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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Shirley C. Robinson, Administrative Law Judge

Appellate Case No. 2020-000448

Pickens County, ...Respondent,

v.

South Carolina Department of Health and Environmental Control and
MRR Pickens, LLC..... Petitioners.

BRIEF OF PETITIONER MRR PICKENS, LLC

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II. Did the Court of Appeals exceed the scope of its review by invading the province of the fact finder, substituting its contrary view of the unappealed findings of the ALC, and making *de novo* findings of fact and conclusions of law beyond the narrow, threshold question of the timeliness of the County's action, all without factual basis in the record or based on an incomplete record, regarding issues that were neither raised to and nor ruled upon by the ALC, and which pertain to the merits of the underlying dispute?

III. Assuming that the ancillary factual and legal questions reached *de novo* by the Court of Appeals are relevant to the sole question of timeliness, did the Court of Appeals err as a matter of law in not remanding this matter to the ALC?

IV. Assuming that the ancillary factual and legal questions reached *de novo* by the Court of Appeals are relevant to the sole question of timeliness, in making its *de novo* findings of fact and conclusions of law, did the Court of Appeals further err in failing to defer to the interpretation by DHEC of its regulations with respect to an issue that is inherently discretionary in nature?

V. Does the Court of Appeals misapprehend the practice and procedure in the ALC with respect to what constitutes "pleadings" of the parties available for consideration in deciding a motion to dismiss?

INTRODUCTION

At its core, this appeal is rather simple. It involves the implications of actual notice in this state on a party's rights and obligations, as well as the application of the proper appellate standard of review to discrete decisions of the lower court involving dismissal of administrative challenges to permit decisions on timeliness grounds. Here, an interested party received actual notice of an administrative permit decision, along with the attendant knowledge of its rights and obligations to seek timely review of the decision, but sat on its administrative rights and did not seek administrative review for over three months. Such is the undisputed record of Respondent Pickens County's (County) actions in this case. To mask this patent failure, the County turned this permit decision into something it was not: controversial and the result of bad faith. Through a concocted tale of subterfuge and manipulation, the County has leveled one unfounded and gratuitous allegation after another against Petitioners MRR Pickens, LLC (MRR) and the South Carolina Department of Health and Environmental Control (DHEC), along with the employees and agents of both. This appeal, the permit modification, and these Petitioners, are none of those things.

The sole issue presented to Administrative Law Court (ALC) was whether the County timely filed a request for final review by the DHEC Board of a permit modification issued to MRR. The ALC narrowly answered that question in the negative, given the undisputed timeline of events and expressly declined to go any further. Seeking a different audience for its unfounded and unpreserved claims of impropriety, the County sought to greatly expand the scope of the appeal beyond the discrete issue ruled upon. The Court of Appeals obliged. However, the record will reflect the fact that the Court of Appeals failed to apply the appropriate standard of review, disregarded undisputed and unchallenged findings of fact by the ALC, made *de novo* findings of fact and law regarding issues the ALC expressly declined to reach on issues that went well beyond

the limited timeliness issue before the court, reached the merits of the case on an incomplete and undeveloped record, and failed to defer to the interpretation and discretion of the agency charged with implementing the applicable regulations.

In truth, the discrete timeliness issue was rendered unfortunately complex by the County's efforts in casting the permit modification as untoward and controversial, which efforts were rewarded in Opinion No. 5707, filed January 8, 2020. (Opinion). The Court of Appeals made reversible error by (1) finding actual notice does not require a timely appeal; and (2) treating an appeal of a lower court dismissal as an opportunity to rule on the merits of the case through *de novo* reversal of the agency decision. The Opinion cannot be squared with this Court's precedent on, and elevates form over substance in the review of cases involving, actual notice, exhaustion of remedies, and agency deference and discretion. It also represents an extraordinary departure from established practices and procedures for a court sitting in appellate review of a final agency decision, and creates an open-ended window to challenge certain DHEC permit decisions. Under the Opinion's holdings, neither DHEC nor a permittee can ever be sure that a non-publicly noticed decision is final and free from challenge, needlessly begetting uncertainty in the regulated community. This could not have been the intent of the legislature, which expressly allowed certain DHEC permits to be issued absent public notice. For these and the many reasons that follow, this Court should reverse the Court of Appeals.

STATEMENT OF THE CASE

DHEC issued Permit LF2-00003 ("Permit") to MRR for the construction of a Class 2 landfill on November 3, 2008. **(App. pp. 422-27)** Absent land-clearing activities, the landfill remains unconstructed to this day. **(App. pp. 141-42)** On March 30, 2015, MRR sought a modification to the permit for that unconstructed landfill to allow it the option of installing a liner and associated leachate collection system. **(App. pp. 73-79, 506)** DHEC deemed the modification request "minor" under the applicable regulations and staff thereafter issued a minor modification of the Permit on August 10, 2015 ("Minor Modification"). **(App. pp. 73-79)** No timely challenge to the Minor Modification was instituted. According to the County, it only learned of the modification on or around December 15, 2015, during a meeting with DHEC regarding the landfill and Permit. The County first filed a request for final review of the Minor Modification with the DHEC Board on March 23, 2016. **(App. pp. 203-14)** The DHEC Board declined to conduct a final review conference by letter dated April 21, 2016. **(App. pp. 201-02)**

