STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

Appellate Case No. 2017-001554

Town of Arcadia Lakes, Robert L. Jackson, Linda Z. Jackson, Robert E. Williams, Barbara S. Williams, Elizabeth M. Walker, Louis E. Spradlin, Mary Helen Spradlin, Thomas Hutton Utsey, Tony Sinclair, Aaron Small, Bette Small, Gene F. Starr, M.D., Elaine J. Starr, Sanford T. Marcus, Ruth L. Marcus, and Steven Brown, Petitioners,

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

vs.

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

REPLY BRIEF OF APPELLANT/RESPONDENT TOWN OF ARCADIA LAKES

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The Town of Arcadia Lakes submits the arguments below in response to the brief of Roper Pond, LLC ("Roper Pond"). The Town first presents arguments related to the ALC's fee and sanction award under the State Action Statute and then presents those related to the ALC's sanctions award under Administrative Law Court Rule 72.

I. The ALC's Award Under the State Action Statute is in Error

Roper Pond has failed to effectively counter the myriad of legal errors cited by the Town that necessitate reversal of the ALC's State Action Statute award.

A. Sufficiency of Fee Documentation Submitted by Roper Pond

The proposition that "reasonable time expended" on this case could be determined by the ALC without an itemized list of time expenditures is a logical and legal non-starter. As examined in the Town's brief, itemized review of time entries (and exclusion of non-compensable time) is part-and-parcel to the fee award process in every court, everywhere. Time sheet review is so fundamental and inherent to this process that it shouldn't even necessitate discussion. Yet, Roper Pond refused to provide descriptions for its time entries in this case, and the ALC determined that such descriptions were not necessary. Roper Pond would assuredly never pay its attorneys without a description of the tasks for which it was paying. Indeed, an attorney would likely run afoul of ethical, if not legal, obligations in compelling a client to pay for time without providing a description of how such time was spent. Yet that is exactly what has been required of the Town, despite the State Action Statute's explicit statutory requirement of "an itemized accounting."

Roper Pond flatly does not address or even mention the dictate in § 15-77-330 that "such

money shall only be paid upon presentation of an itemized accounting of the attorney's fees." Roper Pond likewise just ignores a critical word in § 15-77-300 in order to change the meaning in its favor. The State Action Statute commands courts to determine "reasonable time expended at a reasonable rate," and then it provides five "[f]actors to be applied in determining a reasonable ***rate***." S.C. Code § 15-77-300(B) (emphasis added). Roper Pond ignores the word "rate" in order to treat the five factors as the lone, conclusive method of determining "reasonable time expended at a reasonable rate." (See Brief, p. 33). In addition to the fact that such position is clearly belied by the plain language, the five factors listed in Statute do not provide information sufficient to assess "reasonable time expended." The Town is frankly baffled by the fact that Roper Pond has been willing to risk its entire award under the State Action Statute for the sake of withholding basic descriptions of its time entries, and, from the Town's perspective, Roper Pond's unexplainable stubbornness highlights the need for time entry review.

The outcome advocated for by Roper Pond and arrived at by the ALC misinterprets and thwarts the purpose of amendments to the State Action Statute that were enacted in 2010. Prior to such amendments, our Supreme Court had deciphered legislative intent to conclude that lodestar ("calculated by multiplying a reasonable hourly rate by the reasonable time expended") was the appropriate measure of fees under the State Action Statute. See Layman v. State, 376 S.C. 434, 457, 658 S.E.2d 320, 332 (2008). In 2010, the Legislature passed a bill making that intent explicit, entitled "A Bill to Amend Section 15-77-300, Code of Laws of South Carolina, 1976, Relating to Allowance of Attorney's Fees in State-Initiated Actions, **so as to Limit the Fee to a Reasonable Time Expended at a Reasonable Rate**." 2010 Act No. 125 (emphasis added). For reasons that run counter to the plain language of the Statute and the 2010 amendments, the

ALC and Roper Pond have read the amendments as a rebuke of the lodestar calculation and as providing relief from the requirement of an itemized list of attorney time. Such outcome accomplishes the exact opposite of what the Legislature clearly intended to accomplish in 2010 and opens the door for fee awards based solely on discretionary, amorphous factors, untethered from the requirement of objective timekeeping.

