THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

John D. McLeod, Administrative Law Judge

Case No. 09-ALC-07-0069-CC

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

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

v.

South Carolina Department of Health and Environmental Control . . . . . Respondent,

and

Roper Pond, LLC .. . . . .Respondent/Appellant.

APPELLANT'S BRIEF OF RESPONDENT/APPELLANT ROPER POND, LLC

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STATEMENT OF THE CASE

This appeal involves the award of attorney's fees and costs pursuant to S.C. CODE ANN. § 15-77-300 ("State Action Statute") and the imposition of sanctions under Rule 72 of the South Carolina Rules of Procedure for the Administrative Law Court ("SCRPALC"). In awarding attorney's fees and costs under the State Action Statute, the Administrative Law Court ("ALC") found that Appellant/Respondent Town of Arcadia Lakes ("Town") acted without substantial justification in challenging certain authorizations by Respondent South Carolina Department of Health and Environmental Control ("DHEC") for the development of 13 acres of real property on Trenholm Road in an unincorporated area of Richland County ("Proposed Project"). (Amended Order Vacating Order on Respondents' Petitioner for Attorneys' Fees and Costs and for Sanctions Dated September 1, 2016 issued on March 15, 2017, hereinafter "March 15, 2017 Amended Order," p. 33, R. p. 57). The ALC also imposed sanctions against the Town upon finding that the Town's challenge to the DHEC authorizations was taken "for the purpose of stopping or delaying the Proposed Project." (March 15, 2017 Amended Order, p. 37, R. p. 61). By order dated June 14, 2017, the ALC awarded attorneys' fees and costs to Respondent/Appellant Roper Pond, LLC ("Roper Pond") in the amount of $205,283.84 and sanctioned the Town in the amount of $200,000 under Rule 72, SCRPALC. (Order for Attorneys' Fees and Costs and For Sanctions Pursuant

to SCALC Rule 72 dated June 14, 2017, hereinafter "June 14, 2017 Order," p. 15, R. p. 15). Roper Pond brings this appeal for review of the ALC's decision holding that the award of sanctions are to be paid to the ALC. As discussed more fully below, Roper Pond presented evidence to demonstrate that the company had suffered substantial economic harm as a result of the delay of construction of the Proposed Project during the pendency of the contested case. Indeed, the ALC made specific findings regarding the financial harm to Roper Pond as a result of the contested case. In light of these findings, Roper Pond contends that the ALC improperly denied its request that the sanctions awarded against the Town should be paid to the company.

STATEMENT OF THE FACTS

A. Underlying Contested Case and Appeal

By letter dated December 15, 2008, DHEC authorized coverage to Roper Pond under the 2006 NPDES General Permit for Storm Water Discharges from Large and Small Construction Activities ("State General Permit"), authorizing land-disturbing activities on 9.6 acres of the Property in association with the construction of a multi-family residential housing development in an unincorporated area of Richland County. On February 16, 2009, the Town, along with 16 other petitioners (collectively, "Petitioners"), filed a Request for Contested Case Hearing, asserting numerous grounds for its appeal of the Department's decision in this matter. (*See* Request for Contested Case Hearing dated February 16, 2009, pp. 3-8, R. pp. 214-219). However, at the hearing on the merits, the Town's case in chief focused almost exclusively on the excavation and lowering of the Pond on the property and allegations that Roper Pond did not secure a required federal permit to conduct such activities. On January 21, 2010, the

Administrative Law Court issued an order finding that the Petitioners lacked standing, but ruling on the merits of the case. (Final Order and Decision dated January 21, 2010, hereinafter "January 21, 2010 ALC Order," R. pp. 168-196). The order affirmed the Department's decision to authorize coverage under the State General Permit and rejected the Town's arguments that Roper Pond failed to obtain the necessary Corps permits and DHEC 401 water quality certification for the Proposed Project. (January 21, 2010 ALC Order, p. 27-29, R. p. 194-196).

On April 19, 2010, Roper Pond filed a Petition for Attorneys' Fees and Costs and for Sanctions Pursuant to Rule 72, SCRPALC. (Respondent Roper Pond, LLC's Petition for Attorneys' Fees and Costs and for Sanctions Pursuant to Rule 72, SCRPALC, dated April 19, 2010, hereinafter "April 19, 2010 Petition for Fees," R. pp. 244-341). On April 20, 2010, Petitioners filed and served a Notice of Appeal of the ALC's decision. On May 6, 2013, this Court issued a decision upholding the ALC's ruling on standing and the merits of the case. On June 12, 2013, this Court withdrew its March 6, 2013 Opinion and substituted a new Opinion, again affirming this ALC's Final Order and Decision on standing and the merits of the case.

On July 12, 2013, Petitioners filed a petition for writ of certiorari with the Supreme Court. The Supreme Court granted the writ on August 22, 2014. On March 18, 2015, the Court heard oral arguments. By order dated April 9, 2015, the Supreme Court dismissed the writ of certiorari as moot. (Order dated April 9, 2015, hereinafter "April 9, 2015 Order," R. pp. 124-126). The Order stated that "construction activities subject to and authorized by the state-wide general permit have been completed, Roper's coverage under the state-wide general permit has now terminated." (April 9, 2015

Order, p. 2, R. p. 125). The Supreme Court therefore dismissed the matter as moot "as it is now impossible for this Court to grant any redress in the context of the issues as framed and litigated below (i.e., modify or revoke authorization for Roper's construction activities under the state-wide permit)." *Id.*

B. Petition for Attorneys' Fees and Costs and for Sanctions

As discussed above, Roper Pond filed the April 19, 2010 Petition for Fees at the conclusion of the contested case. (R. pp. 244-341). In addition to the request for attorneys' fees and costs under the State Action Statute, and in the alternative, Roper Pond asked for sanctions under Rule 72, SCRPALC, which provides as follows:

> If the presiding administrative law judge determines that a contested case, appeal, motion, or defense is frivolous or taken solely for purposes of delay, the judge may impose such sanctions as the circumstances of the case and discouragement of like conduct in the future may require.

