an Order finding the Town liable under ALC Rule 72 and under the state action statute. On March 15, 2017, the ALC issued an Amended Order again finding liability. On June 14, 2017, the ALC issued an Order awarding $205,283.84 in attorneys' fees and costs and $200,000 in sanctions.

On July 14, 2017, the Town filed a notice of appeal with this court.

ARGUMENT

Summary of Argument

The course of post-judgment proceedings in this case reflect that the Administrative Law Court decided first, based on whatever internal logic or standard it possessed, that the Town of Arcadia Lakes deserved to be punished for its role in bringing this case, and, thereafter, the law justifying that punishment was shaded in after the fact. At various points during the post-judgment proceedings, the ALC was poised to award fees, costs, and sanctions to Roper Pond without even the most basic information necessary for application of a legal standard, and only Roper Pond's desire for a more legally durable order prevented such action. In short, the ALC desired to see the Town punished irrespective of law and left it to Roper Pond, the party seeking fees and sanctions, to be sure that all the legal boxes were checked in order to justify that

punishment. Due in large part to this "cart before the horse" approach, this appeal presents a profusion of legal errors and oversights, too numerous to mention in this summary, but all of which could rightfully be considered fundamental in relation to the ALC's extraordinary award.

At the root of all the ALC's post-judgment decisions is the same flawed logic: that the Town's overall opposition to Roper Pond's apartment complex project, as-designed, necessarily makes illegitimate the Town's challenge to the stormwater permit for that project. In other words, while the Town's challenge to the stormwater permit was not frivolous, the ALC has read the tea leaves to say that the Town's motivation for filing this case was more about opposition to the entire project, rather than opposition to just the stormwater, and the ALC finds this to be a sanctionable offense. The ALC's "motivation guessing" represents something altogether new in South Carolina's jurisprudence for this type of post-judgment award, and it opens the door for a new type of wholly subjective punishment for litigants, even for those who bring meritorious cases but do not prevail for whatever reason.

It is not hyperbole to say that the ALC's post-judgment award, which basically amounts to double all the costs and fees Roper Pond incurred during this entire case at all phases, is more punitive and severe than any such award appearing in reported South Carolina cases. Yet, South Carolina case law is replete with examples of objectively abusive litigation practices, and here the ALC had to decipher why a non-frivolous case that required detailed treatment and consideration, rising to the level of discretionary Supreme Court review, was nonetheless sanctionable. The Town has now forfeited to Roper Pond a sum equivalent to 126% of the Town's yearly revenue, based on the Town's role as 1/17th of the Petitioners in this case. At the most fundamental level, the "punishment" against the Town is disproportionate to the purported

transgression and reflects the ALC's misconception as to the role and availability of this type of post-judgment relief, as well as the forum's general unfamiliarity with the type of post-judgment petition submitted by Roper Pond.

As the Court will read in the sections that follow, numerous bases exist to conclude that the ALC erred both in finding that Roper Pond was entitled to an award of fees, costs and sanctions, and in calculating the exorbitant figure arrived at for that award.

Standard of Review

On appeal, the ALC's decision regarding an award of attorneys' fees under the State Action Statute will not be disturbed absent an abuse of discretion. Heath v. County of Aiken, 302 S.C. 178, 182, 394 S.E.2d 709, 711 (1990). Similarly, ALC Rule 72 gives the ALC discretion in determining whether sanctions should be imposed. A trial court's ruling on sanctions will not be disturbed absent a clear abuse of discretion. An abuse of discretion may be found where the trial judge's conclusion had no reasonable factual support, resulted in prejudice to the right of appellant, and therefore amounted to an error of law. Johnson v. Dailey, 318 S.C. 318, 457 S.E.2d 613 (1995); Culbertson v. Clemens, 322 S.C. 20, 24, 471 S.E.2d 163, 165 (1996). An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law. Zabinski v. Bright Acres Assocs., 346 S.C. 580, 601, 553 S.E.2d 110, 121 (2001).

I. The ALC Erred in Holding the Town Liable Under the State Action Statute.

The State Action Statute authorizes a prevailing party to recover attorney's fees:

> In any civil action brought by the State, any political subdivision of the State or any party who is contesting state action . . . the court may allow the prevailing party to recover reasonable attorney's fees to be taxed as court costs against the appropriate agency if: (1)

> the court finds that the agency acted without substantial justification in pressing its claim against the party; and (2) the court finds that there are no special circumstances that would make the award of attorney's fees unjust.

S.C. Code Ann. § 15-77-300(A).

Note that, as a threshold matter, the party seeking fees must establish that the action was brought and pressed by the State, or a political subdivision thereof. If that is established, there are three prerequisites to recovery of attorney's fees and costs under the State Action Statute: (1) the contesting party must be the "prevailing party;" (2) the court must find that the agency acted without "substantial justification in pressing its claim" against the party; and (3) the court must find that there are no special circumstances that would make an award of attorney's fees unjust. Heath v. County of Aiken, 302 S.C. 178, 182-84, 394 S.E.2d 709, 711-12 (1990). Roper Pond falls short of this standard in several regards, and the ALC erred in granting Roper Pond any award under the State Action Statute.

A. The Individual Petitioners Preclude Application of the State Action Statute.

The State Action Statute cannot be implicated under circumstances where the governmental entity is not the "cause in fact" of legal action being initiated or continued. Where the Town was but one of seventeen petitioners pursuing the same claims with the same attorneys, the State Action Statute is inapplicable because this case does not meet the threshold requirement of constituting a "civil action *brought by the State*," in which the Town "acted without substantial justification in *pressing its claim* against" Roper Pond. See S.C. Code § 15-77-300 (emphasis added).

No South Carolina appellate court has ever considered whether the State Action Statute applies to legal action pursued jointly by public and private entities. Such question is even more

pointed here, as nothing in the record suggests that it was the Town's insistence that resulted in this case being initiated, nor that it was the Town's persistence or unwillingness to yield that kept the case going. On the contrary, the record reflects that the Town's involvement as a named party in this case did not expand or extend the underlying proceedings whatsoever.[1] Once again, these are unique features in terms of the South Carolina cases that have addressed applicability of the State Action Statute. Under these novel circumstances, the State Action Statute's objective of deterring unjustified legal action spawned by the state is simply not implicated, and the characterization of this case as having been brought and pressed by the Town is exceedingly dubious.

The closest our courts have come to addressing these circumstances was in Layman v. State, in which both the South Carolina Retirement System and the State of South Carolina were named as defendants. 376 S.C. 434, 658 S.E.2d 320 (2008). The State of South Carolina argued that only an *agency* of the State could be assessed fees under the State Action Statute, not the State itself. Id. at 445, 658 S.E.2d at 326. In turn, the South Carolina Retirement System argued that it could not be assessed fees under the State Action Statute, because the same legal action would have proceeded against the State alone, without the Retirement System's involvement. Id. In other words, the South Carolina Retirement System argued that its status as a named party was irrelevant to progression of the case, given the co-party status of an entity that was not subject to the State Action Statute, and that the State Action Statute therefore should not apply. The

[1] All motions, pleadings, and other documents were filed jointly on behalf of the seventeen petitioners by undersigned counsel. The only addition to the underlying proceedings that could be attributed to the Town is that Roper Pond's arguments for dismissal of this case on the basis of standing were different for the Town than for the individual petitioners.

Supreme Court rejected this argument in Layman, but that rejection was based on the artificial nature of a distinction between State and state agency. Id. at 446, 658 S.E.2d at 326 ("as a governing body, the State is ultimately responsible for the actions of its agencies."). The Court's conclusion was only that the State Action Statute did not leave room for a distinction between legal action spawned by the State and that spawned by a state agency: "the overriding principle of the State Action Statute is that as a state agency, the Retirement System is obligated to carry out the instructions of the State. That the statute plainly recognizes this principle is exhibited by the language purporting to apply to cases in which a party is 'contesting state action.'" Id. Critically, though, the rationale of Layman does not close the door on an argument like that advanced by the South Carolina Retirement System, when a private entity is co-party. Indeed, the discussion in Layman presages the Town's argument here and opens the door for this Court's conclusion that the Town's incidental status as a named co-party, with no actual impact on the case being brought or maintained, is not a basis for applying the State Action Statute.

Such conclusion would be consistent with the plain language of the State Action Statute. If our legislature had wanted to incorporate circumstances like those at hand within the State Action Statute, appropriate language was readily available. For example, the legislature could have designated applicability of the Statute to "a civil action in which the State is a party." Instead, the legislature specified that the State Action Statute applies to "any civil action *brought by* the State" or "any party who is contesting state action," language which reflects a clear intent to incorporate legal action that would not have occurred except for the involvement of the government. The plain language of the State Action Statute does not reflect an intent to cover legal action in which a governmental entity is incidentally involved, alongside many more private

co-parties.[2] The State Action Statute does no apply to this case simply because the Town was one of many petitioners, and the ALC erred in applying the Statute under the circumstances of this case.

B. The Town Acted with Substantial Justification

The standard for evaluating whether state agency action was taken "without substantial justification" is based on whether the action can be "justified to a degree that could satisfy a reasonable person." McDowell v. S.C. Dep't of Soc. Servs., 304 S.C. 539, 405 S.E.2d 830 (1991); see also Heath v. County of Aiken, 302 S.C. 178, 394 S.E.2d 709 (1990). "An agency action supported by substantial justification is one which has a reasonable basis in law and fact." Id.

In Heath v. County of Aiken, 302 S.C. 178, 394 S.E.2d 709 (1990), the Court held that "substantial justification" is determined by a "reasonable person" standard. Substantial justification in the context of attorneys' fees means "'justified in substance or in the main'—that is justified to a degree that could satisfy a reasonable man." Pierce v. Underwood, 487 U.S. 552, 565, 108 S.Ct. 2541, 2250 (1990). The Supreme Court in Pierce further explained that the phrase substantial justification "does not mean a large or considerable amount of evidence, but rather such relevant evidence as a reasonable mind might accept to support a conclusion .... To our knowledge, [substantial justification] has never been described as meaning 'justified to a high degree,' but rather has been said to be satisfied if there is a 'genuine dispute.'" Id. at 565, 108

---

[2]By way of anecdote, if a state subdivision were to join a class action alongside hundreds of other private entities who were harmed by a particular occurrence, and that class action were to fail, it would be illogical for the state subdivision to be assessed fees for "bringing the class action," much less for the state subdivision to be charged with all fees for defending the entire class action (which is equivalent to what the ALC has awarded against the Town).

S.Ct. at 2550 (internal citations omitted). If the government acts with "substantial justification" in pursuing its claim or position, the court must deny recovery of fees and costs. See, e.g., 2 S.C. Jur. Attorney Fees § 65.

For purposes of determining whether the prevailing party in a state-initiated action is entitled to attorney fees, the government's loss on the merits does not create a presumption that its position was not substantially justified. Video Gaming Consultants, Inc. v. South Carolina Dept. of Revenue, 358 S.C. 647, 595 S.E.2d 890 (2004); Layman v. State, 376 S.C. 434, 445, 658 S.E.2d 320, 326 (2008). "Conceivably, the Government could take a position that is not substantially justified, yet win; and even more likely, it could take a position that is substantially justified, yet lose." Pierce v. Underwood, 487 U.S. 552, 569, 108 S.Ct. 2541, 2552 (1988).

In deciding whether the Town acted with substantial justification in pressing its claim, as would preclude an award of attorneys' fees, the courts look to *the government's position* in litigating the case to determine whether it is one which has a reasonable basis in law and fact. Video Gaming Consultants, Inc. v. South Carolina Dept. of Revenue, 358 S.C. 647, 595 S.E.2d 890 (2004); McDowell v. S.C. Dept. of Soc. Serv., 304 S.C. 539, 542, 405 S.E.2d 830, 832 (1991) (citing Pierce, 487 U.S. 552, 108 S.Ct. 2541); Layman, 376 S.C. at 445, 658 S.E.2d at 326.

Here, the ALC provided scant evidence or explanation to support its determination that the Town acted unreasonably, instead merely recounting its underlying decision on the merits. The ALC failed to undertake meaningful consideration of pertinent legal authorities supporting the Town's position. This Court has previously recognized that when the state produces relevant legal authority for its position, and where "the parties argued extensively about the proper

interpretation" of such legal authority before the ALC, the state's position cannot be viewed as unreasonable. See Video Gaming Consultants, Inc. v. S.C. Dep't of Revenue, 358 S.C. 647, 651–52, 595 S.E.2d 890, 892 (Ct. App. 2004). The ALC's analysis conflicts directly with such principle.