B. Consequence of the Sixteen Individual Petitioners

Roper Pond has not refuted this fundamental observation from the Town's brief: that all previous awards under South Carolina's State Action Statute have occurred in cases where the state was solely responsible for prosecution or defense. In other words, the State Action Statute has only been applied in cases where all fees and costs imposed were separately and independently attributable to the state and has never been applied to the state acting in concert with private parties. Nevertheless, Roper Pond puts forward, with minimal explanation, not only that the State Action Statute applies but that the Town is liable under that Statute for all fees and costs incurred in defending against the claims of all seventeen petitioners.

As it relates to the sixteen individual petitioners who filed every document in this case jointly with the Town, the dual legal questions presented are: (1) whether their presence dictates that the State Action Statute does not apply; or, in the alternative, (2) whether their presence at least dictates that the Town cannot be assessed every penny of fees and costs attributable to the case. The Town notes, first, that Roper Pond's brief does not provide any counter-argument on the second question. However, even if Roper Pond had addressed this important question, it would not have been able to present any legal authority to support what amounts to a novel and extreme form of joint and several liability. In the context of post-judgment imposition of fees

based on a party's unjustified conduct during litigation, the idea of joint and several liability has no logical basis whatsoever. Rather, a party necessarily should only be assessed fees and costs that it causes through its conduct. Indeed, even in the context of joint tortfeasors, South Carolina law provides that "joint and several liability does not apply to any defendant whose conduct is determined to be less than fifty percent of the total fault for the indivisible damages." S.C. Code § 15-38-15(A). In other words, if the Town and the sixteen other petitioners had somehow committed a tort together, the Town would be liable for total damages only if it was responsible for more than 50% of the total fault. Yet, here, where absolutely nothing in the record suggests that the Town is any more responsible for Roper Pond's total fees and costs than the other petitioners,[1] the ALC has essentially used joint and several liability to impose all damages (total fees and costs) against the Town. Such imposition is not only illogical in the context of post-judgment fees, it is entirely inconsistent with the fundamentals of South Carolina law as it relates to joint liability. At a minimum, the ALC should have endeavored to apportion the fees and costs reasonably attributable to the Town and should have required Roper Pond to provide the billing detail necessary for such attribution.

As for whether the State Action Statute applies to this scenario at all, Roper Pond has not addressed how or why this case constitutes an action "brought by the state" in which fees and costs are incurred as a result of the state agency "pressing its claim." S.C. Code § 15-77-300(A). In passing, Roper Pond characterizes the sixteen individual petitioners as having "joined in this

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[1]The ALC did not even endeavor to allocate responsibility for the fees and costs between the seventeen petitioners, nor could it have done so based on the unannotated list of time submitted by Roper Pond. The ALC did not find that the Town was any more responsible for the fees and costs than the other petitioners, much less that the Town was primarily or completely responsible for the total incursion of fees and costs.

action," as if the case were undertaken on initiative of the Town, with the individuals having only signed on. If such implicit assertion were true, it might support the characterization of this action as one "brought" and "pressed" by the state. In point of fact though, nothing in the record suggests that the Town held such a role, and, more importantly, the ALC did not even endeavor to undertake the inquiry. Rather, the ALC found the Town's status as one of seventeen petitioners to be sufficient in itself to trigger the State Action Statute. No South Carolina court has ever applied the State Action Statute in this manner (including the Layman opinion cited by both parties), and it remains for the Court to determine whether such application is sound under the plain language of the Statute and the policy underlying such statute.

C. Recovery of Fees for Administrative Law Court Proceedings

In arguing that the administrative proceedings in the ALC constitute a "civil action" under the State Action Statute, Roper Pond ignores or concedes many of the Town's central assertions and substantially misrepresents other authority as falling in its favor.