Rule 72, SCRPALC. In the April 19, 2010 Petition for Fees, Roper Pond requested the following relief under Rule 72, SCRPALC:

> Additionally, or in the alternative, Roper Pond asks the Court to award of attorneys' fees and costs and the costs associated with delay in the planned development of the Property to Roper Pond pursuant to Rule 72, SCRPALC, on the grounds that Petitioners' challenge to the DHEC's decision to grant coverage to Roper Pond under the General Permit was frivolous and/or taken solely for the purpose of delay.

(April 19, 2010 Petition for Fees, p. 2, R. p. 245). In support of the request for sanctions for the costs associated with delay in construction of the Proposed Project, Roper Pond offered the Affidavit of Charles C. Mickel, who attested that the cost of delay during the pendency of the contested cases totaled $510,430. (Affidavit of Charles C. Mickel dated March 23, 2010, hereinafter "2010 Mickel Affidavit," p. 2, R. pp. 340). These costs included interest incurred in the financing of the project, costs associated with re-application for county permits which had expired, costs associated with compliance with

a new electrical code, and overhead for management of the project. *Id.* On May 11, 2010, with the consent of the parties, the Court issued an order holding the April 19, 2010 Petition for Fees in abeyance pending the resolution of Petitioners' appeal. (Order dated May 11, 2010, R. pp. 164-165). In this initial April 19, 2010 Petition for Fees and in subsequent amendments to the Petition, Roper Pond clearly and unequivocally asked for sanctions to be paid to Roper Pond and offered evidence of the economic harm suffered by Roper Pond as a result of the delay of the Proposed Project during the pendency of the contested case.

As discussed above, this Court issued a decision on March 6, 2013, upholding the January 21, 2010 ALC Order. On June 12, 2013, this Court withdrew its March 6, 2013 Opinion and substituted a new Opinion, again affirming this ALC's Final Order and Decision on standing and the merits of the case. On July 12, 2013, Roper Pond filed Respondent Roper Pond, LLC's Amended Petition for Attorneys' Fees and Costs and for Sanctions Pursuant to Rule 72, SCRPALC. (Respondent Roper Pond, LLC's Amended Petition for Attorneys' Fees and Costs and for Sanctions Pursuant to Rule 72, SCRPALC, hereinafter "July 12, 2013 Amended Petition for Fees," R. pp. 529-535). As with the April 19, 2010 Petition for Fees, Roper Pond requested the following relief under Rule 72, SCRPALC:

> Additionally, or in the alternative, Roper Pond asks the Court to award of attorneys' fees and costs and the costs associated with delay in the planned development of the Property to Roper Pond pursuant to Rule 72, SCRPALC, on the grounds that Petitioners' challenge to the DHEC's decision to grant coverage to Roper Pond under the General Permit was frivolous and/or taken solely for the purpose of delay.

(July 12, 2013 Amended Petition for Fees, p. 3, R. p. 531). Again, the request for sanctions for the costs incurred by Roper Pond as a result of the delay of the

Proposed Project was supported by the Mickel Affidavit dated March 23, 2010. *Id.*

On July 12, 2013, Petitioners filed a petition for writ of certiorari with the Supreme Court. By order dated April 9, 2015, the Supreme Court dismissed the writ of certiorari as moot. (April 9, 2015 Order, R. pp. 124-126). On April 28, 2015, the Supreme Court issued a Remittitur of the case to the ALC. (Remittitur dated April 28, 2015, R. pp. 122-123). On May 25, 2015, Roper Pond filed Respondent Roper Pond, LLC's Second Amended Petition for Attorneys' Fees and Costs and for Sanctions Pursuant to Rule 72, SCRPALC. (Respondent Roper Pond, LLC's Second Amended Petition for Attorneys' Fees and Costs and for Sanctions Pursuant to Rule 72, SCRPALC, hereinafter "May 25, 2015 Second Amended Petition for Fees," R. pp. 615-724). As with the prior Petitions for Fees, Roper Pond requested the following relief under Rule 72, SCRPALC:

> Additionally, or in the alternative, Roper Pond asks the Court to award of attorneys' fees and costs and the costs associated with delay in the planned development of the Property to Roper Pond pursuant to Rule 72, SCRPALC, on the grounds that Petitioners' challenge to the DHEC's decision to grant coverage to Roper Pond under the General Permit was frivolous and/or taken solely for the purpose of delay.