The parties' briefs and petitions, as well as the numerous appellate decisions in this case, make clear that extensive debate over the proper interpretation of DHEC's permitting authority (and specifically its conditions requiring consideration of impacts from the complete project, see R. p. 1105) occurred.[3] (R. pp. 342-481; 536-614). Yet the ALC failed to recognize the considerable time the appellate courts spent reviewing the complex issues presented in the underlying case, including questions of law that had never been answered by an appellate court. (R. pp. 128-163). Instead, the ALC held that because it rejected the Town's arguments, "the Town acted without substantial justification in bringing this action." (R. p. 53). The ALC failed to look at relevant evidence to determine whether a reasonable mind might accept the Town's conclusion, or whether there is a genuine dispute. The ALC simply rehashed his findings from his and this Court's rulings on the merits regarding the SWPPP and restates his disagreement

[3]On the merits, this Court's Opinion inconsistently addresses the question of DHEC's scope of review under the Section 401 water quality certification program. The Court first agrees with Petitioners that DHEC has broad authority, and indeed is required to consider the "overall project," including impacts beyond those specifically authorized by a United States Army Corps of Engineers ("Corps") permit, but then arrives at a conclusion which limits DHEC's scope of review under the 401 certification program to the Corps' scope of review under the Clean Water Act. The conclusion is contrary to the Supreme Court's prior interpretations of state versus federal jurisdiction of waters, holding that DHEC is required to review impacts to waters of the State beyond those governed under the federal Clean Water Act. Spectre v. DHEC, 386 S.C. 357, 688 S.E.2d 844 (2010); Georgetown County LWV v. Smith Land Co. Inc., 393 S.C. 350, 713 S.E.2d 287 (2011).

with the petitioners' case.[4] Then the ALC equates the Town's burden of proof with the reasonableness test. (R. p. 48). Simply because the ALC disagreed with the Town, and ruled in favor of Roper Pond, does not lead to an inevitable conclusion that the Town had no reasonable basis in fact and law for bringing the action.

The ALC next asserts that the Town was not justified because the Town lacked standing. The ALC cites no support for the contention that standing is tied to the reasonable basis in fact and law for bringing a case. But if standing has any bearing then it would be to preclude the ALC's award under the State Action Statute because if the Town does not have standing, the ALC does not have jurisdiction over it. Baird v. Charleston Cty., 333 S.C. 519, 526, 511 S.E.2d 69, 73 (1999).

In this case, the Supreme Court could have simply denied the Petition for Writ of Certiorari if the petitioners' case had no basis in law or fact. Instead, the Court exercised its discretion, even though it ultimately concluded that it could not provide relief to the Town. The ALC cites cases where the Supreme Court dismissed appeals as "improvidently granted" in support of its conclusion that the Town's case had no reasonable basis in fact or law (Order, p. 30); however, this case was not dismissed because the Court determined that certiorari was improvidently granted and none of those cases are applicable.

This case is also unlike Heath, which found a lack of substantial justification when both

---

[4]Without belaboring the point, the Town notes that the ALC's Order focuses on one small aspect of the Town's overall case, i.e., deficiencies in the SWPPP. A review of the Town's request for contested case hearing reveals that the technical deficiencies in the SWPPP was one very small part of the factual and legal grounds for filing the case. (R. pp. 230-243). The legal authority for the Town and Petitioners' claims can be found in the briefs that were presented to this Court, as well as their Petition for Rehearing and Petition for Certiorari. (R. pp. 342-481; 536-614).

the statute was unambiguous and the relevant precedent indicated that the claims were without merit. Neither of these circumstances exist here. The ALC has not found a lack of ambiguity nor identified any relevant case law regarding the Department's scope of review and authority under the Section 401 water quality certification program. Instead of elucidating how this case is similar to Heath, or any other cases where a court has found a lack of substantial justification. The ALC simply assumes that the Town did not have substantial justification because of its ruling on the merits.

On the other hand, the Town provided testimony and evidence demonstrating that it did have substantial justification for pursuing its claims, proving that they were guided by a reasonable basis in law and fact.[5] The Town sought the advice of experts in the fields of environmental and administrative law and environmental engineering. (R. pp. 913-917) The Town utilized this advice and counsel in deciding to file the request for contested case hearing. Id. The Town retained James S. Chandler, Jr., who advised the Town that ample support in fact and law existed to warrant filing the request for contested case hearing. (R. pp. 918-920). The Town also retained Eugene McCall, who has been practicing law for 27 years, primarily in the areas of environmental and water law. (R. pp. 913-917). In 2008 the Town and individual petitioners asked Mr. McCall and Mr. Chandler to review DHEC's file for the Roper Pond project, as well as inspect the project site. Id. Both attorneys advised the Town of their opinion that there was sufficient legal and factual basis for filing a request for contested case hearing. (R.

[5]The ALC erroneously frames (or misunderstands) the Town's arguments with respect to reliance on advice of counsel. (R. p. 53). The Town's argument with respect to advice of counsel is to demonstrate that the Town – at every turn – worked to avail itself of the necessary information to determine whether a reasonable basis existed for filing the request for contested case.

pp. 913-917)

That advice and counsel formed the basis of the Town's decision to pursue this contested case proceeding. (R. pp. 913-920) Indeed, at the time that the contested case was filed, Mr. McCall believed that the Town was doing "the right thing." (R. p. 922). The Town pursued litigation in this case when it was convinced in good faith that DHEC was not abiding by its own regulations in a way that adversely affected the Town's own material interests.

The ALC narrowly focuses on the impetus behind the Town's challenge of DHEC's authorization for the construction project.[6] In so doing, the ALC erroneously neglects to assess the reasonable basis in fact and law upon which the Town pursued this action, instead injecting its assessment of the Town's motivation into the substantial justification test. (R. p. 55). Obviously, the Town sought to stop the project or delay it to ensure compliance, otherwise it would not have joined the individual Petitioners in pursing the case. But our courts have never looked to a party's end goal in litigation to determine whether the party is substantially justified.

Instead of looking beyond the four corners of its own and this Court's decisions on the merits, the ALC rejected competent evidence on the question of reasonable factual and legal bases for bringing the case.

---

[6]The ALC also concludes, without any supporting evidence, that a draft letter prepared by one of the individual petitioners, Ms. Jackson, reflects the Town's "actual concerns." (R. p. 30). Of course, Ms. Jackson cannot speak for the Town (see Section III.B., infra). But what is more troubling is the ALC's failure to look at the Town's Request for Contested Case Hearing, appellate briefs, any other filing, or official statement to determine the Town's actual concerns. The ALC does recite the concerns expressed by the Town through their 30(b)(6) deponent, specifically concerns about depressed property values; economic impact; impact on the character of he neighborhood; safety; overflow of the sewer system; and pollution in Cary Lake. (Order pp. 13-14). Confusingly, the ALC fails to consider this sworn testimony as the reasonable factual basis and motivation behind the appeal.

i. The ALC Erred in Striking Evidence of Substantial Justification

The ALC rejected the Town's evidence on the question of whether a reasonable factual and legal basis existed for the Town's participation in the case. In support of its response to Roper Pond's petition for fees, and specifically the factual and legal bases for the Town's appeal, the Town submitted the affidavits of Eugene C. McCall, Jr., D. Cravens Ravenel, and John P. Freeman. These affiants presented testimony regarding their involvement at varying stages of the contested case: (1) Mr. McCall independently reviewed the facts and law *prior* to the filing of the request for contested case hearing; (2) Mr. Ravenel independently reviewed the facts and law while the case was pending before the S.C. Court of Appeals; and (3) Professor Freeman independently reviewed the facts and law after the S.C. Supreme Court dismissed the case as moot.

In striking the affidavits, the Order places sole reliance on one case, Dawkins v. Fields, which held that generally, expert testimony on questions of law is inadmissible. 354 S.C. 58, 580 S.E.2d 433 (2003). In that case, the only case where Professor Freeman's expert testimony has ever been rejected, the court's decision rested on the fact that Professor Freeman's legal arguments and conclusions were not based on his expert review of the relevant facts.[7] Id. at 65. The premise of the ALC's determination is that substantial justification is something other than a reasonableness determination. Yet, the substantial justification standard is exactly that: a question of whether a reasonable basis in fact and law exists. Under that standard, the rationale of Dawkins falls away because the ALC should have considered the fact and opinion testimony

[7]The same cannot be said here, where Professor Freeman reviewed over 700 pages of material. (R. pp. 876-892).

of witnesses involved in assessing the merits of the case at every single stage in determining whether the Town acted reasonably.

The ALC rejected all three affidavits, asserting that expert opinions are only "required" in malpractice suits, but not required under the State Action Statute.[8] (R. pp. 110-111). The ALC overlooks that malpractice suits similarly involve inquiry as to the *reasonableness* of the action.

Without a doubt and at a minimum, the McCall Affidavit should have been admitted. Mr. McCall provides **factual information** that can and should have assisted the finder of fact with this matter. Namely, Mr. McCall reviewed the DHEC decision documents **prior** to the Town's filing of this contested case proceeding.[9] Mr. McCall reviewed the request for contested case hearing and noted that some of his opinions were contained therein and testified that the Petitioners presented a "colorable, adequate, reasonable and proper factual basis" for filing their request. (R. p. 895, ¶ 11). On the question of reasonable basis in law for the request, Mr. McCall testified that the "allegations that Roper Pond's alterations to waters of the state would violate

---

[8]Critically, while the ALC proclaims that "attorney misconduct is not asserted in this case," the conduct of the attorneys representing the Town, including the undersigned, Mr. McCall and Mr. Ravenel, is undoubtedly at issue in this case for two reasons. First, the Town relied on the advice of counsel in all of its actions. That the Town acted solely on advice of counsel puts attorney misconduct directly at issue. Second, the Civility Oath, Rule 402(k) provides that lawyers who delay causes are subject to discipline: "I will assist the defenseless or oppressed by ensuring that justice is available to all citizens and will not delay any person's cause for profit or malice." For these two reasons, attorney conduct and legal malpractice are undoubtedly key components to the issues raised. Indeed, counsel for the Town has put her malpractice carrier on notice.

[9]In 2008, the Town and individual petitioners asked Mr. McCall to review DHEC's file for the Roper Pond project, as well as inspect the project site. (R. pp. 893-908). At that time Mr. McCall opined that the project would most likely have a "significant and deleterious impact on Roper Pond and also likely to the connecting, downstream Cary Lake and other portions of Gills Creek Watershed." (R. p. 894, ¶ 7).

Regulations 61-9 and 61-68; that Roper Pond did not qualify for a Nationwide Permit and Certification and should have been required to obtain an individual NWP Certification; that the Stormwater Pollution and Prevent Plan ("SWPPP") was deficient; and that water quality would be impaired in violation of Regulation 61-68 provide sufficient legal basis upon which I would, as an attorney licensed and practicing in South Carolina, file a request for contested case hearing."(Id. ¶ 12). Indeed, at the time that the contested case was filed Mr. McCall believed that the Town was doing "the right thing." (R. p. 922).

The ALC's basis for rejecting Mr. McCall's testimony is solely the fact that Mr. McCall's opinions are not in alignment with the Final Order and Decision (R. pp. 114-115); however, whether the Town had a reasonable basis in fact and law for filing the contested case proceeding is the central and critical inquiry. The ALC's rejection of Mr. McCall's testimony, which was directly related to this inquiry, is clearly erroneous.

Mr. Ravenel provided factual information and insights beyond what is contained in the record. He was retained by the Town to provide legal advice and counsel regarding the Town's appeal. (R. p. 910, ¶ 5 & 6). Mr. Ravenel is an attorney with extensive experience working in legal ethics in a professional capacity. He testified that he reviewed the relevant documents contemporaneous with the appeal and advised the Town on how to proceed. (R. pp. 909-912). Mr. Ravenel provided factual information regarding advice he provided to the Town, which the Town relied on in taking action.

While the ALC has discretion, in a case such as this, where the law does not support rejecting the affidavits, such an act is an abuse of discretion. The ALC can give as little or as much weight to the affidavits as it deems warranted. See, e.g., Tiller v. Nat'l Health Care Ctr. of

Sumter, 334 S.C. 333, 340, 513 S.E.2d 843, 846 (1999). But here, the affidavits should have been considered because they prove the reasonable steps that the Town and petitioners took prior to filing the contested case, the reasonable steps taken while the case was pending, the legal advice and counsel they sought prior to and during the pendency of this proceeding, and an outside review of the relevant pleadings.

Professor Freeman similarly provided expert opinions regarding the reasonableness of the claims. It is exactly these types of cases that involve the conduct of parties or their attorneys where Professor Freeman has been permitted to provide expert opinions. See, e.g., Vortex Sports & Entertainment, Inc. v. Ware, 378 S.C. 197, 662 S.E.2d 444 (2008) (whether the fiduciary duty was breached under the specific facts of the case was a mixed question appropriate for Professor Freeman's expert testimony); Tuten v. Joel, 410 S.C.104, 763 S.E.2d 54 (Ct. App. 2014) (Professor Freeman testified on an ultimate issue: the existence of an attorney-client relationship and the duties arising thereunder). Hatfield v. Van Epps, 358 S.C. 185, 197-98 (2004) (addressing an ultimate issue of whether there was an improper conflict of interest and, as such, no attorney's fees should be awarded). Neither Vortex Sprots nor Tuten nor Hatfield involved malpractice and Professor Freeman's opinions were accepted in those cases. And in these cases and others, Professor Freeman has provided his professional opinions regarding the conduct of parties or their attorneys, as he has done here.