To begin, it is worth noting the important points from the Town's brief that Roper Pond simply does not address. Those include, most notably, the distinction between the State Action Statute and the South Carolina Frivolous Proceedings Act ("SCFPA"), our state's fee recovery statute of general applicability. Roper Pond does not dispute or in any way counter that: the ALC is defined by law as an "agency" and an arm of the executive branch; that the SCFPA is explicit in its application to "civil or administrative action;" and that the State Action Statute, in direct contrast, states its applicability only to "civil action." The legislative intent reflected in the contrast between these two fee statutes could not be more clear. The Town is not arguing that the ALC is a free-for-all where one might engage in whatever abusive litigation practice one could

conceive, without threat of fee imposition. Rather, the Town's point is merely that if fees and costs are to be recovered in the ALC, it must be under the frivolity standard of the SCFPA, rather than the State Action Statute's relaxed standard. The Town has previously explained why such distinction has sound logical bases within the ALC's truncated and simplified proceedings. Roper Pond has not countered this line of argument at all.

One of the Town's arguments that Roper Pond does attempt to counter is the proposition that no South Carolina court has ever awarded State Action Statute fees for proceedings before the ALC. Roper Pond's counter-argument, though, is merely a passing misrepresentation of this Court's opinion in Video Gaming Consultants, Inc. v. South Carolina Dep't of Revenue, 358 S.C. 647, 595 S.E.2d 890 (Ct. App. 2004). (See Brief, p. 30). While Roper Pond cites this case for the proposition that ALC proceedings are subject to an award under the State Action Statute, the first major flaw to note is that no fees were awarded in the case. Specifically, this Court stated its holding in Video Gaming Consultants as follows: "we hold the trial court abused its discretion in determining the Department acted without substantial justification in the underlying litigation. The trial court's award of attorney's fees pursuant to Section 15–77–300 is REVERSED." Id. at 652, 595 S.E.2d at 892. Certainly one must strain to make a fee reversal case into one authorizing a new class of fee awards. On top of that, the opinion makes not one mention of whether State Action Statute fees are recoverable for the ALC, and it is entirely uncertain from the opinion whether the fees awarded by the trial court (which were reversed in full) were for ALC proceedings or only the subsequent civil proceedings. Video Gaming Consultant is the one case Roper Pond could find that originated in the ALC and also discusses State Action Statute fees, but the case bears absolutely no relation to the proposition for which it

is cited by Roper Pond.

Roper Pond also significantly misrepresents § 15-77-300(C), which absolutely is not a partial list of ALC cases excluded from coverage under the State Action Statute. The purpose of Roper Pond's misrepresentation is to facilitate the argument that because § 300(C) lists certain ALC cases as exceptions to the State Action Statute, those ALC cases not listed must fall under the Statute. (See Brief, pp. 30-31). Flatly, though, none of the cases listed in § 15-77-300(C) are Administrative Law Court cases. The first, and most obvious, tipoff to such fact is that the list of exceptions in that subsection are introduced as follows: "The provisions of this section do not apply to *civil actions* relating to...." S.C. Code § 15-77-300(C). Again, by unequivocal legal definition, no proceedings before the ALC can be civil actions. Nevertheless, Roper Pond makes a disingenuous effort to recast the civil actions listed in § 300(C) as falling within ALC jurisdiction. Roper Pond's attempt is flawed as follows:

- "child support actions" and "child abuse and neglect actions" are the province of Family Court–a civil court hearing civil actions–and would never be heard in the ALC.

- while the ALC's jurisdiction includes some instances of "ratemaking, price fixing, and licensing," that is by no means the same as "establishment of public utility rates," as listed in § 300(C). Rather, public utility rates are established by the Public Service Commission and are then appealed to the Supreme Court or Court of Appeals–civil courts hearing civil actions. S.C. Code. § 58-5-340 ("A decision of the commission may be reviewed by the Supreme Court or court of appeals...").