(May 25, 2015 Second Amended Petition for Fees, p. 3, R. p. 617). In support of the request for sanctions for the costs associated with delay in construction of the Proposed Project, Roper Pond offered a new Mickel Affidavit, attesting that the cost of delay during the pendency of the contested cases totaled $605,250. (Affidavit of Charles C. Mickel dated May 28, 2015, hereinafter, "2015 Mickel Affidavit," p. 2, R. pp. 684-685). These costs included interest incurred in the financing of the project, costs associated with re-application for county permits which had expired, costs associated with

compliance with a new electrical code, property taxes paid during the delay, increase in the water/sewer impact and tap fees, and overhead for management of the project. *Id.*

On June 24, 2015, Petitioners filed a motion to strike the affidavits in support of the May 28, 2015 Second Amended Petition for Fees. (Petitioners' Motion to Strike or, Alternatively, to Allow Discovery dated June 24, 2015, hereinafter "June 24, 2015 Motion to Strike," R. pp. 725-727). On July 16, 2015, Roper Pond filed a response in opposition to the June 24, 2015 Motion to Strike. (Respondent Roper Pond, LLC's Response in Opposition to Petitioners' Motion to Strike or, Alternatively, to Allow Discovery dated July 16, 2015, hereinafter "July 16, 2015 Response to Motion to Strike," R. pp. 733-763). In response to the arguments raised in the June 24, 2015 Motion to Strike, the July 16, 2015 Response to Motion to Strike included an Amended Affidavit of Charles C. Mickel which provided additional documentation in support of the costs incurred by Roper Pond as a result of the delay of the Proposed Project during the pendency of the contested case. (Amended Affidavit of Charles C. Mickel dated July 17, 2015, hereinafter "Amended Mickel Affidavit," R. pp. 1307-1420). Mr. Mickel attested that the cost of delay during the pendency of the contested cases totaled $617,623.16. (Amended Mickel Affidavit, p. 2, R. p. 1308). These revised costs included interest incurred in the financing of the project, costs associated with re-application for county permits which had expired, costs associated with compliance with a new electrical code, property taxes paid during the delay, increase in the water/sewer impact and tap fees, and overhead for management of the project. *Id.* On August 3, 2015, the ALC issued an order granting the parties request for bifurcating the issues regarding sanctions and costs. (Order dated August 3, 2015, hereinafter "August 3, 2015 Order," R. p. 118). The order

also memorialized Petitioners withdrawal of the June 24, 2015 Motion to Strike "with express right to re-file that motion should the Court determine that any liability exists." *Id.*

On November 30, 2015, Roper Pond filed Respondent Roper Pond, LLC's Third Amended Petition for Attorneys' Fees and Costs and for Sanctions Pursuant to Rule 72, SCRPALC. (Respondent Roper Pond, LLC's Third Amended Petition for Attorneys' Fees and Costs and for Sanctions Pursuant to Rule 72, SCRPALC, hereinafter "November 30, 2015 Third Amended Petition for Fees," R. pp. 810-843). The November 30, 2015 Third Amended Petition for Fees withdrew Roper Pond's claims for sanctions against the individual Petitioners and limited to the request for sanctions to those "based on a determination that the contested case was 'taken solely for purposes of delay.'" (November 30, 2015 Third Amended Petition for Fees, p. 3, R. p. 812). The request for relief under Rule 72, SCRPALC, was revised to read as follows:

> Additionally, or in the alternative, Roper Pond asks the Court to award attorneys' fees and costs and the costs associated with delay in the planned development of the Property to Roper Pond pursuant to Rule 72, SCRPALC, on the grounds that the Town's challenge to the DHEC's decision to grant coverage to Roper Pond under the General Permit was taken solely for the purpose of delay.

(November 30, 2015 Third Amended Petition for Fees, pp. 3-4, R. pp. 812-813). While the requested relief was revised, Roper Pond still clearly requested that the sanctions be awarded to Roper Pond. The November 30, 2015 Third Amended Petition for Fees offered the Amended Mickel Affidavit in support of its request for sanctions for the costs incurred by Roper Pond as a result of the delay of the Proposed Project. *Id.*

On May 9, 2016, the ALC heard argument on the first phase of bifurcated issues to determine whether Roper Pond is entitled to attorneys' fees and costs under the State

Action Statute and sanctions under Rule 72, SCRPALC. (Notice of Hearing (Motion) dated March 30, 2016, R. pp. 1422-1423). At the request of the ALC, the Town and Roper Pond submitted proposed orders on the November 30, 2015 Third Amended Petition for Fees. (Roper Pond Proposed Order filed on June 20, 2016, R. pp. 1424-1474; Town of Arcadia Lakes Proposed Order filed on June 20, 2016, R. pp. 1476-1504). On September 1, 2016, the ALC issued an Order on Respondents' Petition for Attorneys' Fees and Costs and for Sanctions, finding that the Town brought the contested case for the purpose of delay. (Order on Respondents' Petition for Attorneys' Fees and Costs and for Sanctions dated September 1, 2016, hereinafter "September 1, 2016 Order," p. 38, R. p. 101. The ALC thus held that "Roper Pond is entitled to an award of attorneys' fees and costs under the S.C. Code Ann. § 15-77-300 and an award of costs of delay of the proposed development as sanctions against the Town pursuant to SCALC Rule 72." (September 1, 2016 Order, p. 2, R. p. 65). In the September 1, 2016 Order, the ALC made the following finding with respect to the economic impact of the delay caused by the contested case on Roper Pond:

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

(September 1, 2016 Order, p. 16, R. p. 79). These findings were included almost verbatim in Roper Pond's June 20, 2016 Proposed Order and cited to the Amended