In this case, the ALC erroneously rejected evidence of a "genuine dispute" and justification that would "satisfy a reasonable man." Pierce, 487 U.S. at 565, 108 S.Ct. at 2550.

C. Roper Pond did not Provide Enough Information to Satisfy the Minimum Statutory Requirement for an Award Under the State Action Statute.

If the State Action Statute does apply, the statute contains the unequivocal requirement that fees "**shall only be paid upon presentation of an itemized accounting of the attorney's fees.**" S.C. Code § 15-77-330. Our Supreme Court has previously relied upon this exact language in rejecting a lower court's fee award under the State Action Statute: "Viewing the circuit judge's award of attorneys' fees in light of **the State Action Statute's limitation that attorneys' fees assessed to a state agency may only be paid 'upon presentation of an itemized accounting of the attorney's fees,'** ... [w]e find this fee inconsistent with this Court's careful crafting of both the procedural and substantive path of this case aimed at minimizing costs for all involved." Layman v. State, 376 S.C. 434, 457, 658 S.E.2d 320, 332 (2008). An itemized accounting of fees is necessary in order to facilitate the requisite analysis of reasonableness. The State Action Statute embodies this principle by outright barring payment of fees in the absence of itemization.

Despite the Town having repeatedly made an issue of the failure, and despite the fact that Roper Pond submitted many amended and supplemental filings to its original fee petition, Roper Pond failed and refused to provide an itemized accounting of fees in this case. (See R. pp. 810-844). Rather, Roper Pond simply submitted and resubmitted a list of time quantities (basically a column of numbers) without any identification or description of the associated tasks. Roper Pond unequivocally failed to satisfy the itemization requirement in §15-77-330, despite ample opportunity.[10] (Id.). Roper Pond's failure is more than a technical non-compliance. Rather,

---

[10]If such analysis is necessary, the ordinary meaning of "itemized" comports with the Town's arguments. An itemized bill lists the good or service corresponding to each charge,

Roper Pond's dissociated list of hours was wholly inadequate to allow the ALC to perform its duties under the law, especially its duty to determine whether the attorney time claimed by Roper Pond is reasonable under §15-77-300. (See infra, Section II.A.) The requirement for an itemized accounting in § 15-77-330 is intended to keep the Court out of this untenable position. As a result of the ALC's failure to require itemization, it awarded $205,283.84 to Roper Pond under the State Action Statute without any way to determine the specific attorney tasks for which it was compensating.

The ALC justified its failure to require itemization by citing to Maybank v. BB&T Corp., 416 S.C. 541, 787 S.E.2d 498 (2016).[11] However, the court failed to recognize the relevance of the critical distinction that Maybank involves a fee award under statutory authority of the Unfair Trade Practices Act, not the State Action Statute. See Id. at 579, 787 S.E.2d at 518 ("Generally, attorneys' fees and costs are not recoverable unless authorized by contract or statute. The UTPA permits a successful plaintiff to recover reasonable attorneys' fees and costs. S.C. Code Ann. §39–5–140(a).") The UTPA's fee provision, found in S.C. Code § 39–5–140, is quite different

---

rather than just a list of numbers. Merriam-Webster defines "itemize" as "to set down in detail or by particulars."

[11]Specifically, the ALC stated as follows:

> 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's fees pursuant to the UTPA. 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.

(R. p. 6)

from the State Action Statute and does not dictate that fees "shall only be paid upon presentation of an itemized accounting of the attorney's fees," as does §15-77-330. Indeed, the ALC itself discussed in another part of its Order that fees are calculated differently under the UTPA and the State Action Statute. (R. p. 3).

If the Supreme Court held in Maybank that fees can be awarded under the UTPA without descriptive time entries, that holding is not relevant in this context, where the itemization requirement in §15-77-330 must be satisfied.[12] Roper Pond's failure in this regard is prohibitive of any fee award.

D. Roper Pond is Not a Prevailing Party.

Even if the Court determines that the Town can be liable under the State Action Statute where multiple other parties were pressing identical claims irrespective of the Town's participation, Roper Pond must also show that it is the "prevailing party." S.C. Code Ann. § 15-77-300(A). The S.C. Supreme Court has held that a prevailing party is a party who successfully prosecutes the action by prevailing on the main issue and "in whose favor the decision or verdict is rendered and judgment entered." Heath v. County of Aiken, 302 S.C. 178, 394 S.E.2d 709 (1990) (citing Buza v. Columbia Lumber Co., 395 P.2d 511 (Alaska 1964)); Sloan v. Friends of Hunley, 393 S.C. 152, 157, 711 S.E.2d 895, 897; see also Douan v. Charleston County. Council, 373 S.C. 384, 386, 645 S.E.2d 241, 243 (2007) ("The key factor in determining whether a party

---

[12]While the opinion in Maybank does not make clear what level of detail was provided by the party seeking fees, nor what level of detail was sought by the party opposing fees, the Town does not read Maybank to say that the Supreme Court is awarding fees without any explanation of how attorney time was spent, as the ALC has done here. See, 416 S.C. at 580, 787 S.E.2d at 519. Rather, Maybank simply reflects a dispute about the *level* of detail that is required in itemized fee petitions.

is a prevailing party is the degree of success obtained by the party seeking attorney's fees.").

Moreover, prevailing at one stage of the case is insufficient to meet the "prevailing party" requirement. Douan v. Charleston County Council, 373 S.C. 384, 645 S.E.2d 241 (2007) ("the circuit court judge properly found Douan was not the prevailing party in the action below due to this Court's superseding opinion"). Rather, the final disposition must be entered in favor of the party seeking fees and costs.

The ALC erred in concluding that Roper Pond is the prevailing party in this case, simply by virtue of the fact that the Town is not. (R. p. 42). The ALC's error arises from an assumption that in every case there must be a "prevailing party;" yet the ALC's narrow, all-or-nothing view ignores the reality of the legal system: sometimes no party "wins." Where, as here, the Supreme Court determined that the case was moot "as it is now impossible for this Court to grant any redress in the context of the issues as framed and litigated below (i.e., modify or revoke authorization for Roper Pond's construction activities under the State-wide general permit)," it cannot be said that a verdict or judgment has been rendered "in favor of" Roper Pond.[13] (R. p.

---

[13]After the Supreme Court dismissed the appeal as moot, Roper Pond filed a motion for costs on appeal pursuant to SCACR Rule 222. Rule 222 states that "costs shall be taxed against the appellant when the appeal is dismissed or judgment on appeal affirmed." Unlike § 15-77-300, et seq., which creates a "substantial justification" standard or SCALC Rule 72, which creates a "frivolous or taken solely for the purposes of delay" standard, Rule 222 contains no standard for determining whether an award of costs is warranted. In other words, if the Supreme Court affirms a lower court ruling or dismisses an appeal favourably, then an award of costs is presumed under SCACR Rule 222, and the respondent need only file a motion along with a sworn, itemized statement of costs incurred. SCACR Rule 222(d).

In denying the motion for costs, the Supreme Court implicitly determined that dismissal on mootness grounds is not a favourable disposition and does not evidence that the case was brought solely for delay such that costs would be warranted. This conclusion is further bolstered by case law holding that dismissal on mootness grounds does not satisfy the "prevailing party" requirement. Douan v. Charleston County Council, 373 S.C. 384, 645 S.E.2d 241 (2007) (no prevailing party status where case dismissed as moot); City of Charleston v. Masi, 362 S.C. 505,

125). The Supreme Court had the final say on the merits of the underlying appeal. It did not affirm the lower court opinions, instead concluding that since Roper Pond had proceeded with and completed the challenged construction during the pendency of the appeal, the case was moot. While Roper Pond "got its way" by proceeding with construction, such action cannot now be used to bestow prevailing party status.

Yet overlooking the import of the ultimate disposition of the underlying case, the ALC finds that Roper Pond is the prevailing party relying solely on its own order and that of the Court of Appeals. (R. p. 42). If such were the case, a party could lose at the trial court level and on appeal, prevail on certiorari, yet be sanctioned under the statute. At base, the ALC determined that Roper Pond is entitled to attorneys' fees and costs simply because it agreed with Roper Pond's position in the underlying proceeding. The ALC was required to look beyond its own decision and that of this Court in determining prevailing party. The ALC should have considered the ultimate disposition and how that result was reached. Specifically, the ALC should have assessed the import of the Supreme Court's Opinion dismissing the case as moot (due to relief being foreclosed) on the question of prevailing party.

A case is moot when a judgment, if rendered, would not have any practical legal effect upon existing controversy and it becomes impossible for the court to grant any effectual relief. City of Charleston v. Masi, 362 S.C. 505, 508, 609 S.E.2d 301, 303 (2005). The State Action Statute presumes that there would only be a prevailing party *if* the court could grant relief to that party. See, e.g., Cornelius v. Oconee Cty., 369 S.C. 531, 539, 633 S.E.2d 492, 496 (2006) ("A

510, 609 S.E.2d 301, 304 (2005) (same).

party whose position prevails in a declaratory judgment dispute with a state agency may be awarded fees under § 15–77–300.").

South Carolina's appellate courts have ruled on the impact of a dismissal on mootness grounds under a § 15-77-300 cause of action in only two cases. In both of those cases the courts held that a party cannot claim prevailing party status if the ultimate disposition of a case is a mootness dismissal.[14]

In Douan, the Plaintiff whose challenge to the county's sales and use tax referendum was rendered moot by Supreme Court's decision voiding election results was not a "prevailing party," under provision authorizing award of attorney fees to the prevailing party under the State Action Statute.. Id. In City of Charleston v. Masi, 362 S.C. 505, 609 S.E.2d 301 (2005), the City of Charleston asked the Court to declare that the residents of the Town of James Island be prohibited from voting in elections for the James Island Public Service District ("District"). When the Court, in another case, declared that the Town was a nullity because it had been created by unconstitutional legislation, the Masi court dismissed the case as moot because it could no longer grant the relief sought. The District sought to recover fees under the State Action Statute, asserting itself as the prevailing party. The Supreme Court rejected the petition on the basis that because the case was dismissed as moot, there can be no prevailing party.

The ALC erroneously reads into Masi a requirement that a party is barred from claiming

---

[14]The only other S.C. court to consider the impact of mootness on a fee-shifting statute is Sloan v. Friends of Hunley, 393 S.C. 152, 711 S.E.2d 895 (2011). In that case, the Court found that under the FOIA statute, the plaintiff was a prevailing party despite a ruling that the underlying action was moot because "[h]onoring legislative intent as expressed in FOIA by awarding attorney's fees in these circumstances may serve as an impetus for public bodies to comply with a FOIA request and thus avoid the imposition of an attorney's fee award." Id. at 156-58, 897-98. That rationale is inapplicable under the State Action Statute.

prevailing party status only when the trial court does not issue a ruling on the merits. Masi does not stand for that proposition. While the Masi court noted that the lack of a specific ruling was a factor in denying prevailing party status, it also found that prevailing party status was not available *because of the mootness dismissal.* Id. at 510, 304 ("The District is not a prevailing party because its degree of success is nonexistent given that the circuit court did not specifically find for either party **and because this case is being dismissed as moot.**") (emphasis added).

Here, as with Douan and City of Charleston v. Masi, the posture of the case precludes any party from claiming "prevailing party" status.

Tellingly, the Supreme Court's Order of dismissal supports such a conclusion here. The Court acknowledged the existence of a problem and that the Department should take enforcement action if sediment control issues are occurring on the site: "As to Petitioners' concerns regarding post-construction stormwater, sedimentation, and water-quality issues, counsel for Respondent South Carolina Department of Health and Environmental Control (DHEC) assured this Court at oral argument that DHEC has the ongoing ability to receive and investigate postconstruction complaints." (R. p. 125, note 2). On this passage, the Supreme Court was attentive to and solicitous of the Town's concerns. The Supreme Court's Order attests to legitimate judicial concern over the conduct of Roper Pond and DHEC. Id. The fact that the Supreme Court dismissed this case as moot after hearing arguments and indicating a concern that meaningful judicial relief was no longer possible, and without affirming the Court of Appeals, takes "prevailing party" status off the table. See City of Charleston v. Masi, 362 S.C. 505, 510, 609 S.E.2d 301, 304 (2005); Sessions v. Withers, 327 S.C. 409, 488 S.E.2d 888 (Ct. App. 1997) (declining to determine whether party was a "prevailing party" entitled to an award of costs where

matter on appeal dismissed as moot).