- "habeas corpus or post conviction relief actions" are filed in the circuit court or appellate courts and appealed by writ of certiorari. See Uniform Post-Conviction Procedure Act, § 17-27-10, *et seq.* ("A proceeding is commenced by filing an application verified by the applicant with the clerk of the court in which the conviction took place."). Contrary to Roper Pond's assertions, such actions could never be heard in the ALC. The case cited by Roper Pond involves a narrow class of administrative appeals from the Department of Corrections that has nothing to do with challenging a criminal conviction. Roper Pond misapprehends the distinction between post conviction relief and prison cases arising from issues like inmate discipline and conditions of confinement.

In short, § 15-77-300(C) has nothing to do with administrative proceedings or excluding certain ALC cases, and Roper Pond's argument on this point is fatally and facially flawed. All administrative actions are excluded from the State Action Statute, as is apparent from the Statute's plain language and the holding in the previously discussed McDowell case, and § 300(C) excludes certain types of civil actions as well. McDowell v. S.C. Dep't of Soc. Servc., 304 S.C. 539, 405 S.E.2d 830 (1991).

D. Substantial Justification for the Town's Actions

At base, Roper Pond's argument on the question of whether the Town had a reasonable basis in fact and law relies on a recitation of the ALC and this Court's rulings on the merits. It is understandable that Roper Pond focuses on the ALC and Court of Appeals rulings, which were favorable to it. But the standard is not whether Roper Pond prevailed in the ALC or this Court. Instead, the ALC should have looked beyond its decision on the merits to the Town's position in litigating the case and determined whether that position was "disingenuous." Pierce v. Underwood, 487 U.S. 552, 565, 108 S.Ct. 2541, 2550 (1988); Video Gaming, 358 S.C. 647, 595 S.E.2d 890 (2004); McDowell, 304 S.C. at 542, 405 S.E.2d at 832 (1991). As long as a "genuine dispute" exists, the Town is substantially justified.

While Roper Pond disagrees with the Town's position in litigating the case, boldly asserting that its position is contrary to "well-settled law," it fails to cite any such well-settled law in support of its disagreement. (Brief, p. 8, 16). Moreover, Roper Pond and the ALC's disagreement with the Town's position does not legally translate into a conclusion that the Town's position was disingenuous. The Town's position in litigating this case was that 1) the NWPs only cover certain clearly defined activities; 2) DHEC's 401 certifications of the NWPs

provide additional limitations, including general conditions; 3) in order to receive coverage under DHEC's certifications the activity must be limited to the impacts authorized by that certification and must meet the general conditions; 4) the general conditions require DHEC to review the "overall project," not "only the land area directly impacted by the NWP;" and 5) when a project's impacts to wetlands and waters go beyond the defined impacts authorized by the NWP certification, as they admittedly did in this case, they are not covered by DHEC's NWP certification. (R. pp. 342-421). This Court noted the Town's argument, finding that "the general conditions for water quality certification require DHEC to review the 'overall project proposed by a single owner/developer,'[which] 'includes all land within the project bound under single ownership,' and is not confined to 'the land area directly impacted by each NWP request.'" Town of Arcadia Lakes, 404 S.C. 515, 534, 745 S.E.2d 385, 395 (Ct. App. 2013). This Court said:

> DHEC 401 certifications for all NWPs included general conditions that a given project must meet, including the requirement **that DHEC, in reviewing a project for which coverage under an NWP is sought, would consider not only the land area directly impacted by each NWP request, but also impacts to adjacent water bodies or wetlands resulting from the activity.**

Id.(emphasis added). In so ruling, this Court agreed with the Town that DHEC has broad authority to consider the "overall project," including impacts beyond those specifically authorized by a Corps permit, but simply did not apply this conclusions to the DHEC decision at issue. Arcadia Lakes, 404 S.C. at 534, 745 S.E.2d at 395. While this Court ultimately concluded that the Town's argument did not "warrant reversal,"[2] such conclusion cannot be manipulated into a finding that the Town's position was disingenuous and had no reasonable basis in fact or

[2]This Court did not cite any law in support of its reversal on that point, or state that the Town's position was without any legal support.

law. Id.