Mickel Affidavit in support of these proposed findings. (June 20, 2016 Roper Pond Proposed Order, p. 20, R. p. 1444). In ruling that Roper Pond was entitled to sanctions, the ALC found as follows:

> The Town argues that sanctions are not warranted because the "appeals process also did nothing to delay the project, as the project went forward to completion regardless." This argument disregards the financial impacts of the substantial delay in the construction of the Proposed Project. The DHEC decision which was challenged in this contested case was issued to Roper Pond by letter dated December 15, 2008. This Court issued its Final Order and Decision on January 21, 2010. Petitioners thereafter filed a Motion to Reconsider and for Stay on February 16, 2010. The Court denied that Motion on April 1, 2010. As such, the DHEC decision was stayed for not less than thirteen months. Additionally, this delay required Roper Pond to re-apply for certain County permits which had expired during the pendency of the contested case and thus resulted in further delay. Accordingly, the Town cannot claim that there was there was no consequence to the delay in the construction of the Proposed Project during the pendency of this contested case.
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> Roper Pond claims substantial cost increases directly attributable to the delay of construction of the Proposed Project during the pendency of the contested case before this Court. Roper Pond has presented evidence to demonstrate that the Town availed itself of the contested case procedures established under S.C. CODE ANN. § 44-1-60 and the APA, S.C. CODE ANN. §§ 1-23-10 *et seq.*, for the purpose of stopping or delaying the Proposed Project. SCALC Rule 72, authorizes this Court to impose such sanctions "as the circumstances of the case and discouragement of like conduct in the future may require." SCALC Rule 72. **The objective of discouraging like conduct in the future is appropriately achieved by shifting some or all of the cost of the delay of the Proposed Project from Roper Pond to the Town.** Otherwise, the Town has achieved its stated and improper objective of delaying the Proposed Project by preventing the commencement of construction for not less than thirteen months. Not only has such action unnecessarily expended valuable judicial resources, it has caused significant economic harm to Roper Pond. The Court therefore grants Roper Pond's Petition for sanctions for delay of the Proposed Project during the pendency of the stay before this Court.

(September 1, 2016 Order, pp. 37-38, R. pp. 100-101) (emphasis added). Accordingly, in the September 1, 2016 Order, the ALC found that Roper Pond had been economically damaged by delay during the pendency of the contested case which the Town brought for

the purpose of stopping or delaying the Proposed Project. The ALC thus held that sanctions should be imposed on the Town pursuant to Rule 72, SCRPALC, and that such sanctions were an appropriate means for "shifting some or all of the cost of the delay of the Proposed Project from Roper Pond to the Town." (September 1, 2016 Order, p. 38, R. p. 101).

On October 3, 2016, the Town filed a notice of appeal with this Court, seeking review of the September 1, 2016 Order and an Order Granting Motion to Strike issued January 25, 2016 ("January 25, 2016 Order"). On October 12, 2016, Roper Pond filed a motion to dismiss the Town's appeal on the grounds that the September 1, 2016 Order and the January 25, 2016 were not final decisions of the ALC subject to judicial review pursuant to the South Carolina Administrative Procedures Act, S.C. CODE ANN. §§ 1-23-10 *et seq.* ("APA"). By order dated January 12, 2017, this Court granted Roper Pond's motion to dismiss. On January 31, 2017, this Court remitted the case to the ALC.

On February 21, 2017, the Town filed Town of Arcadia Lakes' Amended Motion to Strike or, Alternatively, to Allow Discovery. (Town of Arcadia Lakes' Amended Motion to Strike or, Alternatively, to Allow Discovery dated February 21, 2017, hereinafter "February 21, 2017 Amended Motion to Strike," R. pp. 797-802). On March 3, 2017, Roper Pond filed a response to the February 21, 2017 Amended Motion to Strike. (Respondent Roper Pond, LLC's Response in Opposition to Town of Arcadia Lakes' Amended Motion to Strike or, Alternatively, to Allow Discovery dated March 3, 2017, hereinafter "March 3, 2017 Response to Amended Motion to Strike," R. pp. 803-809). On March 10, 2017, the ALC held a telephone hearing on the February 21, 2017 Amended Motion to Strike. (Notice of Motion Hearing (by Telephone Conference) dated

March 1, 2017, R. pp. 1505-1506). During the telephone conference, Roper Pond argued that the Town's motion to strike the Amended Mickel Affidavit was untimely because the ALC had already relied on the Affidavit in the September 1, 2016 Order. (See email from Joan Hartley to Anthony Goldman on March 15, 2017, R. pp. 1507-1508).

On March 15, 2017, the ALC vacated the September 1, 2016 order and issued a new ruling on Roper Pond's Third Amended Petition for Fees. (March 15, 2017 Amended Order, R. pp. 25-63). On March 15, 2017, the ALC further advised the parties that the Court would grant the Town's motion to strike the Amended Mickel Affidavit and deny the Town's request to conduct additional discovery. (Email from Anthony Goldman dated March 15, 2017, R. p. 1509). Despite the ALC's decision to strike the Amended Mickel Affidavit, the March 15, 2017 Amended Order on Roper Pond's Third Amended Petition for Fees included findings which were clearly based on evidence presented in that Affidavit. The following paragraphs were included in March 15, 2017 Amended Order and were identical to those in the September 1, 2017:

> Roper Pond incurred increased costs as a result of the delay in the construction of the Proposed Project. The DHEC decision, which was challenged in this contested case, was issued to Roper Pond by letter dated December 15, 2008. A request for a contested case was filed on February 16, 2009. This Court issued its Final Order and Decision on January 21, 2010. Petitioners thereafter filed a Motion to Reconsider and for Stay on February 16, 2010. The Court denied that Motion on April 1, 2010. As such, the DHEC decision was stayed for not less than thirteen months. Additionally, this delay required Roper Pond to re-apply for certain County permits which had expired during the pendency of the contested case and thus resulted in further delay. Roper Pond claims specific increased costs for the Proposed Project as a result of this delay.
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> The Town argues that sanctions are not warranted because the "appeals process also did nothing to delay the project, as the project went forward to completion regardless." This argument disregards the financial impacts of the substantial delay in the construction of the Proposed

> Project. The DHEC decision which was challenged in this contested case was issued to Roper Pond by letter dated December 15, 2008. This Court issued its Final Order and Decision on January 21, 2010. Petitioners thereafter filed a Motion to Reconsider and for Stay on February 16, 2010. The Court denied that Motion on April 1, 2010. As such, the DHEC decision was stayed for not less than thirteen months. Additionally, this delay required Roper Pond to re-apply for certain County permits which had expired during the pendency of the contested case and thus resulted in further delay. Accordingly, the Town cannot claim that there was there was no consequence to the delay in the construction of the Proposed Project during the pendency of this contested case.

(March 15, 2017 Amended Order, pp. 16 & 37, R. pp. 40 & 61). However, the conclusory paragraph of the discussion on the award of sanctions was revised to read as follows:

> Roper Pond has presented evidence to demonstrate that the Town availed itself of the contested case procedures established under S.C. CODE ANN. § 44-1-60 and the APA, S.C. CODE ANN. §§ 1-23-10 *et seq.*, for the purpose of stopping or delaying the Proposed Project. SCALC Rule 72, authorizes this Court to impose such sanctions "as the circumstances of the case and discouragement of like conduct in the future may require." SCALC Rule 72. The objective of discouraging like conduct in the future is appropriately achieved by imposing a Rule 72 sanction against the Town. Otherwise, the Town has achieved its stated and improper objective of delaying the Proposed Project by preventing the commencement of construction for not less than thirteen months. Not only has such action unnecessarily expended valuable judicial resources, it has caused significant economic harm to Roper Pond. The Court therefore finds that sanctions for delay of the Proposed Project are proper.

(March 15, 2017 Amended Order, pp. 37-38, R. pp. 61-62). Significantly, the March 14, 2017 Amended Order deleted and replaced the following sentence: "The objective of discouraging like conduct in the future is appropriately achieved by shifting some or all of the cost of the delay of the Proposed Project from Roper Pond to the Town." (September 1, 2016 Order, pp. 37-38, R. pp. 100-101). This section of the March 15, 2017 Amended Order also included the following footnote: "The Administrative Law Court is not the proper venue in which to seek and recover damages. The type of amount

of sanctions is discretionary with the Court." (March 15, 2017 Amended Order, p. 38, R. p. 62).

Finally, the September 1, 2016 Order had ruled as follows on Roper Pond's petition for sanctions: "**IT IS FURTHER ORDERED** that Roper Pond is entitled to sanctions against Petitioner Town of Arcadia Lakes for the delay in construction of the Proposed Project during the pendency of the stay before this Court." (September 1, 2016 Order, p. 38, R. p. 101). In the March 15, 2017 Amended Order, this ruling was replaced with the following: "**IT IS FURTHER ORDERED** that sanctions against Petitioner Town of Arcadia Lakes are proper." (March 15, 2017 Amended Order, p. 38, R. p. 62). The March 15, 2017 Amended Order thus revised the ALC's initial ruling that the sanctions against the Town would be awarded to Roper Pond. This ruling was further supported by the March 24, 2017 Order ruling on the Town's Amended Motion to Strike. Specifically, the March 24, 2017 Order included the following ruling on the motion to strike the Amended Mickel Affidavit:

> The Town moves to strike the Mickel Affidavit on the basis that the affidavit and attached exhibits are insufficient evidence of the costs of delay incurred by Roper Pond due to the Town's filing of this contested case. The Mickel Affidavit is offered by Roper Pond in support of its petition for sanction under Rule 72, SCRALC, as evidence that the contested case resulted in increased costs for the project which was the subject of this contested case. The March 15, 2017 Order vacated the September 1, 2016 Order and re-issued the ruling on Roper Pond's Third Amended Petition to clarify that the type and amount of sanctions are in the discretion of the Court. Rule 72 provides that "the judge may impose such sanctions as the circumstances of the case and discouragement of like conduct in the future may require." Rule 72, SCRPALC. Therefore, the Mickel Affidavit has no relevance to the determination of the type and amount of sanction to discourage the Town from like conduct in the future. The Town's motion to strike the Mickel Affidavit is therefore granted.

(March 24, 2017 Order, pp. 5-6, R. pp. 21-22). The ALC thus struck the Amended

Mickel Affidavit even though it was the sole evidence in support for multiple findings in the September 1, 2016 Order and the March 15, 2017 Amended Order. On June 14, 2017, the ALC issued Order for Attorneys' Fees and Costs and for Sanctions pursuant to SCALC Rule 72, which required the Town to pay Roper Pond an award of attorneys' fees and costs in the amount of $205,283.84, and required the Town to pay the ALC sanctions in the amount of $200,000. (June 14, 2017 Order, p. 15, R. p. 15).