Yet under the ALC's rationale, an applicant could plow forward with construction, causing the case to become moot, even thought the challenger would have prevailed under the law if relief had not been foreclosed by the applicant's actions. The ALC's attempt to spin the Supreme Court's mootness dismissal into an explicit affirmation of the lower courts' rulings on the standing issue has no legal support. Contrary to the theory hypothesized by the ALC, the Supreme Court's decision to dismiss the case as moot does not evidence an intent to affirm the Court of Appeal's decision. The case was simply dismissed because Roper Pond's actions made "it . . . impossible for this Court to grant any redress in the context of the issues as framed and litigated below." (R. p. 125).

Because Roper Pond is not the "prevailing party," the ALC's order should be reversed.

II. <u>The ALC Erred in the Amount of Fees and Costs it Awarded to Roper Pond.</u>

Even if Roper Pond were entitled to a fee award under the State Action Statute, the ALC erred in compensating Roper Pond for all the fees and costs it claimed in the case.

A. The Lack of Information Provided by Roper Pond Warrants a Substantial Reduction in the ALC's Fee Calculation.

If Roper Pond's failure to itemize or describe the attorney time for which it claims fees is not an outright bar to recovery under § 15-77-330, certainly a substantial reduction in the fee award is appropriate. The lack of information provided by Roper Pond prevented the ALC from complying with the State Action Statute's requirement that a fee award be limited to "reasonable time expended." <u>See</u> S.C. Code §15-77-300(B). The ALC was unable to, and did not, consider whether Roper Pond's time entries were excessive, redundant, or otherwise non-compensable. A

fee reduction is necessitated on this basis.

Applicable Standard for Fee Calculation:

The State Action Statute provides the following standard for calculating fee awards:

> B) Attorney's fees allowed pursuant to subsection (A) **must be limited to a reasonable time expended at a reasonable rate.** Factors to be applied in **determining a reasonable *rate*** include:
>
> (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 §15-77-300(B) (emphasis added). Note that the primary requirement of this standard is for determination of "reasonable time expended" by the attorney and of a "reasonable rate" at which that time should be billed. In determining what *rate* is reasonable, the State Action Statute provides five factors to consider.

This statutory standard is almost identical to the traditional lodestar method of fee calculation. "A lodestar figure is designed to reflect the reasonable time and effort involved in litigating a case, and is calculated by multiplying a **reasonable hourly rate** by the **reasonable time expended**." Layman, 376 S.C. at 457, 658 S.E.2d at 332 (emphasis added). Both lodestar and the State Action Statute rely on the same reasonable rate and reasonable time determination. Indeed, until recently, the method for calculating fees under the State Action Statute was purely lodestar. As held by the Supreme Court in Layman in 2008: "lodestar analysis is the proper method for determining an award of 'reasonable' attorneys' fees under the State Action Statute." Id. At the time Layman was decided, the State Action Statute did not say anything about how its fee awards were to be calculated. See Id. at 452-54, 658 S.E.2d at 329-30. After Layman, in 2010,

the statute was amended to add subsection (B) above, making explicit the "reasonable time expended at a reasonable rate" standard.

The current standard for calculating fees under subsection (B) includes lodestar ("reasonable time expended at a reasonable rate") as well as five additional factors for evaluating what is a reasonable *rate*. However, nothing in the language of §15-77-300(B) suggests that the lodestar method has been rejected (quite the contrary), or that the five factors constitute the entire scope of analysis, or that a party seeking fees is not bound to provide information sufficient for the court to assess "reasonable time expended."

Application of the Fee Calculation Standard by the ALC:

A court must receive an explanation of how attorney time was spent in order to determine whether that time is reasonable. This conclusion is self-evident, and it also has been stated repeatedly in cases evaluating "reasonable time expended" under lodestar. For example, in Liberty Mut. Ins. Co. v. Employee Res. Mgmt., Inc., the South Carolina district court, applying state law, explained as follows:

> [I]t has been held that the **court will pay close attention to the detailed bill submitted by plaintiff's counsel** recognizing that **counsel for a party statutorily entitled to recover attorney's fees must** exercise billing judgment and **exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary**. Hours that are not properly billed to one's client also are not properly billed to one's adversary pursuant to statutory authority.

176 F. Supp. 2d 510, 536-37 (D.S.C. 2001) (internal quotations omitted) (emphasis added). Indeed, in the context of this analysis, "[p]roper documentation is the key to ascertaining the number of hours reasonably spent on legal tasks." Guidry v. Clare, 442 F. Supp. 2d 282, 294 (E.D. Va. 2006). Therefore, courts have consistently required a party seeking fees to submit

documentation sufficient to assess the legitimacy of individual time entries. See, e.g., SunTrust Mortg., Inc. v. AIG United Guar. Corp., 933 F. Supp. 2d 762, 777 (E.D. Va. 2013) ("fee claimants must submit documentation that reflects 'reliable contemporaneous recordation of time spent on legal tasks that are **described with reasonable particularity,' sufficient to permit the Court to weigh the hours claimed and exclude hours that were not 'reasonably expended.'**" (emphasis added) (citing Hensley v. Eckerhart, 461 U.S. 424,103 S. Ct. 1933 (1983))); ECOS, Inc. v. Brinegar, 671 F. Supp. 381, 394 (M.D.N.C. 1987) ("At the very least, an attorney should identify the general subject matter of his time expenditures."). Once again, there is no reason to conclude that the requirement differs for determining "reasonable time expended" under the State Action Statute.

The conclusion that Roper Pond must provide an explanation of how its attorneys spent their time in order for the ALC to determine whether that time constitutes "reasonable time expended" under §15-77-300(B) is not revelatory. This underlying case was legally and procedurally complex, and it is impossible for the ALC to "ballpark" that the total hours submitted by Roper Pond seems "about right" for the nature of such a case. Yet, the ALC required no explanation or description whatsoever of the tasks represented by Roper Pond's time entries and instead accepted each of those time entries as submitted.

In failing to require itemization, the ALC misapplied the legal standard under §15-77-300(B). Particularly, the ALC applied only the five factors listed in 300(B) and declined any consideration of Roper Pond's individual time entries, on the basis that lodestar had been supplanted. (See, R. pp. 4-13 ("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 ALC's order provides nothing that might be considered an analysis of Roper Pond's time entries. Rather, in discussing those entries, the ALC basically notes only that the case was complex and that the bulk of Roper Pond's time entries are attributable to a lawyer billing at a lower rate than another of Roper Pond's lawyers. (R. pp. 5-6). These observations are practically meaningless as it relates to whether the time claimed by Roper Pond's attorneys is reasonable. The ALC provides zero analysis of individual time entries, nor could it, and the ALC forgoes such analysis in the name of the five factors in 300(B). This was a serious error and misconstruction of the law.

This error is particularly problematic here, based on a number of considerations. First of all, Roper Pond's attorneys indicated that their firm has represented Roper Pond's parent company in more than one hundred other matters. (R. p. 12). Under the circumstances, one cannot just assume that any time billed to this client from this firm is wholly related to the Town's legal challenge. Second, as described herein, there are several categories of time that must be entirely excluded from the Court's fee calculation, including time spent on administrative proceedings, on fee proceedings, and on the individual Petitioners' claims. Yet the Court has not been provided the information to make such exclusion. Finally, there are any number of deficient or unjustified time entries which courts have found appropriate for exclusion from the "reasonable time" calculation, including: multiple lawyers billing for the same meeting/call/hearing/work, excessive conferencing and meeting time, discretionary travel time and travel expenses, and work that is related but not directly tied to the legal challenge.[15] Such

---

[15]See, e.g., Daly v. Hill, 790 F.2d 1071, 1079 (4th Cir. 1986). In that case, the prevailing attorneys sought compensation for 107.4 hours for conferences with their client. The district court found that only 10 hours were reasonable under the lodestar calculation. The Fourth Circuit

non-compensable entries simply cannot be identified here because Roper Pond failed to provide any information on how its counsel spent their time, and the ALC determined that it was unnecessary to do so.

A proper remedy for Roper Pond's failure to provide descriptions of its attorneys' time is a reduction in the fee award. "Where the documentation of hours is inadequate, the district court may reduce the award accordingly." Hensley, 461 U.S. at 433, 103 S. Ct. at 1939. Given that this Court has absolutely no descriptive information for Roper Pond's time entries, the reduction must be significant. Indeed, in addressing the same issue, the court in SunTrust Mortgage applied a 20% reduction in fees because the petitioning party had submitted time entries with "block billing." 933 F. Supp. 2d at 779. "Block billing" occurs when an attorney uses one generalized description to cover time spent on multiple tasks. Id. at 778. The court in SunTrust Mortgage had much more information on time entries than does this Court, and it still found that a 20% reduction was necessary to account for its inability to assess whether all time was

---

affirmed, holding:

> Street's commitment to work closely with his client is certainly laudable. Conferences with clients are an important part of any litigation and attorney time reasonably spent with clients in preparing a case should be part of the hours compensated in an attorney's fee award. **The burden of proving entitlement to compensation, however, rests with the prevailing attorneys**. Hensley, 461 U.S. at 437, 103 S.Ct. at 1941. In this case, Street's **supporting affidavits are not detailed. They do not illuminate the way in which the many hours of client conferences may have aided Street's preparation of the case**. Accordingly, we cannot find that the district court erred in finding that the requested hours were unreasonable, and that compensation for ten hours was proper under the circumstances.

(emphasis added). The courts in Daly were given more detail on the time claimed than this Court has been given, yet a substantial reduction was still appropriate.

reasonably expended. The Town submits that a drastic reduction in fees is necessary to account for the fact that this Court has no idea what Roper Pond's time entries actually represent. Under the standard of §15-77-300(B), Roper Pond cannot recover for every minute of time it claims to have spent on this case, without providing an itemized description of how that time was spent.

B. The ALC Erred in Awarding Full Costs and Fees Against a Single Petitioner.

The State Action Statute allows for "*reasonable* attorney's fees to be taxed" against a political subdivision if "the court finds that there are no *special circumstances* that would make the award of attorney's fees *unjust*." S.C. Code §15-77-300 (emphasis added). In contravention of this standard, it is patently unreasonable and unjust to levy all fees and costs against one governmental petitioner under the State Action Statute, when the same claims were pursued with the same attorneys by sixteen non-governmental petitioners. The role of the individual petitioners in this case undoubtedly constitutes a "special circumstance" for which the ALC failed to account.

In order to recover fees under the State Action Statute, a party must have prevailed in a "civil action brought by the State," during which the governmental entity acted "without substantial justification in pressing its claim." S.C. Code § 15–77–300. As explained above, the role of the sixteen individual petitioners in this case calls into question the very application of the State Action Statute and whether this case can be considered a civil action brought and pressed by the state. (See, Section I.A., infra). At a minimum, though, Roper Pond cannot recover its full costs and fees under this Statute, when nothing suggests that this case took a different track because of the Town's involvement. The ALC did not, and could not, find that the Town's

involvement in this case multiplied proceedings or required Roper Pond to expend significant additional resources. On the contrary: all the petitioners in this case were represented by the same attorneys; all the petitioners made the same claims; and the individual petitioners could have asserted those claims without the Town as a co-party. Where the basis of an award under the state action statue is the Town's propagation of unwarranted legal action, but sixteen other non-government petitioners were equally "pressing the claims;" the rationale for awarding full fees and costs against the Town falls away. The State Action Statute accounts for the possibility of this incongruent result by commanding that courts consider the presence of special circumstances. The ALC simply failed to apply that language here, producing a result that is unreasonable and unjust.[16]

The analysis of this issue in the ALC's Order is both incomplete and inaccurate. The ALC relies exclusively on the Supreme Court's opinion in Layman v. State, 376 S.C. 434, 658 S.E.2d 320 (2008), which actually supports the Town's position. First of all, the posture of Layman is completely dissimilar to the one at play here. As far as the Town has been able to ascertain, no South Carolina court has ever addressed the question of how the presence of non-governmental co-parties impacts an award under the State Action Statute. For certain, no South Carolina court has ever addressed the State Action Statute under the unusual circumstances here, where governmental and non-governmental parties jointly initiated and pursued the same legal challenge. Layman is no exception, in that it has nothing to do with whether a governmental entity can be taxed with fees and costs attributable to co-parties. Layman does not come close to

[16]This matter is once again complicated by the fact that Roper Pond has not provided the information necessary to determine which time entries might be attributed to the Town and which entries relate directly to the sixteen individual petitioners.

answering the critical question overlooked by the ALC, which is whether the Town should be taxed with full fees and costs, when those same fees and costs would have been incurred defending against the sixteen other petitioners.