Roper Pond rejects that notion that inclusion of the relevant legal authority and supporting arguments are proper considerations in making a reasonableness determination. In support, Roper Pond cites Cornelius v. Oconee Cty, 369 S.C. 531, 633 S.E.2d 492 (2006). But that case only says that raising novel issues alone does not mean that a state agency is substantially justified. Id. at 539-40. The Town has not asserted that whenever novel issues arise a showing of substantial justification is presumed (though the fact that no court has ruled on the particular legal issue is relevant).

Instead of addressing head on the entirety of the Town's position in litigating this case, Roper Pond (and the ALC) erroneously constrain and mischaracterize the Town's arguments. Roper Pond and the ALC focus exclusively on issues related to the technical sufficiency of the SWPPP to the exclusion of the other errors alleged and argued in the Town's Prehearing Statement all the way through to its Brief on Certiorari. (R. pp. 23-243; 342-421; 536-613). Instead, the Town's case was centered around whether Roper Pond has the necessary state authorizations to dredge the Lily Pad Pond. Id. The question was not simply the nature or extent of those impacts, but whether DHEC failed to assess and consider the impacts caused as a result of dredging the Lily Pad Pond in the first place.[3] (Town's opening Brief, p. 10). The only brief mention of the Town's argument that the Roper Pond project did not qualify for coverage under DHEC's nationwide 401 water quality certification is the ALC's swift dismissal because this Court did not deem it to warrant reversal. Arcadia Lakes at 534, 395.

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[3]While the ALC was not persuaded by the Town's expert witness, it nonetheless did present evidence that impacts would flow from the pond excavation, and it is uncontested that DHEC did not consider those impacts. (R. pp. 109-129).

The Supreme Court heard oral arguments on March 18, 2015 during which time counsel for the Town explained the legitimate concerns with regard to Roper Pond's construction project – that there would be stormwater management and erosion runoff and control problems. Counsel for the Town provided the Court with photographs evidencing that those concerns had become a reality on the site since Roper Pond moved forward with its construction project. (R. pp. 893-908). The Supreme Court acknowledged the existence of a problem and that the Department should take enforcement action if sediment control issues are occurring on the site. (R. p. 125, note 2). The Supreme Court was presented with and considered the predicament of the parties in light of the Town's basis for challenging the construction project, the fact that construction had occurred, and that many of the Town's concerns came to fruition, ultimately concluding that its hands were tied now that the development project was completed. ("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)." Id.

On the question of the whether the ALC erred in striking the Affidavits of McCall, Ravenel and Freeman, Roper Pond erroneously characterizes the nature and substance of the affidavits in question. First, the Town did not seek to have the affidavits admitted as expert testimony. Substantial justification for purposes of the state action statute means "justified to a degree that could satisfy a **reasonable person**." Heath v. County of Aiken, 302 S.C. 178, 183, 394 S.E.2d 709, 712 (1990) (quoting Pierce v. Underwood, 487 U.S. 552, 564, 108 S.Ct. 2541, 101 L.Ed.2d 490 (1988) (emphasis added)). The Town asserts that, based on their testimony, these three individuals have extensive experience and credible reputations that would deem them

"reasonable people." In this way, the testimony of these individuals with factual and legal knowledge is not only admissible but also relevant to the question of whether the Town's position was justified to a degree that would satisfy a reasonable person. Even if some expertise is needed, as with Vortex Sports, 378 S.C. 197, 662 S.E.2d 444 (Ct. App. 2008) and Tuten v. Joel, 410 S.C. 104, 763 S.E.2d 52 (Ct. App. 2014), the Town submits that each of these individuals is beyond qualified as a "reasonable person" able to opine on the bases in law and fact for the Town's case.

Second, none of the affidavits contain an "overwhelming majority" of "simply legal argument" on the question of the Town's liability under the State Action Statute. Each of the affidavits contains factual information, and particularly Mr. McCall and Mr. Ravenel's affidavits, which shed light on information made available to the Town in determining whether to proceed with the underlying case even prior to its initiation in the ALC. While the prejudice is nonexistent in admitting the affidavits – the ALC is able to distinguish between its role and that of a witness with regard to legal conclusions – at a minimum the ALC could have stricken any legal opinions on ultimate issues and left the remaining portions to stand. It did not, and it was error to strike those affidavits in toto.