ARGUMENTS

Roper Pond does not dispute the amount of the sanctions awarded by the ALC. However, Roper Pond appeals the ALC decision holding that sanctions imposed on the Town are to be paid to the ALC. The actions for which the sanctions were imposed—i.e., bringing a contested case for the purpose of stopping or delaying the Proposed Project—caused Roper Pond to incur substantial additional costs for the Proposed Project. Indeed, the ALC expressly found that Roper Pond had incurred these additional costs as a result of the delay caused of the Town's action. As such, the sanctions imposed on the Town should be paid to Roper Pond—the party harmed by the unwarranted and unjustified actions of the Town. Roper Pond brings this appeal requesting that the Court reverse the ALC's ruling and hold that the sanctions of $200,000 against the Town should be paid to Roper Pond.

I. THE ALC ERRED IN STRIKING THE AMENDED MICKEL AFFIDAVIT.

In striking the Amended Mickel Affidavit, the ALC incorrectly found the Affidavit "has no relevance to the determination of the type and amount of sanction to discourage the Town from like conduct in the future." (March 24, 2017 Order, p. 6, R. p. 22). The ALC ruling on the motion to strike the Amended Mickel Affidavit is

reviewed by this Court under an abuse of discretion standard. *Conner v. City of Forest Acres*, 363 S.C. 460, 467, 611 S.E.2d 905, 908 (2005) (holding that the admission or exclusion of evidence is within the sound discretion of the trial court). "An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion without evidentiary support." *Id.* In this case, the ALC's ruling on the motion to strike the Amended Mickel Affidavit is based on an error of law.

The costs incurred by Roper Pond as a result of the delay in construction of the Proposed Project is a proper consideration in awarding sanctions against the Town. The South Carolina Supreme Court has held that costs incurred by an opposing party is an appropriate consideration when awarding sanctions for legal action taken solely for the purpose of delay. *Ex parte Bon Secours-St. Francis Xavier Hosp., Inc.*, 393 S.C. 590, 596, 713 S.E.2d 624, 627 (2011) (affirming an award of sanctions which included lost income of plaintiff doctor caused by improper second removal to federal court). In *Bon Secours*, the trial court imposed sanctions under Rule 11 for a second removal of the case by defendant hospital on the morning on which a jury trial of the case was scheduled to begin. The trial court found that the "second removal was based upon the same grounds as the first removal, was without merit, and was interposed solely for delay." *Id.* at 595, 713 S.E.2d at 627. The trial court ordered sanctions totaling $68,000, including $53,685.65 for the plaintiff doctor for lost income, trial costs and fees, and attorneys' fees. *Id.* at 596, 713 S.E.2d at 627. The Supreme Court upheld this portion of the sanctions awarded to the plaintiff doctor under Rule 11, SCRCP. *Id.* at 600, 713 S.E.2d at 629-30.

The purposes of sanctions under Rule 11, SCRCP, are comparable to those under

Rule 72, SCRPALC. Under Rule 11, an attorney signature on a filing is certification that "that to the best of his knowledge, information and belief there is good ground to support it; and that it is not interposed for delay." S.C.R. CIV. P. Rule 11. Similarly, Rule 72, SCRPALC, provides that the ALC may impose sanctions upon a determination that "a contested case, appeal, motion, or defense is frivolous or taken solely for purposes of delay." Under both rules, the sanctions are intended to deter similar conduct in the future. Rule 72, SCALC, provides in full:

> If the presiding administrative law judge determines that a contested case, appeal, motion, or defense is frivolous or taken solely for purposes of delay, the judge may impose such sanctions as the circumstances of the case and discouragement of like conduct in the future may require.

Rule 72, SCRPALC (emphasis added). The *Bon Secours* Court set forth the following factors for determining the appropriate sanctions under Rule 11, SCRCP:

> A trial court may impose sanctions on a party, a party's attorney, or both for filing a pleading, motion, or other paper to cause delay or when no good grounds exist to support the filing. *See Runyon*, 322 S.C. at 19, 471 S.E.2d at 162. The sanctions may include: an order to pay the reasonable costs and attorneys' fees incurred by the party defending against the action brought in bad faith; a reasonable fine to be paid to the court; a reasonable monetary penalty to the party defending the action brought in bad faith; or a directive of a nonmonetary nature designed to deter the party or the party's attorney from bringing any future action in bad faith. *Id.*

Bon Secours, 393 S.C. at 597-98, 713 S.E.2d at 628 (citing *Runyon v. Wright*, 322 S.C. 15, 19, 471 S.E.2d 160, 162 (1996)) (emphasis added). Although deterrence of similar future action was a factor in determining the appropriate sanctions, the *Bon Secours* Court clearly held that the costs to the opposing party also was a consideration, and in fact, upheld sanctions to that opposing party for lost income incurred a result of the Rule 11 violation. In striking the Amended Mickel Affidavit, the ALC found that "the Mickel Affidavit has no relevance to the determination of the type and amount of sanction to

discourage the Town from like conduct in the future." (March 24, 2017 Order, p. 6, R. p. 6). This is clearly error of law under the *Bon Secour* holding as the ALC should have considered the costs to Roper Pond for the delay caused by the Town's action in violation of Rule 72, SCRPALC. The ALC's motion to strike the Amended Mickel Affidavit should therefore be reversed.