Layman involves a situation of partial success in claims against the government, not a situation of the government only being partially responsible for fees and costs. 376 S.C. at 441, 658 S.E.2d at 324. The state was the only defendant in Layman, so all the fees and costs incurred were attributable only to the state's refusal to capitulate. Rather, some of the class action plaintiffs in Layman were successful, while some were not, and the Court considered whether class action counsel could still recover all fees and costs. Id. Because the claims of the successful and unsuccessful plaintiffs were "virtually indistinguishable," the presence of the unsuccessful plaintiffs did not add significantly to the time expended by counsel, and the court determined that a minor reduction would account for time attributable solely to the unsuccessful claims. Id. at 459, 658 S.E.2d at 333. Paralleling to this case, because the seventeen petitioners brought the same claims, only a very small percentage of Roper Pond's fees and costs can be specifically attributed to the Town, and the rest would have been incurred regardless of the Town's involvement. The underlying point of Layman's fee analysis is actually the exact same as the Town is making here: when parties advance the same claims with the same attorneys, counsel's time attributable to those claims does not change appreciably based on the presence of any particular party. In Layman, that logic worked in favor of awarding fees, but here it works in the complete opposite direction.

The ALC abused its direction in levying all fees and costs incurred by Roper Pond in this case against 1/17th of the petitioners. Such award is not "reasonable" under § 15–77–300, and

the "special circumstances" of numerous non-governmental co-petitioners, which has never before been encountered under South Carolina case law, makes the award "unjust."

C. The ALC Erred in Awarding Costs and Fees Incurred During Administrative Proceedings.

The State Action Statute allows fees in "any *civil action* brought by the State, any political subdivision of the State or any party who is contesting state action." S.C. Code § 15–77–300. "**[T]he South Carolina Supreme Court has already decided that an administrative proceeding is not a civil action within the meaning of § 15–77–300**." Just v. Spartanburg Cmty. Coll., No. 3:12-CV-03115-JFA, 2013 WL 3833063, at *4 (D.S.C. July 23, 2013) (citing McDowell v. S.C. Dep't of Soc. Servs., 304 S.C. 539, 405 S.E.2d 830 (S.C.1991)). Contested cases before the ALC indisputably are not civil actions and are legally defined as administrative proceedings. Further, a review of appellate case law does not reveal a single occasion where our state's courts have considered a State Action Statute award arising from the ALC. Yet, Judge McLeod awarded all fees and costs incurred during the administrative process.[17]

The ALC's legal definition as an executive agency leaves no room for dispute that its proceedings are not covered by the State Action Statute. The ALC is an agency and an arm of the executive branch: "There is created the South Carolina Administrative Law Court, *which is an agency* and a court of record *within the executive branch* of the government of this State."

---

[17]Once again, Roper Pond's time sheets do not provide information sufficient to determine whether entries are attributable to proceedings before DHEC, the ALC, appellate courts, or other. The Town is speculating, based on dates, as to the proceedings which Roper Pond's fees and costs are attributable, and Roper Pond has not contested that it is recovering fees and costs for proceedings before the ALC.

See S.C. Code § 1-23-500 (emphasis added). Tellingly, the ALC was created by the South Carolina *Administrative Procedures* Act, and that Act makes clear that judicial review occurs only after the ALC's final decision: "A party *who has exhausted all administrative remedies* available within the agency and *who is aggrieved by a final decision in a contested case* is entitled *to judicial review* pursuant to this article and Article 1." See S.C. Code § 1-23-380 (emphasis added). Only by ignoring the ALC's enabling statute, and the ALC's operation consistent with that statute, could one conclude that a contested cases before the ALC constitutes a "civil action" and not an "administrative proceeding."

Comparison of the State Action Statute to South Carolina's primary fee authorization statute, the South Carolina Frivolous Proceedings Act ("SCFPA"), is particularly instructive and, indeed, decisive. The SCFPA explains that: "An attorney or pro se litigant participating in a **civil or administrative action** or defense may be sanctioned" for a violation of the Act. S.C. Code § 15-36-10(A)(4) (emphasis added). The Act likewise explains that its terms apply to "[a] pleading filed in a civil **or administrative action**" or "[a] document filed in a civil **or administrative action**." Id. at (A)(2)-(A)(3) (emphasis added). In light of the SCFPA's specification that it allows for recovery of fees in an "administrative action," the State Action Statute's limitation that it applies to "any *civil action*" is obviously meaningful.

Our legislature intended that the SCFPA capture ALC and other administrative actions and that the State Action Statute not, and that intent reflects a sound logical basis. The SCFPA authorizes fees and costs against any party, whether a governmental entity or not, on the basis *frivolous* legal action. See Id. at (A)(4). In contrast, the bar for fee recovery under the State Action Statute is much lower, in that a governmental entity only must have acted "without

substantial justification." In short, it is much easier to get fees under the State Action Statute, if that statute is applicable. The inclusion of "administrative action" only in the SCFPA reflects the legislature's determination that a party seeking fees in an administrative forum should not benefit from the State Action Statute's low bar, but rather should have to meet the higher standard of frivolity in order to recover. The legislature had any number of good reasons for reaching such determination, including that the ALC process is set up as a more efficient and curtailed alternative to traditional civil court. Roper Pond could have pursued fees and costs against the Town under the SCFPA, but presumably it chose to utilize the state action statue because of its much easier standard. It was error for the ALC to apply the State Action Statute to its own proceedings, and Roper Pond should have been required to satisfy the SCFPA's standard of frivolity.

The ALC's holding on the applicability of the State Action Statute to administrative proceeding is inconsistent, in that the court concedes that fees are not recoverable for the first stage of administrative review, which occurs before the DHEC Board.[18] (R. p. 9 ("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.")). Nothing in the language of the State Action Statute or the Administrative Procedures Act allows such a distinction to be drawn between the first and second stages of administrative review. The ALC operates as a final review step within the

[18]The DHEC Board operates as the first level of review for challenges to permit, license, and certification decisions made by the Department. S.C. Code. § 44-1-60. After the DHEC Board issues its decision, the permit challenger may file in the ALC. Id.

decision making process of executive agencies. While the ALC sits over a variety of state executive agencies, and is not confined within a single agency like the DHEC Board, the ALC is for all intents and purposes acting as DHEC when it considers contested case challenges to DHEC permitting decisions (hence the ALC's legal definition as an agency). As it relates to the State Action Statute's authorization of fees on the basis of claims pressed in a civil action, the function of the ALC and the DHEC Board are indistinguishable.

The ALC attempts to make a distinction based on the Supreme Court's opinion in McDowell v. S.C. Dep't of Soc. Servs., 304 S.C. 539, 405 S.E.2d 830 (1991), the case in which State Action Statute fees were first denied for agency proceedings. The ALC notes that the fee denial in McDowell was for a hearing at the agency level (the Department of Social Services) and contrasts the nature of that purportedly informal hearing with the more structured hearings in the ALC. (R. p. 9). Of course, the formality of an administrative hearing makes it no less administrative and no more of a "civil action." McDowell occurred before creation of the Administrative Law Court, during a time when appeals from the agency review process went to circuit court. See Id. at 541, 405 S.E.2d at 832. While the holding of McDowell was necessarily limited to the DSS hearing, as it was the only administrative review in place at the time, the creation of a second administrative review step (the ALC) does not change the rationale. Indeed, the critical distinction that appears from case law and from the plain language of the statute is drawn between agency review and judicial review. See Transportation Ins. Co. & Flagstar Corp. v. S.C. Second Injury Fund, 389 S.C. 422, 433, 699 S.E.2d 687, 692 (2010) (Pleicones, J., concurring (an "administrative proceeding is a civil action for purposes of the attorneys fees statute once it reaches circuit court, but not while before agency."); McDowell, 304 S.C. at 543,

405 S.E.2d at 833 ("[A]n agency typically 'presses its claim' in the courts in the context of actions for judicial review."); Just, 2013 WL 3833063, at *6 (declining to award fees under § 15–77–300 for a case before the State Ethics Commission because such proceedings are "not a civil action.").

The plain statutory language of the State Action Statute and Administrative Procedures Act paint a clear picture, and the limited available appellate case law does nothing to mottle it. For purposes of this case, a "civil action" is that which occurs subsequent the ALC.[19] Roper Pond's time sheets do not provide information sufficient to determine whether entries are attributable to administrative or judicial proceedings. Indeed, Roper Pond's time sheets provide no description at all of the tasks corresponding to time entries. Under the circumstances, the ALC's levy of fees and costs for all proceedings is an abuse of discretion.

D. The ALC Erred in Awarding "Fees on Fees."

Roper Pond has never argued, and the ALC never concluded, that the Town is acting "without substantial justification" in opposing imposition of the fees, costs, and sanctions sought by Roper Pond. Rather, the focus of Roper Pond's arguments and the ALC's analysis was entirely on whether the Town's pursuit of the merits of this case was "without substantial justification," warranting an award under the State Action Statute: "Roper Pond asserts that the Town acted without substantial justification *because Petitioners failed to offer evidence at the hearing on the merits* to support its allegations that DHEC acted in conflict with established

[19]In the alternative, the administrative nature of the proceedings before DHEC and the ALC is a "special circumstance" upon which the ALC should have determined a full fee award to be unjust, given that no precedent exists for an award of State Action Statute fees in the ALC, and the Town could not have been apprised of the risk of exposure to such fees.

regulations and the relevant case law." (R. p. 47 (emphasis added)). Nevertheless, the ALC has awarded Roper Pond fees and costs incurred during its pursuit of fees, costs, and sanctions–so called "fees on fees." (R. p. 10). Where it is Roper Pond "pressing its claim" to fees and sanctions, and where the Town has not been found to be acting "without substantial justification" in opposing that claim, the State Action Statute does not permit an award.

The ALC's conclusion that the Town lacked "substantial justification" in pursuing the merits of this case does not equate to a conclusion that the Town lacks justification for opposing Roper Pond's fee/sanction petition. Rather, the Town's arguments in opposition to the fee/sanction petition, which are presented herein and were also presented during the ALC proceedings, have unquestionable justification, apart from any relation to the merits of the case. The Town surely cannot be faulted, for example, on the basis that it has contested the ALC's awarding of fees for administrative proceedings or Roper Pond's failure to itemize its time entries. Yet, without reference to the justification behind the Town's arguments in opposition to fees/sanctions, the ALC simply awarded Roper Pond fees and costs for these proceedings.[20]

When a prevailing party seeks to recover "fees on fees" under the State Action Statute, that party must also prove that the governmental entity's defense of fees/sanctions is "without substantial justification." To hold otherwise would be to place the governmental entities subject to the State Action Statute in the horribly untenable position of having to choose between simply conceding whatever fee/sanction petition is submitted by the prevailing party, regardless of its

---

[20]Once again, the lack of any detail in the fee petition makes it impossible to determine exactly how much attorney time Roper Pond has been compensated for that is attributable to the pursuit of fees, costs, and sanctions. However, the ALC indisputably concluded that such time is compensable.

flaws, or defending with knowledge that the imposition of additional fees and costs is automatic. Under the plain language of the State Action Statute, and as a matter of sound legal policy, governmental entities must be free to defend flawed fee/sanction petitions, with knowledge that additional fees will only be imposed upon a separate finding of no substantial justification.[21]

The ALC's legal conclusions do not permit an award of "fees on fees." The ALC's conclusion that the Town pressed the merits of this underlying case "without substantial justification" is not a sufficient finding to support Roper Pond being paid for the fee proceedings. The award levied by the ALC therefore must be reduced.[22]

III. The ALC Erred in Concluding that the Town Sought Administrative Relief Solely for the Purpose of Delay.

Administrative Law Court Rule 72 provides for the possibility of sanctions when the judge determines "that a contested case, appeal, motion, or defense is frivolous or taken solely for purposes of delay." Here, Roper Pond expressly conceded that the case was not frivolous.

---

[21]Such conclusion is further bolstered upon consideration that the basis for cost and fee recovery under § 15–77–300 is a state entity "*pressing its claim*" without "substantial justification." (emphasis added). During the Town's appeal of the permits issued to Roper Pond, it was indeed the Town that was "pressing" the claims. However, following the conclusion of such appeal, it is Roper Pond that made the independent decision to pursue fees and sanctions, through proceedings not driven or "pressed" by the Town.

[22]South Carolina case law is of little help with this issue. The ALC cited the McDowell case, which does levy fees against DSS for its defense against an award under the State Action Statute. However, the Supreme Court in McDowell provides only one sentence on the entire issue, and it is impossible to determine whether the Court's holding is based on a conclusion that such defense also lacked substantial justification. See McDowell, 304 S.C. at 543-44. For what it's worth, the headnote analysis reflects the Town's position: "Food stamp applicant who was awarded attorney fees based on determination that Department of Social Services' position in denying food stamps was not substantially justified **was also entitled to attorney fees for litigation and appeal seeking to secure attorney fees, on ground that Department was not substantially justified in opposing attorney fees**." Id. (Headnote 6).

(R. p. 812). Thus, the ALC's sanctions award rests entirely on its conclusion that the Town brought this case "solely for purposes of delay." (R. p. 61). The ALC's basis for reaching such conclusion is significantly flawed for the reasons that follow.