E. Recovery of "Fees on Fees"

Roper Pond does not address the issue of "fees on fees" in its brief. As the Town previously discussed, the ALC has not found, and Roper Pond has not argued, that the Town's defense against post-judgment fees and sanctions lacks substantial justification. Indeed, the Town has been perfectly justified in its defense of these issues. Consequently, Roper Pond has no basis for recovery under the State Action Statute for the fees and costs attributable to the post-

judgment proceedings in this case. Yet, Roper Pond has been awarded fees and costs for its time spent pursuing fees, costs, and sanctions. Such award under the State Action Statute is clearly in error, and Roper Pond has not argued otherwise.

F. Prevailing Party Status

The parties have offered competing interpretations of the Supreme Court's decisions in this case, as it relates to whether Roper Pond has achieved "prevailing party" status. However, even under Roper Pond's circumscribed reading of the Supreme Court's finding of mootness on certiorari, the necessity for prevailing party status dictates at least a reduction in the ALC's fees and costs award. That is, whether or not the Supreme Court's decisions destroy Roper Pond's prevailing party status in the ALC and Court of Appeals, there can be no doubt that Roper Pond did not prevail before the Supreme Court. Throughout these proceedings, Roper Pond has been eager to lump together the various stages of this case, as if entitlement to fees and costs at one stage necessarily dictates that all fees and costs can be recovered. Similarly, the ALC seems to have viewed fees and costs as an all-or-nothing proposition. However, as the Town pointed out, for example, in relation to the post-judgment fee proceedings in this case, entitlement to recovery under the State Action Statute is not static. Indeed, it is readily apparent in the fee cases cited throughout the briefing that a party may be assessed fees or sanctioned for a course of conduct occurring in a particular venue or even in relation to a particular hearing or motion. In short, the sanction compensates for the period of the sanctionable conduct.

Under any of the cases cited on this topic by either party, Roper Pond did not prevail before the Supreme Court. Therefore, it cannot satisfy the State Action Statute's standard for recovery of fees and costs as to those proceedings. At a minimum, as it relates to Roper Pond's

prevailing party status, the ALC's total fees and sanctions award should be reduced to account for this error.

II. The ALC's Sanctions Award Under ALC Rule 72 is in Error

Roper Pond has failed to effectively counter the myriad of legal errors cited by the Town that necessitate reversal of the ALC's sanctions award under SCALC Rule 72.

A. Propriety of Recovery in Excess of Fees and Costs

Roper Pond's brief actually lends support to the Town's argument that the ALC abused its discretion in conjuring a $200,000 penalty in excess of fees and costs. As explained by Roper Pond, its basis for requesting sanctions in addition to legal fees and costs was to compensate for construction delay costs it had allegedly occurred during litigation. (Roper Pond Brief, p. 40). Roper Pond attempts to explain in its response brief, as well as in its appellant brief, that such delay costs are recoverable as a sanction. While there is actually no legal basis for the recovery of delay costs as sanctions (see the Town's respondent brief), at least Roper Pond's initial request for sanctions had a decipherable logic. The ALC, though, did not calculate the sanction based on Roper Pond's delay costs or even award the sanctions to Roper Pond. Both Roper Pond and the Town are opposed to the ALC's decision to fine the Town $200,000, completely untethered from any measurable costs. Roper Pond does not endeavor to defend the ALC's unexplained and baseless conclusion that sanctions of "significant strength" are necessary in addition to fees and costs, nor does Roper Pond contest that similar penalties have not been imposed in even the most egregious examples of frivolous and abusive litigation practice appearing in South Carolina jurisprudence. Rather, Roper Pond seemingly agrees that the ALC's rationale for imposition of sanctions is inadequate and requires reversal.