Additionally, the ALC erred in striking the Amended Mickel Affidavit because the ALC had already relied on the Affidavit as evidence in support of findings in the September 1, 2016 Order and the March 15, 2017 Amended Order. The Town first moved to strike the 2015 Mickel Affidavit in its June 24, 2015 Motion to Strike. (June 24, 2015 Motion to Strike, p. 2, R. p. 726). The Town argued that the 2015 Mickel Affidavit was "filled with vague assertions about delay costs with absolutely no supporting documentation that would allow the Petitioners to test the validity and veracity of the statements and to prepare an appropriate response." *Id.* In response to this argument, Roper Pond filed the Amended Mickel Affidavit which provided additional documentation in support of the costs incurred by Roper Pond as a result of the delay of the Proposed Project during the pendency of the contested case. (July 2015 Mickel Affidavit, R. pp. 1307-1420). On August 3, 2015, the ALC issued an order which memorialized the Petitioners' withdrawal of the June 24, 2015 Motion to Strike "with express right to re-file that motion should the Court determine that any liability exists." (August 3, 2015 Order, R. p. 118). As discussed above, both the September 1, 2016 Order and the March 15, 2016 Order included findings which were solely supported by the Amended Mickel Affidavit. Both orders found that:

a) Roper Pond incurred increased costs as a result of the delay in the construction of the Proposed Project (September 1, 2016 Order, pp.

16, R. p. 79; March 15, 2017 Order, p. 16, R. p. 40);

b) this delay required Roper Pond to re-apply for certain County permits which had expired during the pendency of the contested case and thus resulted in further delay. (September 1, 2016 Order, pp. 16 & 37, R. pp. 79 & 100; March 15, 2017 Order, pp. 16 & 37, R. pp. 40 & 61);

c) the Town cannot claim that there was there was no consequence to the delay in the construction of the Proposed Project during the pendency of this contested case. (September 1, 2016 Order, p. 37, R. p. 100; March 15, 2017 Order, p. 37, R. p. 61);

d) Not only has such action unnecessarily expended valuable judicial resources, it has caused significant economic harm to Roper Pond. (September 1, 2016 Order, p. 38, R. p. 101; March 15, 2017 Order, p. 38, R. p. 62).

As discussed above, these findings were included in Roper Pond's Proposed Order and cited to the Amended Mickel Affidavit as evidence to support these findings. (Roper Pond Proposed Order, pp. 20 & 49-50, R. pp. 1444, 1473-1474). No other evidence was offered in support of these findings.

The February 21, 2017 Amended Motion to Strike was an untimely objection to the Amended Mickel Affidavit. "The failure to make an objection at the time evidence is offered constitutes a waiver of the right to object." *Doe v. S.B.M.*, 327 S.C. 352, 356, 488 S.E.2d 878, 880 (Ct. App. 1997); *see also* Rule 103, SCRE (a party may not claim error on the admission of evidence unless "a timely objection or motion to strike appears on the record"). When the ALC made the finding in the September 1, 2016 Order, there was no objection or motion to strike pending on the Amended Mickel Affidavit. Although the Town had filed the June 24, 2015 Motion to Strike, the August 3, 2015 Order acknowledged that this Motion had been withdrawn by the Town. Moreover, the Amended Mickel Affidavit was filed on July 16, 2015, and addressed alleged defects raised by the Town in the June 24, 2015 Motion to Strike. As such, there was no motion

to strike the Amended Mickel Affidavit when the ALC issued the September 1, 2016 Order. The February 21, 2017 Amended Motion to Strike was therefore an untimely objection to the Amended Mickel Affidavit.

The March 15, 2017 Amended Order cannot give effect to an untimely objection to the Amended Mickel Affidavit. As discussed above, the ALC issued the March 15, 2017 Amended Order, which amended and vacated September 1, 2016 Order. (March 15, 2017 Amended Order, R. pp. 25-63). However, the ALC had already relied on the Amended Mickel Affidavit when the Town filed the untimely February 21, 2017 Amended Motion to Strike and thus had waived this objection. *See Doe,* 327 S.C. at 356, 488 S.E.2d at 880 ("The failure to make an objection at the time evidence is offered constitutes a waiver of the right to object."). The ALC's issuance of the March 15, 2017 Amended Order cannot give effect to an objection which had already been waived by the Town. Moreover, as discussed above, the March 15, 2017 Amended Order included multiple findings that were supported only by evidence offered in the Amended Mickel Affidavit. Therefore, the ALC erred in granting the Town's motion to strike the Amended Mickel Affidavit in the March 24, 2017 Order.

II. THE ALC ERRED IN RULING THAT THE AWARD OF SANCTION UNDER RULE 72, SCRPALC, IS TO BE PAID TO THE ADMINISTRATIVE LAW COURT.