A. The Evidence Does Not Support a Conclusion that the Town Brought the Case Solely for Purposes of Delay

"Solely" is defined as "without another" or "to the exclusion of all else." See "Solely," Merriam-Webster, http://www.merriam-webster.com/dictionary/solely. Thus, for a challenge to be taken "solely" for the purposes of delay, there can be no other purpose for which the challenge is commenced. In other words, a case brought "solely for the purposes of delay" requires a demonstration that no legitimate basis for initiating the action exists and a lack of intention or desire to achieve resolution of the issues raised. Delaying or preventing a project is undoubtedly a desirable outcome in a challenge to a contentious project, but only if that delay is brought about solely for the sake of delay, i.e., harassment, is Rule 72 implicated. As discussed thoroughly below, the Town had a legitimate motivation and rationale for initiating this case.

The legitimate purposes for which the challenge was commenced include, inter alia, protecting interests recognized by law, such as the financial, recreational and aesthetic harms asserted by the Town of Arcadia Lakes. (R. pp. 138-139; 1130-1134). The Town of Arcadia Lakes raised these legitimate concerns regarding Roper Pond's project after having sought legal advice and counsel related to those concerns.

Through its 30(b)(6) deposition, the Town articulated legally recognized interests that would be affected by Roper Pond's project. Richard Thomas, then-mayor of Arcadia Lakes, testified as to the Town's justification for filing this contested case, including that water from

Roper Pond goes straight under Trenholm Road into Cary Lake, which is in the town of Arcadia Lakes. (R. pp. 1146 - 1148); the Town's desire to protect the environmental quality of Cary Lake; the Town's concern for property values, economic impact, and stormwater problems. (R. pp. 1146-1152; 1217-1218). Mayor Thomas explained that the project will cause "potential harm to the water flowing through the project under North Trenholm Road, and into Cary Lake" which would work a "harm to the environmental interest of the town." (R. p. 1146, lines 16-21).

Mayor Thomas further explained the Town's justification for filing this case on the basis that Roper Pond's project stands to damage the Town's interest in maintaining its character and desirable attributes. Mayor Thomas noted that "[o]ur town motto is seven lakes - one town." (R. p. 1147, lines 3-4). The "seven lakes [within our borders] are a vital part of our identity" and environmental harm to Cary Lake stands to damage this identity. (R. p. 1147, line 3). Mayor Thomas cited the risk of "[h]arm to the aesthetic interest of the Town of Arcadia Lakes being that the project is surrounded on three sides by the town" and that water flowing through the project flows directly into a lake within the Town's borders. (R. p. 1146, lines 20-22). The diminishment of the aesthetics, character and environment of the Town which would result in decreased demand for residing in the Town provide the motivation and justification for the Town's election to file the contested case proceeding; the advice and counsel of its attorneys provide the factual and legal justification.

Further, the permit and project threatened the Town's ability to comply with federal law. Mayor Thomas noted that "we are responsible for the water that flows into Cary Lake as well as

out through our NPDES rules and regs."[23] (R. p. 1152, lines 11-13). The Town's ability to comply with federal law provided further substantial justification for its decision to file the contested case proceeding.

None of this testimony was contradicted. The ALC does not deny the Town's interest in "protecting the environmental quality of Cary Lake" and interest in "maintaining its character and desirable attributes, including aesthetic appeal," all of which formed the basis of its decision to seek review of the DHEC authorization. Nor does the ALC deny the Town's testimony that there would be a "diminution of property values within the Town" as a result of Roper Pond's project.

Instead, the ALC relies exclusively on cherry-picked statements – not made by the Town – and considered in isolation, while ignoring all of the other statements reflecting the reasons why the Mr. Thomas wanted to stop or delay the project. For example, Mr. Thomas states "I believe that the town was misled and deceived in the initial meetings 3+ years ago when the same developer came to us for our support and the support of the adjacent neighborhood to rezone and then used the rezoning to restructure his plans for monetary gain." (R. pp. 291-292). Yet the ALC finds fault with the Town for not obtaining and reviewing the plans within two days.[24] (R.

---

[23]Mayor Thomas elaborated on the Town's responsibilities under the NPDES provision of the Clean Water Act as follows: "The town is responsible for what comes into the town and what leaves the town as far as water quality. If the water quality coming into the town is not regulated by the town and we allow it to flow through the town [into downstream water bodies], then the way I understand the NPDES, we would then be responsible. Therefore, we could -- it could result in financial and/or litigation for the mitigation of that damage. Whatever that would be." (R. p. 1168, lines 5-15).

[24]The ALC relies upon Mr. Thomas' email dated December 17, stating the need to obtain the plans and *inquiring* whether the project could be appealed, faulting the Town for not having yet assessed the plans, even though the permit was issued a mere two days before on December

p. 29-30).

After Mayor Thomas felt the Town had been deceived, and after Roper Pond refused to develop the property in the responsible, low-density way as previously agreed, then the Mayor finally resorted to discussing the use of delay as a negotiation tactic and to obtain more information about the newly-proposed development. (R. pp. 1227-1230). While Mayor Thomas wanted to slow the process, at least to allow it to fully assess Roper Pond's new plans, his communications do not show that the Town brought the case "solely for the purpose of delay."

The Town has found no support for the contention that a case could be reasonable or meritorious, i.e., not frivolous, and also brought **solely** for the purpose of delay. While a party could file a legally and factually sound case for purposes of delay; there has never been any instance where a reasonable attorney or party did so **solely** for the purpose of delay. Furthermore, the unlikely scenario of a reasonable filing **solely** for the purpose of delay is not one that can be proven by use of a threadbare assumption. Yet that is what the ALC did.

The ALC completely ignored evidence supporting the Town's reasonable and legitimate purposes for bringing a challenge to the stormwater authorizations at issue in this case. The ALC's incomplete and one-sided analysis cannot support a finding that delay was the Town's sole purpose in bringing this case. Indeed, the ALC lists the reasons that the Town acted for purposes other than delay, but, in awarding sanctions, the ALC evaluated and dismissed those purposes as somehow inadequate. In doing so, the ALC misapplied the legal standard for sanctions and committed reversible error. For example, the ALC acknowledged the Town's stormwater concerns as a basis for it bringing this action, but then dismissed that purpose

15. Naturally, the Town desired time to obtain and review the plans.

because the Town purportedly had earlier opportunities for raising those concerns. (R. p. 59 ("[W]ith respect to the Town's concerns regarding the SWPPP for the Proposed project, the Town was afforded numerous opportunities to raise those concerns prior to the Department's decision to grant Roper Pond coverage under the [stormwater permit].")). Likewise, the ALC acknowledged the Town's non-stormwater concerns with the project, but then dismissed that purpose on the basis that it should have been pursued in another venue. (Id. ("The Town claims that the contested case was not brought 'solely for purpose of delay' because there were numerous concerns about zoning, compliance with the county land development ordinance, maintaining the character of the Town, diminution in property values in the Town, and faulty traffic impact studies. However, none of these alleged concerns related to the DHEC decision at issue in this contested case. Moreover, these concerns should be addressed through local zoning and land use authorities.")). The ALC's analysis clearly elevates the sanctions inquiry beyond the basic standard of whether the petitioner had any discernible purpose for filing and pursuing litigation other than delay, instead requiring the Town to demonstrate a purpose that the ALC found to be appropriate and to have been appropriately pursued.

Moreover, the ALC simultaneously faults the Town for having brought this action for the purpose of stopping construction of the apartment complex altogether. (See, e.g., R. p. 58). The ALC and Roper Pond are correct that the Town's ultimate objective was to win this case and to stop the project, as designed, from being constructed. Such purpose, as acknowledged and cited by the ALC, is inherently inconsistent with the idea that the only thing the Town sought to gain from this project was a delay. If delay alone was the Town's purpose, certainly the ALC or Roper Pond could have explained what the Town would stand to gain for such delay, but no

explanation has ever been offered. The ALC cannot simultaneously fault the Town for its desire to defeat this project and sanction the Town on the basis that it only desired delay.

The ALC's findings on sanctions, even when taken as complete and accurate, cannot support a conclusion that delay was the Town's only purpose for starting and continuing this action. The sanctions award must therefore be reversed and vacated in full.

The Town's long-standing counsel of over ten (10) years was present and participated in the discussions surrounding the factual and legal bases for filing the underlying contested case proceeding and testifies that he has seen no evidence to indicate that the Town filed the contested case hearing solely for the purposes of delay. (R. pp. 915-916). In fact, on February 17, 2009, during the time which the Town sought legal advice, Mr. McCall told the Town's attorney that "I believe the Town of Arcadia Lakes and citizens did the right thing in filing the appeal. I was glad I was able to help you get over this critical hurdle." (R. p. 922).

No evidence exists showing that the Town was under the impression that there were no legitimate legal arguments to be made. Instead, the Town had consistently and reasonably expressed its belief that there had been potential violations of DHEC regulations and zoning laws, as well as an unanticipated change in the proposed project. (R. pp. 328 (potential violations of DHEC regulations, and concerns over SCDOT enforcement); 333-334 (potential violations of zoning code); 913-917).

In sum, the ALC erred in concluding that the Town filed the contested case with the lone objective of delaying Roper Pond's project as required by SCALC Rule 72.

B. The ALC Improperly Attributed Positions and Statements to the Town.

Even if Richard Thomas' statements were read to reflect a desire only to delay the project

with no other rationale for such challenge, the ALC erred in treating the words and motivations of an individual voting member of Town Council as if they constituted official policies, positions, or actions of the Town. The Town, as a duly formed legal entity, cannot be imputed with the same motives or purpose as any particular official casting votes on Town Council. Rather, "[t]he governing body of a municipality acts as a collective body, not as individuals, and decisions made in this fashion are the product of debate and compromise." Bear Enterprises v. Cty. of Greenville, 319 S.C. 137, 139, 459 S.E.2d 883, 884 (Ct. App. 1995). Indeed, "[t]estimony of individual council members as to their motivations for [council decisions] is not competent evidence." Horry Tel. Co-op., Inc. v. City of Georgetown, 408 S.C. 348, 354, 759 S.E.2d 132, 135 (2014). The ALC committed reversible error in relying exclusively on individual motivations and in treating the Town as equivalent to one of its individual elected officials.

The Town of Arcadia Lakes legally adopted the council form of government on April 28, 1976. As stated in the Arcadia Lakes Town Code, "[t]he town shall be governed by the council form of government as provided in Sections 5-11-10 through 5-11-40 of the Code of Laws of South Carolina." Article 1, § 2-101. South Carolina's enabling statute for the council form of government dictates that matters of policy and administration are determined by vote of municipal council: "**All legislative and administrative powers of the municipality and the determination of all matters of policy shall be vested in the municipal council. Each member of council, including the mayor, shall have one vote**." S.C. Code § 5-11-30 (emphasis added). Under this form of government, the "Town" acts and speaks only by majority vote of Council. The positions or statements of a single Council member or the mayor are not imputed to the Town as a whole, nor do the statements of a particular voting member reflect the

policies underlying a majority vote of Council.

This Court in particular has emphatically rejected the idea that an individual council member's personal motivations or internal thought process can be ascribed to decisions of the council as a body. See Bear Enterprises, 319 S.C. at 139, 459 S.E.2d at 884. In Bear Enterprises, the plaintiff sought to pick apart the basis for a county council decision by deposing the individual council members and parsing their individual rationales for the group decision. However, this Court went out of its way to reject such approach as inconsistent with the council form of government:

> We note that Bear deposed Council members and presented their testimony as evidence to support Bear's argument that Council's decision was arbitrary. **We are aware of no authority allowing someone challenging action by Council to interrogate members individually to impeach Council's decision. The governing body of a municipality acts as a collective body, not as individuals, and decisions made in this fashion are the product of debate and compromise.**

Id. (emphasis added). This passage in Bear Enterprises is based in part on this Court's recognition that municipal councils rarely act with one mind, and decisions of council are likely to flow from a variety of individual motivations and justifications. The plain message of Bear Enterprises is that an individual council member's rationale in voting for a particular action cannot be used to indict the collective decision on that action.

Indeed, our Supreme Court has described such legal principle as fundamental in South Carolina jurisprudence. In Horry Tel. Co-op., Inc. v. City of Georgetown, Horry Telephone Co-op sought to attack Georgetown City Council's decision to deny its license. 408 S.C. at 350-51, 759 S.E.2d at 133. A couple of Council members had explained rationale for their individual votes that would have been unlawful. Id. at 351, 759 S.E.2d at 134 ("Essentially, HTC's

argument is that the individual members had motives for denying consent to the franchise agreement which were prohibited by the Act."). However, once again, the attempt to ascribe those individual motivations to the decision of the Council body as a whole was emphatically rejected:

> HTC relies almost exclusively on the trial testimony and depositions of individual city council members concerning their respective motivations for denying HTC's request. This testimony was improperly admitted over Respondents' objection. **Testimony of individual council members as to their motivations for denying consent is not competent evidence. We have stated that in reviewing decisions of municipal governments, "[m]unicipal records properly authenticated or verified are the only competent evidence of the proceedings of the transactions of governing bodies."** ...
>
> Essentially, HTC's argument is that the individual members had motives for denying consent to the franchise agreement which were prohibited by the Act. This argument asks this Court to inquire into individual city council members' motives behind their legislative acts. **This is a fundamentally inappropriate inquiry for a court.**

Id. at 354, 759 S.E.2d at 135 (emphasis added) (internal citations omitted). As explained in more detail below, the entire factual basis for the ALC's sanctions award is what the Supreme Court describes as a "fundamentally inappropriate inquiry."