The question of whether sanctions in excess of full fees and costs are recoverable under any rationale is an issue that spans both appeals in this case. Roper Pond's arguments have centered around a single case, Ex parte Bon Secours-St. Francis Xavier Hosp., Inc., 393 S.C. 590, 713 S.E.2d 624 (2011), which is actually a case about reversal of sanctions in excess of legal fees and costs. Roper Pond misrepresents this case by relying entirely on a single statement from the procedural background about an issue that was not before the court. The Town hereby references and incorporates the discussion of the Bon Secours case contained in its respondent Brief. (pp. 4-5). That discussion, along with the Town's previous brief in this appeal, explains how Bon Secours is archetypal of South Carolina court's unwillingness to sanction beyond full fees and costs.

Finally, Roper Pond has not countered the Town's argument that it was improper and unprecedented for the ALC to impose "double sanctions," meaning two separate post-judgment awards under two separate authorities, based on the same conduct in the same case. Nor has Roper Pond disputed that the additional sanction award is particularly improper and unprecedented alongside of an award against a state entity under the State Action Statute, which has never before been applied concomitant with another authority for post-judgment sanction. The Town rests on those arguments as stated in its prior brief.

B. Reliance on Mayor's Statements

In an attempt to cover for the fact that the ALC's sanctions award rests upon improper attribution of the mayor's words to the Town, Roper Pond retroactively rewrites the ALC's stated basis for that award. However, a plain reading of the ALC's order unequivocally reflects that the ALC relied almost entirely on the mayor's statements in an individual capacity as its explanation

for sanctions and that the ALC's finding of "solely for purposes of delay" cannot stand without those individual statements.

As an initial matter, Roper Pond has not contested the relevant legal principle announced and examined in the Town's prior brief: that municipalities like the Town act through the collective body of council and that the motivations and statements of individual council members are not competent evidence. (See Town's Brief, pp. 47-48). Clearly, South Carolina has "no authority allowing someone challenging action by Council to interrogate members individually to impeach Council's decision." See Bear Enterprises v. Cty. of Greenville, 319 S.C. 137, 139, 459 S.E.2d 883, 884 (Ct. App. 1995). Roper Pond does not dispute the validity of such conclusion or cite any contrary authority. So, Roper Pond pursues its only other option: attempting to obscure, or misrepresent, the fact that the ALC relied on such individual statements and attributed them unadulterated to the Town.

Digging into the ALC order, it includes a separate section entitled "Sanctions Pursuant to SCALC Rule 72," and the content of that section speaks for itself. The following is a complete list of the evidence referenced by the ALC in its discussion of sanctions, meaning that these are the only pieces of evidence the ALC says it relied on in concluding that the Town acted "solely for purposes of delay:"

- "numerous communications between the Town's mayor and the engineers who assisted the Town during DHEC's review of Roper Pond's SWPPP;"
- a December 17, 2008 email from the Town's mayor;
- "numerous communications in which the Town's mayor and those acted on the Town's behalf admit that Petitioners were challenging the DHEC decision to issue coverage under the General Permit as a means to stop or delay the proposed development;"

- an October 2, 2008 email from the Town's mayor;
- an October 29, 2008 email from the Town's mayor to Brian Bates, a professional engineer residing in the Town;
- the email response from Mr. Bates to the Town mayor;
- an email reply from the mayor to Mr. Bates.

(R. pp. 58-60). Then, if it wasn't already clear that these individual communications from the mayor are the linchpin, and indeed the entirety, of the ALC's sanctions determination, the ALC states the following in relation to the Supreme Court's review of this case:

> The Town argues that in denying Roper Pond's motion for costs under Rule 222, SCACR, "the Supreme Court implicitly concluded that dismissal on mootness grounds is not a favorable disposition and, after a thorough review of the record, found nothing untoward or evidencing that the case was brought solely for delay such that costs would be warranted." ... **A review of the record would not provide the Supreme Court with the evidence supporting Roper Pond's claim that the Town brought the contested case solely for the purpose of delay. The record on appeal before the Supreme Court did not include the Mayor's communications prior to bringing the contested case**."