Roper Pond does not dispute the amount of the sanctions imposed against the Town or the ALC's consideration of the Town's financial condition and responsibilities in making that determination. As discussed above, Rule 72, SCRPALC, provides the ALC "may impose such sanctions as the circumstances of the case and discouragement of like conduct in the future may require." Rule 72, SCRPALC. The "discouragement of like conduct in the future" suggests that the amount must be sufficient to deter future

conduct and such discouragement would depend on the available financial resources of the party. In this case, the ALC found that a $200,000 sanction was proper:

> In some cases a severe sanction may be justified even though the dollar value in issue may be small. Conversely, in other cases a mild sanction may be indicated even though the amount in issue is large.
>
> In this case involving the construction by a lawful owner of a multiunit housing complex, we have not only a significant value involved but also an egregious use of lawful statutes to the harm of the owner and the unnecessary expenditure of the time of the Court.
>
> The sanctions to be imposed must be of significant strength for the "discouragement of like conduct in the future." I find that given the evidence in the record as a whole, including the financial standing of the Town, that a sanction of Two Hundred Thousand Dollars ($200,000.00) is proper. *Cf. Gamble v. Stevenson*, 305 S.C. 104, 111-12, 406 S.E.2d 350, 354 (1991) (A wrongdoers ability to pay is a factor to consider in assessing damages). The sanction shall be payable to the Clerk of the ALC.

(June 14, 2017 Order, p. 15, R. p. 15). Although the amount of sanctions imposed against the Town are appropriate given the financial conditions and responsibilities of the Town, the ALC erred in ruling that the sanctions should be paid to the ALC. "The imposition of sanctions is generally entrusted to the sound discretion of the Circuit Court." *Downey v. Dixon*, 294 S.C. 42, 45, 362 S.E.2d 317, 318 (Ct. App. 1987). "An abuse of discretion may be found where the appellant shows that the conclusion reached by the trial court was without reasonable factual support and resulted in prejudice to the rights of appellant, thereby amounting to an error of law." *Kershaw County Bd. of Educ. v. U.S. Gypsum Co.*, 302 S.C. 390, 395, 396 S.E.2d 369, 372 (1990). Under the *Bon Secours* holding, the Amended Mickel Affidavit should have been considered by the ALC and supports the award of sanctions to Roper Pond for the costs of delay in construction of the Proposed Project during the pendency of the contested case.

As discussed above, the *Bon Secours* Court upheld an award of sanctions for the

costs of lost income of the plaintiff doctor as a result of the improper removal of the case on the morning of the schedule trial. In addition to the plaintiff's costs for lost income, trial costs and fees, and attorneys' fees, the trial court also awarded the following sanctions:

- $6,313.00 payable to the South Carolina Judicial Department to reimburse the cost of the salary and benefits of Judge Baxley, his law clerk, and the court reporter for being unable to operate the week for which trial was scheduled;
- $5,000.00 to the Access to Justice Commission for denying the public access to the court during the scheduled trial week, along with a letter to Executive Director Robin Wheeler explaining the reason for the payment;
- $2,550.00 to the Charleston County Clerk of Court to reimburse the cost of summoning and administering the jury panel for that week; and
- $50.00 to each juror for the inconvenience they suffered, along with a letter of apology and explanation.

Bon Secours, 393 S.C. at 596, 713 S.E.2d at 627. The Supreme Court held that these sanctions were improper:

> 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 when he required Appellants to reimburse the South Carolina Judicial Department for the cost of the court's salary and benefits for the week it was unable to proceed with the scheduled trial, to reimburse the Charleston County Clerk of Court for the expense it incurred in summoning and administering the jury panel, to pay $5,000.00 to the Access to Justice Commission with a letter of apology to Robin Wheeler, and to pay $50.00 to each juror with a letter of apology. Accordingly, we reverse those sanctions.

Id. at 600-01, 713 S.E.2d at 629-30. While Roper Pond acknowledges the expenditure of judicial resources as a result of the contested case, the *Bon Secours* holding clearly limits the amount of any such sanctions. However, the holding also acknowledges that

sanctions properly include "[t]he award to the other party of its detailed, itemized costs and fees incurred." *Id.* Indeed, the Supreme Court found that lost income of the plaintiff was an appropriate costs to be considered in determining the amount of sanctions. *Id.* at 600-01, 713 S.E.2d at 629-30.

In this case, Roper Pond presented the Amended Mickel Affidavit which documented more than $600,000 in additional costs incurred as a result of the delay in the construction of the Proposed Project. In the September 1, 2016, the March 15, 2017 Amended Order, and the June 14, 2017 Order, the ALC correctly found that the delay had caused significant economic harm to Roper Pond. Additionally, in the June 24, 2017 Order, the ALC acknowledged that the contested case was "an egregious use of lawful statutes to the harm of the owner." (June 24, 2017 Order, p. 15, R. p. 15). While Roper Pond acknowledges that sanctions under Rule 72, SCRPALC, is not the venue for seeking full recovery of its damages as a result of the Town's action in bringing this contested case, Roper Pond contends that the award of sanctions against the Town is appropriately set at $200,000, and the $200,000 sanction should be awarded to Roper Pond under the *Bon Secour* holding.

III. CONCLUSION

For the reasons stated herein, the Court should reverse the ALC's ruling on the payment of sanctions to the ALC and hold that the sanctions of $200,000 against the Town should be paid to Respondent/Appellant Roper Pond, LLC.

Respectfully submitted,

June 7, 2018

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

John D. McLeod, Administrative Law Judge

Case No. 09-ALJ-07-0069-CC

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

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

v.

South Carolina Department of Health and Environmental Control. . . . . Respondent,

and

Roper Pond, LLC . . . . . .Respondent/Appellant.

CERTIFICATION OF COUNSEL

The undersigned hereby certifies that Appellant's Brief of Respondent/Appellant Roper Pond, LLC complies with Rule 211(b), SCACR.

June 7, 2018

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