Applying the fundamental principle in Bear Enterprises and Horry Telephone Co-op to this case, even if a particular member of Arcadia's Town Council had the purpose of pure delay when voting to file this underlying case, that does not become the intent of the Council body, nor of the Town and its 900+ residents. Indeed, such individual motivations should have been ignored entirely in favor of actual municipal records reflecting on the Council body as a whole.

Yet, in holding that the Town acted "solely for purposes of delay," the ALC relied exclusively on isolated comments from the Town's mayor, who is merely one voting member of

Town Council and a consulting engineer. See S.C. Code § 5-11-30. Specifically, the ALC explains its basis for sanctions as follows:

> As discussed above, Roper Pond cites to the numerous communications **between the Town's mayor and the engineers** who assisted the Town during DHEC's review of Roper Pond's SWPPP. In a December 17, 2008 email regarding the appeal of the Department's decision on the [stormwater permit] coverage for Roper Pond, **Mr. Thomas** wrote: "Let me know where you think we can go to delay and/or stop this project."

(R. p. 58 (emphasis added)). Regardless of whether Mayor Thomas's communications reflect an intent to file this lawsuit solely for purposes of delay, it is not Thomas who chose to file this lawsuit nor to continue it. Rather, Town Council has sole authority under the law to make such decisions and did make such decisions in this case. Mr. Thomas's communications at most reflect his individual motivation for the votes he cast as part of Town Council.[25] As discussed above, South Carolina law thoroughly rebukes the use of such individualized evidence to attack the collective decisions of Council. Roper Pond did not present, and the ALC did not consider, any municipal records, of the type described in Horry Tel. Co-op, which would be necessary to reflect on the purpose or intent of Council. Indeed, the only evidence that might properly be considered to reflect the purpose of Council (the Town) in pursuing this case does not reflect a desire to delay but does reflect many legitimate legal objections to the challenged project. (See,

---

[25]Charlie Cook, who has served as the Town's attorney for more than a decade, was present when Town Council made the decisions to pursue and continue this case, and he recounts those proceedings in an affidavit submitted in opposition to Roper Pond's fees/sanctions petition. (R. pp. 913-917). As Mr. Cook explains he was intimately involved in Town Council's decision to file the request for contested case hearing. Having maintained his role as Town attorney, he continued to be intimately involved in the Town Council's decision to continue pursuit of its legal challenges to Roper Pond. (Id.). Mr. Cook explains in his affidavit that Town Council relied upon the legal opinions of their own attorneys, as well as the independent legal analyses of two outside lawyers, in making the decisions to pursue this case.

e.g., R. pp. 913-917).

The ALC isolated and misread the communications of one voting member of Town Council and then imputed that isolated misreading to all of the Council and the Town, despite ample evidence showing that the Council as a whole acted on advice of several consistent legal opinions having nothing to do with delay. The ALC committed fundamental legal error in examining and imputing the motivations of Mayor Tomas.

C. The ALC Improperly Equated the Town's Opposition to the Apartments with Improper Purpose in the Case.

The Town, whether measured by the members of Town Council or it 900+ residents, did not want Roper Pond's apartment complex, as designed, to be built at the gateway to Town, using the Town's signature landmark as a stormwater conveyance. The ALC determined this fact to be fundamentally problematic. In granting sanctions, the ALC leaned heavily on the Town's opposition to the apartment complex, basing the award on the flawed logic that because the Town was interested in stopping the project altogether, its stormwater permit arguments raised in this case were necessarily an illegitimate front. Such rationale has no legal or logical basis and represents a fundamental misconception of the manner in which our legal system operates.

In explaining the basis for its sanctions, the ALC noted, as if revealing a nefarious plot, that "Roper Pond has presented evidence of numerous communications in which the Town's mayor and those acting on the Town's behalf admit that Petitioners were challenging the DHEC decision to issue [the stormwater permit] as a means to stop or delay the proposed development." (R. p. 59; see also p. 58 ("Roper Pond asserts that the Town's primary objective in appealing the Department's decision in this matter was not to challenge the technical sufficiency of the

[stormwater permit], but to stop or delay the construction of an apartment complex on the Roper Pond property.")).[26] The ALC did not explain why it was wrongful for the Town to challenge the apartment complex's stormwater authorization as a means to stop the project as designed, but such conclusion formed the linchpin for the ALC's sanctions analysis.

In actuality, there is nothing improper or inconsistent about the Town expressing its opposition to the apartment complex through this legal challenge. As an initial matter, it is not at all unusual for a party to litigate a narrow set of facts, or a narrow point of law, in order to pursue a broader objective. Such phenomenon does not represent an abuse of the law, but rather a natural part of the legal system. For example, an entire legal concept, the "test case," exists to describe litigation where factual scenarios (and litigants) are cherry-picked for the specific purpose of pursuing overarching legal objectives. See, e.g., District of Columbia v. Heller, 554 U.S. 570 (2008) (a case brought for the purpose of establishing an individual right to firearm possession under the Second Amendment, couched in the specific facts of one gun owner's permit denial.). Within the context of environmental citizen suits like the one at hand, it is practically inherent that broad opposition to a project or activity will be expressed through whatever narrow legal handle is available. For example, it is commonly understood and accepted that the National Environmental Policy Act (NEPA), which imposes purely procedural requirements, is wielded for the purpose of accomplishing an environmental plaintiff's

[26]Note that, as discussed more thoroughly below, both of these statements are directly contradictory to the basis of the ALC's sanctions finding, which is that the Town brought this case "solely for purposes of delay." If the Town brought this action to stop the apartment complex from being built, as the ALC and Roper Pond contend, then the Town's sole purpose was not delay. A delay in the development, with no change in design, would have done nothing to further the interests of the Town.

underlying substantive objectives. In all of these cases, one could accurately assert that the particular facts or particular legal mechanism involved in the case are merely incidental tools to accomplish the litigant's true purpose. Such phenomenon is ubiquitous and expressed in myriad scenarios like: a municipality attacking an adult business for its failure to comply with fire codes, when the municipality's ultimate objective is to force the business out of town; a citizen attacking the procedure through which a local council decision was made, when the citizen's real issue is with the substance of that decision; or a group challenging a new oil pipeline's failure to comply with President Trump's executive order requiring the use of United States steel, when the group is actually concerned with the environmental impacts of the pipeline. Nothing at all is wrongful or abusive about this strategy. Yet, the Town has been sanctioned here on the basis that its opposition to Roper Pond's stormwater plan is actually an expression of the Town's overall desire to stop the apartment complex as designed.

The ALC's logic is also significantly flawed in that it ignores the fact that a major reason why the Town wanted to stop the apartment complex is because of the project's stormwater plan. In other words, the Town was opposed to the apartments because of the stormwater plan for those apartments, and the Town's challenge to the stormwater plan is a natural expression of the Town's opposition to the project. (See R. pp. 212-229; 307-310).[27] The ALC's conclusion to the contrary–and its treatment of the Town's opposition to the apartments as completely independent from its stormwater challenge–lacks even a discernible logical basis.

The Town's desire to stop the apartment complex as a whole is not a basis to fault the

---

[27]This list of concerns originating from Town Council and officially captioned as representing the Town of Arcadia Lakes includes at least eight paragraphs relating to stormwater, including some of the exact arguments that were advanced in the underlying case.

Town in the context of a sanctions analysis, much less a standalone basis for awarding sanctions, as found by the ALC. Under the rationale employed by the ALC, a party opposed to a project or activity as a whole has committed a sanctionable offense by challenging a particular component of that project or activity. Without this significantly flawed rationale, the ALC's sanctions award fails and must be reversed.

IV. The ALC Erred in the Amount of Sanctions it Awarded to Roper Pond.

A. The ALC Abused its Discretion in Awarding More Than Full Fees and Costs

South Carolina has no precedent for a sanction award exceeding the amount of full fees and costs. Even if the Town acted without substantial justification in pursuing this action for purposes of delay, as the ALC has concluded, the legal mechanism to correct such transgression is an award of fees and costs, and the ALC erred in awarding what amounts to $200,000 in punitive damages, simply conjured out of whole cloth as a sum sufficient to punish the Town.

When a party in South Carolina has been sanctioned for an unjustified filing, whether under the rules of procedure, the Frivolous Civil Proceedings Sanctions Act, the State Action Statute, some other legal authority, or a combination thereof, the measure of sanctions has, without fail, been some portion of the fees and costs induced by the filing. See, e.g., Father v. S.C. Dep't of Soc. Servs., 353 S.C. 254, 257, 578 S.E.2d 11, 13 (2003) ("Following a series of hearings and orders, the family court ... awarded Father $22,000 in attorney's fees as a sanction pursuant to the FCPSA."); Ex parte Gregory, 378 S.C. 430, 436, 663 S.E.2d 46, 50 (2008) ("The court awarded respondent $27,364.31 in attorney fees and costs in defending the action and in pursuing the claim for sanctions."); Holmes v. E. Cooper Cmty. Hosp., Inc., 408 S.C. 138, 149,

758 S.E.2d 483, 489 (2014) ("Judge Harrington ordered Appellant to pay Respondents' attorneys' fees and other costs associated with this action in the amount of $53,447.15."); Irby v. Lawson, 2012 WL 10864150, at *1 (S.C. Ct. App. Oct. 31, 2012) ("Augusta Lawson moved for sanctions against Karen Irby under the South Carolina Frivolous Civil Proceedings Sanctions Act and Rule 11, SCRCP. The trial court granted attorneys' fees and costs of $5,143 to Lawson."); Ex parte Megna, 2015 WL 576683, at *1 (S.C. Ct. App. Feb. 11, 2015) ("We find the circuit court awarded Ballard sanctions-not attorney's fees-and find no abuse of discretion in the circuit court measuring the amount of the sanctions award by the amount of time Ballard spent responding to Megna's discovery requests and pursuing sanctions against Megna, multiplied by her hourly rate.").

Indeed, our Supreme Court has explained that fees and costs are the "conventional award" of sanctions and has held that going beyond such measure "exceed[s] the bounds of a judge's discretion." Ex parte Bon Secours-St. Francis Xavier Hosp., Inc., 393 S.C. 590, 600, 713 S.E.2d 624, 629 (2011). In Ex parte Bon Secours, a case involving sanctions imposed under Rule 11 of the Rules of Civil Procedure,[28] the defendant engaged in a filing strategy that the trial

[28]It does not appear that a South Carolina appellate court has ever considered a sanction award arising from the Administrative Law Court. Analysis of the ALC's sanction award in this case is complicated by that fact, as the award was ordered under the particular terms of ALC Rule 72. It is true that Rule 72 explicitly includes that sanctions may be imposed for purposes of "discouragement of like conduct in the future." The equivalent sanctions provision in the South Carolina Rules of Civil Procedure, found in Rule 11, does not include equivalent language. However, case law interpreting Rule 11 has certainly made clear that Rule 11 authorizes sanctions for an equivalent purpose. See, e.g., Father, 345 S.C. at 66, 545 S.E.2d at 528 (referencing "the fundamental objective of deterring egregious misuses of the court system."). Consequently, case law on Rule 11 can be applied with equal strength to the ALC's award under Rule 72. Certainly there is no basis in law or reason to conclude that Rule 72 authorizes larger sanction awards than Rule 11, nor that the Rules operate in a significantly divergent manner.

court found to be "*reprehensible* and an improper delay tactic." Id. (emphasis added). Despite the egregious nature of the transgression, the trial judge's imposition of approximately $14,000 in sanctions on top of fees and costs was overturned as an abuse of discretion. Id. Unlike here, the additional sanction amount imposed by the judge in Ex parte Bon Secours was actually tethered to real figures–the cost of disruption to court personnel and jurors from the improper filings. Id. at 596, 713 S.E.2d at 627. Nevertheless, the Supreme Court determined that legal authority existed only for an "award to the other party of its *detailed, itemized costs and fees* incurred as a result of the improper" filings.[29] Id. at 600, 713 S.E.2d at 629. When a "reprehensible" filing cannot sustain $14,000 in additional sanctions based on real figures, certainly the ALC did not have discretion to impose $200,000 in additional sanctions based on the judge's spitballing of what is appropriate.[30] Other than Ex parte Bon Secours, it is impossible to assess the reasonableness of the ALC's $200,000 sanction award by comparison to other cases, because there are no other such awards in South Carolina jurisprudence to measure.