(R. p. 61 (emphasis added)). In short, the mayor's statements and communications as an individual member of Town council–entirely separate and unrelated to his testimony as the Town's 30(b)(6) designee–are *the* reason why ALC awarded sanctions, which is a serious, unequivocal legal error. Regardless of the content of these communications to and from the mayor, absolutely none of them can be attributed to the Town or used as a basis to impose sanctions against the Town.

Seemingly recognizing this error, Roper Pond pretends as if the ALC was relying on the mayor's statements as the Town's 30(b)(6) designee. (Roper Pond Brief, p. 38 ("The Town argues that the evidence on the record in support of the imposition of sanctions is not sufficient to bind the Town because the Mayor is only one vote on the town council. However, this

argument disregards the fact that the Town designated the Mayor as its sole deponent for the Town's 30(b)(6) deposition."). But, of course, the fact that the mayor was the Town's 30(b)(6) designee during this litigation does not retroactively or prospectively give his individual words the Town's imprimatur. The only time the mayor was potentially speaking for the Town was during his 30(b)(6) deposition, and **the ALC did not cite or otherwise reference a single statement from that deposition in relation to sanctions**. The best Roper Pond can do is try to put words in the ALC's mouth or try to fill in an analysis of sanctions that the ALC flatly did not provide.[4]

C. "Solely for Purposes of Delay"

Roper Pond provides minimal response to the Town's arguments that the ALC's findings do not support a conclusion that the Town brought this case "solely for purposes of delay." Particularly, Roper Pond merely cites to certain pieces of evidence that it believes support the proposition that the Town had an intent to delay the project. (See Roper Pond brief, pp. 37-38). Roper Pond misses the point, though, as the relevant inquiry is not whether the Town intended to delay the project, but, rather, whether the Town *only* intended to delay the project–in other words, whether this case was just brought for purposes of harassment.

Critically, Roper Pond has not attempted to counter the inherent inconsistencies in the

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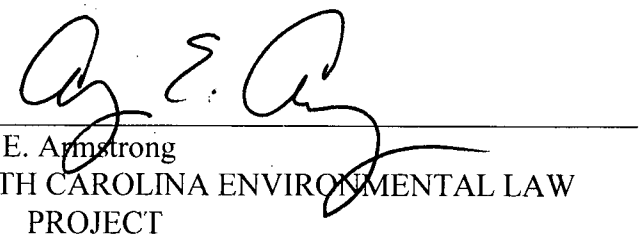
[4]Roper Pond also persists in advancing, without explanation, the fundamental misconception at the heart of the ALC's imposition of sanctions: that the mayor or Town's opposition to other aspects of Roper Pond's apartment project, or the mayor or Town's opposition to the project as a whole, somehow is wrongful and invalidating of any legitimacy in this case. The Town explained at length in its prior brief that this case is a normal and perfectly acceptable way for the Town to express its opposition to the project as a whole, and Roper Pond has not attempted to explain otherwise, rather simply continuing to act as if it is inherently, and obviously, improper.

ALC's conclusion that the Town acted only for delay, especially in that the ALC identifies a variety of other purposes possessed by the Town. As previously explained by the Town, the ALC does not deny that the Town had other purposes in bringing this action, but rather nitpicks whether those purposes could have been more effectively pursued through other means. (See Town Brief, pp. 44-45). Roper Pond presents no argument on this point, nor does Roper Pond address the stark inconsistency in the ALC both faulting the Town for its desire to stop the project as a whole and finding that the Town only wanted to delay the project. Properly applying the standard "*solely* for purposes of delay," the ALC's analysis of sanctions is self-defeating as written, and that is not even considering the wealth of other evidence of the Town's non-delay purpose, as cited in the Town's prior brief, which did not make it into the ALC's order. (See Town Brief, pp. 41-46).

CONCLUSION

For all of these reasons, the Appellant/Respondent Town of Arcadia Lakes respectfully requests that the Court reverse the Administrative Law Court's ruling imposing fees, costs, and sanctions against the Town and that the Court order the immediate return of such sum to the Town, with interest.

Respectfully Submitted,



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Certificate of Counsel

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

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