The ALC's misstep here seems to arise from his determination that two separate legal authorities provide for the recovery of fees or sanctions within the context of this case. In other words, because the State Action Statute happens to apply here and allows for full recovery of fees and costs, the ALC felt constrained (or empowered) to order an additional, independent award

---

[29]The quote, in context, is as follows: "The award to the other party of its detailed, itemized costs and fees incurred as a result of the improper removal plainly is allowed under the express language of Rule 11, SCRCP. However, we find Judge Baxley abused his discretion in going beyond the conventional awards of costs and fees."

[30]A few South Carolina appellate opinions, including the Supreme Court's opinion in Ex parte Bon Secours, have recited the availability of financial penalties as part of sanction awards. However, the Town has been unable to find a single instance where a penalty has actually been imposed, and the holding of Ex parte Bon Secours stands for the proposition that it never would.

under ALC Rule 72. If the State Action Statute was not applicable, the Town seriously doubts that the ALC would have awarded full fees and costs plus $200k as a sanction award under ALC Rule 72. However, it is no more appropriate that the ALC issued such award through a combination of those authorities. The fact that sanctions or fees could be awarded under multiple authorities does not necessitate, nor even allow, that an award be compounded or that a separate award be ordered under each authority. Indeed, it is often the case that multiple applicable authorities authorize fees or costs, but no other South Carolina court has resolved such occurrence in the manner of the ALC. For example, in Ex Parte Gregory, the defendant claimed that plaintiff's suit was frivolous and a violation of SCRCP Rule 11 and the South Carolina Frivolous Proceedings Sanction Act. 378 S.C. at 432, 663 S.E.2d at 47. The Frivolous Proceedings Sanction Act authorizes the recovery of fees and costs, like the State Action Statute,[31] and Rule 11 is a broad authorization of sanctions, like ALC Rule 72.[32] The Supreme Court concluded that the standard for an award under both authorities had been met, but the sanction was a single award of fees and costs. Id. at 437-48, 663 S.E.2d at 50. See also, Russell v. Wachovia Bank, N.A., 370 S.C. 5, 17, 633 S.E.2d 722, 728 (2006) ("Sanctions were imposed pursuant to the South Carolina Frivolous Civil Proceedings Sanctions Act and Rule 11 of the South Carolina Rules of Civil Procedure." A single award of fees and costs was ordered: "the court ordered Mim to pay certain attorney's fees and costs incurred from the point in the

[31] "Sanctions may include ... an order for the party represented by an attorney or pro se litigant to pay the reasonable costs and attorney's fees of the prevailing party under a motion pursuant to this section." S.C. Code Ann. § 15-36-10.

[32] "If a pleading, motion, or other paper is signed in violation of this Rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction." Rule 11(a).

litigation that she should have realized the lawsuit was frivolous.").

The ALC's "double sanction" has no precedent. This "double sanction" is particularly problematic in the context of case where the State Action Statute applies. In cases where a governmental entity has been found to owe fees on the basis that it legal actions were "without substantial justification" under the State Action Statute, no South Carolina court has ever imposed, nor ever even considered, additional sanctions on the basis of frivolity or delay. Indeed, the only time when an appellate court has considered other sanction authorities alongside the State Action Statute is in Father v. S.C. Dep't of Soc. Servs., where it was determined that the State Action Statute does not apply to child abuse and neglect cases. 345 S.C. at 65, 545 S.E.2d at 528. Only after expressing this conclusion did the Court of Appeals go on to consider whether another authority for fees or sanctions might apply. Id. at 65-66, 545 S.E.2d at 528. It would be entirely appropriate and consistent with case law for this Court to conclude that when the State Action Statute is applicable, it represents the sole available remedy against a governmental entity for frivolous or unjustified legal action.

In summation, the Town submits that it would not be unfair to describe the ALC's fee/sanction award as the most severe and punitive appearing in the South Carolina case record. Aside from the fact that the purported transgressions of the Town do not nearly rise to the level to warrant such a distinction, there is just no legal precedent for an award of this nature and magnitude.

B. The ALC's Justification for the Amount of its Sanction Award is Inadequate

Even if the ALC was on sound legal ground in ordering an additional sanction award after awarding full fees and costs under the State Action Statute, the ALC's explanation for arriving at

the foundationless sum of $200,000 is legally deficient. In other words, the ALC's explanation of why $200,000 is the appropriate sum to "discourage like conduct in the future" under ALC Rule 72 is so lacking in detail and consistency as to constitute an abuse of discretion. The ALC was obligated to explain its reasons for arriving at the $200,000 sanction figure. See, e.g., Runyon v. Wright, 322 S.C. 15, 19, 471 S.E.2d 160, 162 (1996) ("A court imposing sanctions under Rule 11 should, in its order, describe the conduct determined to constitute a violation of the Rule and **explain the basis for the sanction imposed**." (emphasis added)). However, the ALC has given almost no explanation as to how it arrived at its number.

The ALC does note its belief that sanctions of "significant strength" will be necessary to deter the Town going forward. (R. p. 15). As for why the ALC has this belief, that is left unsaid. The ALC does not cite any basis upon which to conclude that the Town is particularly intransigent, that the Town is likely to take more unjustified legal action in the future, or that the $205,283.84 in fees and costs already levied against the Town is inadequate deterrent. Indeed, in awarding "deterrent" sanctions under Rule 72, the Town completely ignores its concomitant award of fees under the State Action Statute. In actuality, nothing about this case or the Town suggests that sanctions are necessary to deter like conduct in the future. The circumstances of this case are so unique that they could never come close to replication again. While the complete destruction of the Town's primary natural landmark prompted it to litigate, the Town has no prior history of frivolous or unjustified legal action in its nearly sixty years of existence. Indeed, the ALC was not presented with evidence that the Town had ever before taken legal action. Further, the "Town" is actually the collective voice of its council members that happen to be in office at the time. Even if the Town council that authorized the filing of this action needed to be deterred,

that group no longer exists. Finally, it is difficult to see that any deterrent administered to the Town serves a meaningful purpose for Roper Pond or the ALC, given that sixteen of seventeen petitioners in this case are not being sanctioned. The lack of explanation from the ALC on this issue reflects that the ALC's desire to have sanctions of "significant strength" has nothing to do with the need for deterrence and is merely reflective of his desire to punish the Town and reward Roper Pond.

In terms of the figure the ALC determined to constitute a deterrent of "significant strength," that number was based on Roper Pond's ability to pay. (Id.). Specifically, the ALC determined how much money Roper Pond has and then conjured the portion of that money it believed would have the desired deterrent effect. Apparently the ALC concluded that forcing the Town to pay 126.6% of its yearly revenue is what it will take to deter the Town going forward. Because, as noted by the ALC, the Town has a yearly revenue of $320,000, versus the $405,283.84 in fees and sanctions levied. (See Id.). By comparison, applying the same standard to the City of Columbia, a sanction in excess of $444 Million would have been necessitated.[33] The ALC does also note the Town's financial reserves of approximately $1,000,000. (Id. at 14). Basically, this is the amount the Town has managed to save over the history of its existence. As explained by Town Mayor Huguley, these funds are set aside for emergencies and certain planned capital projects, including construction of a town hall and a small park, as well as intersection improvements. Once again, the ALC's apparent conclusion is that 40% of all the money the Town has managed to save over its existence is what it will take to deter the Town

[33]The City of Columbia had a revenue of $350,986,487 in the most recently reported fiscal year. <http://columbiasc.gov/depts/financial-reporting/cafr/city_of_columbia_cafr_final.pdf>, p. 16.

going forward. Such conclusion is unreasonable on its face and is tied to nothing concrete whatsoever.

A sanction award of the nature imposed by the ALC, which is unprecedented under South Carolina case law, requires more explanation than the judge's general sense of what is appropriate. The $200,000 sanction imposed by the ALC cannot be sustained on the basis of deterring the Town from future unjustified litigation.

C. The Sanction Award is Untenable in This Non-Frivolous Case.

The need for a sanction of "significant strength" rings particularly hollow when considered alongside the fact that the ALC did not determine the Town's claims, nor the Town's actions in pursuit of those claims, to be frivolous. Rather, the ALC's sanction award under Rule 72 is based entirely on the proposition that the Town filed this case "solely for purposes of delay," even if the case did have merit. (R. p. 58 ("Roper Pond asserts that the Town's primary objective in appealing the Department's decision in this matter was not to challenge the technical sufficiency of the SWPPP, but to stop or delay the construction of an apartment complex on the Roper Pond property.")). In other words, by imposing sanctions, the ALC did not seek to deter the Town from taking frivolous legal action in the future, because the legal action the Town took in filing this case was not frivolous. Instead, the ALC determined that a sanction of "significant strength" is necessary to deter the Town from taking legal action in the future "solely for purposes of delay." That the Town's payment of $405,283.84 is necessary to accomplish such a narrow objective more than strains the bounds of credulity.

The "punishment" of $405,283.84 simply does not fit the purported "crime" of filing a non-frivolous case for purposes of delay. South Carolina case law on sanctions is replete with

examples of repeated, egregiously frivolous legal action taken for improper purposes. See, e.g., Holmes v. E. Cooper Cmty. Hosp., Inc., 408 S.C. 138, 758 S.E.2d 483 (2014) (After losing an earlier case decisively, on the basis that the disputed action was not subject to judicial review, plaintiff sued again on the same issues, because "he wanted another 'bite of the apple.'" Plaintiff was sanctioned in the amount of attorneys' fees and costs.). Yet even in these cases, fees and costs have still been the ceiling on sanctions. Surely a sanction of the magnitude involved here (and, for that matter, imposition of any sanction beyond fees and costs) would be reserved for the most egregious examples of repeated frivolous action with bad motive. This case is very obviously not one of those examples. But, nonetheless, the Town owes an additional $200,000 because the ALC has deciphered that the Town had an improper intent for filing a non-frivolous lawsuit along with sixteen other petitioners.[34]

The ALC's stated deterrent objective does not comport with the magnitude of the award levied against the Town. The ALC abused its discretion in awarding $200,000 in sanctions under Rule 72, especially when that award is not even back by a finding of frivolity.

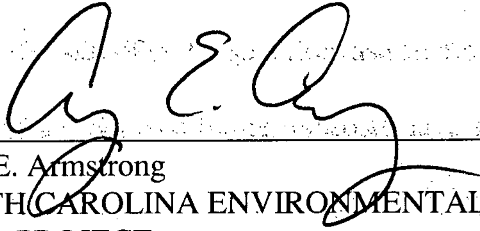
CONCLUSION

For all of these reasons, the Appellant/Respondent, the Town of Arcadia Lakes, asks this Court to overturn the orders of the ALC determining that Roper Pond is entitled to fees, costs, and sanctions, and setting the amount of that award, as well as the order striking the Town's

[34]The sixteen other petitioners were not determined to have filed this case for purposes of delay. Roper Pond did not seek sanctions against such individuals, and the evidence the ALC relied on to determine that the Town acted for purposes of delay does not bear on the intent of the individual petitioners. (See R. p. 812, ¶5). The fact that these individual co-petitioners did not file suit for purposes of delay even further narrows the prospect that imposing this massive sanction against the Town furthers any meaningful objective.

affidavits in support of the reasonable basis in fact and law. The Town further seeks an order requiring immediate return of the $405,283.84 that it was forced to pay to Roper Pond at the initiation of this appeal, along with accrued interest on that sum.

Respectfully submitted,



Amy E. Armstrong
SOUTH CAROLINA ENVIRONMENTAL LAW PROJECT
Mailing address: Post Office Box 1380
Pawleys Island, SC 29585
Office address: 430 Highmarket Street
Georgetown, SC 29440
Telephone (843) 527-0078
Email amy@scelp.org

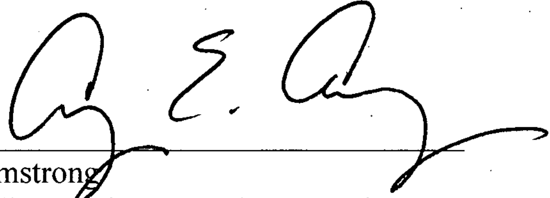
Terry E. Richardson, Jr.
Richardson, Patrick, Westbrook & Brickman, LLC
Mailing address: P.O. Box 1368
Barnwell, SC 29812
Email trichardson@rpwb.com

Georgetown, South Carolina

June 7, 2018

Certificate of Counsel

The undersigned does hereby certify that this Final Brief complies with SCRAP Rule 211(b).



Amy E. Armstrong
South Carolina Environmental Law Project
Mailing Address: Post Office Box 1380
Pawleys Island, SC 29585
Office Address: 430 Highmarket Street
Georgetown, SC 29440
Telephone: (843)527-0078
Fax: (843)527-0540

Attorney for the Appellant/Respondent

Georgetown, South Carolina

June 7, 2018

RECEIVED
JUN 08 2018
SC Court of Appeals