The County then filed a Request for Contested Case Hearing before the ALC on May 19, 2016. **(App. p. 200)** At the direction of the ALC, each of the parties filed and served prehearing statements on July 5, 2016. **(App. pp. 55-87)** Thereafter, MRR and DHEC each filed motions to dismiss the contested case on July 28 and July 29, 2016, respectively.[1] **(App. pp. 215-32, 488-639)** The primary basis for dismissal was that the County's request for review to the DHEC Board, and subsequent request for contested case review by the ALC, was untimely, as the County had failed to timely exhaust its administrative remedies, and the ALC therefore lacked jurisdiction to hear the contested case. The ALC held a hearing on these motions on December 2, 2016. **(App.**

[1] On July 29, 2016, MRR and DHEC also filed a Motion to Stay Discovery pending a ruling on the Motions to Dismiss, which was granted on September 7, 2016. **(App. p. 47)**

pp. 88-199) By written order dated December 12, 2016, the ALC granted Petitioners' motions, holding the County failed to timely fulfill the procedural requirements for bringing a contested case before the ALC. **(App. pp. 42-46)**

On January 11, 2017, the County filed a Notice of Appeal with the Court of Appeals. The Court of Appeals held oral argument on May 6, 2019, ultimately issuing the Opinion reversing the ALC on January 8, 2020. **(App. pp. 1-15)** Petitioners filed a timely Petition for Rehearing on January 23, 2020, which the Court of Appeals denied on February 14, 2020. **(App. pp. 16-36, 37)** This Court issued a writ of certiorari on December 14, 2020.

STATEMENT OF FACTS

I. MRR's Permit and Minor Modification to the Permit for the Highway 93 Landfill.

On November 3, 2008, DHEC issued the Permit to MRR to construct and operate a Class 2 landfill on property located at 2180 Greenville Highway, Liberty, South Carolina, in Pickens County (the "Highway 93 Landfill"). **(App. pp. 422-27)** Prior to issuing the Permit, DHEC publicly noticed the agency decision and sent written notice to neighboring landowners and the County. **(App. pp. 694-708)** The County did not object or otherwise contest the Permit, and, importantly, did not request of DHEC that it provide notification of any subsequent modifications to the Permit or to otherwise be treated as an "affected party." **(App. pp. 513-14, 542 ¶ 4)**

On March 30, 2015, MRR applied for a modification to the Permit to allow for the option to install a liner and associated leachate collection system. **(App. pp. 73-79, 506)** There are two key points for the Court to understand with respect to the liner and collection system: (1) once installed, those features would add greater environmental protection for the Highway 93 Landfill upon its construction and receipt of approved waste streams, **(App. pp. 737, line 17-p. 738, line 23)**; and (2) the installation of those features would not satisfy certain federal requirements for a

landfill to dispose of coal combustion residual from coal-fired electric utilities, **(App. p. 736, line 24-737, line 16)**. The efforts by the County to make this Minor Modification controversial stem directly from its abject misrepresentation to the ALC and the Court of Appeals[2] that this permit modification is the final administrative step to allow MRR to accept coal ash at the Highway 93 Landfill. In fact, on multiple occasions counsel for the County told the ALC that the landfill is "on the verge of receiving thousands of tons of coal ash." **(App. p. 165, lines 1-4; p. 194, lines 7-11)** But this representation is demonstrably false. First, and fundamentally, other than land-clearing, cell construction of the landfill has not started; for this and many other reasons, the suggestion of imminent disposal of coal ash is merely an attempt by the County to manufacture hysteria and controversy.

But even beyond that obvious infirmity, the record evidence is undisputed in this case that the Permit, as originally issued in 2008, and which the County concedes is still valid, allows for the receipt of coal ash and other Class II waste streams *only if* MRR first obtains separate and independent approval from DHEC which is not encompassed by the Minor Modification (i.e., MRR would need *this same approval* even with the Minor Modification is affirmed). **(App. pp. 519; 736, line 24 to p. 737, line 16; p. 739, line 25 to p. 740, line 6)** To date, MRR has neither sought nor obtained that approval. **(App. p. 739, lines 18-24)** This is so because the modifications sought by MRR do not, in and of themselves, allow the landfill to accept additional categories of waste or an increased volume of waste, including coal ash. **(App. p. 737, line 21-p. 738, line 18)**

[2] In reading the Opinion, one gets the sense that the Court of Appeals fully subscribed to the County's unsupported assertions in its pleadings regarding coal ash, along with the associated assignations of nefarious conduct on the part of MRR and DHEC, despite the same being directly contradicted by the record. It is likely, therefore, that the misapprehension of the coal ash issue resulted in the Opinion's disregard of the applicable standard of review in order to reach *de novo* determinations on the merits of the underlying contested case.

The modifications sought by MRR do not change the Highway 93 Landfill from a Class 2 to a Class 3 landfill. **(App. p. 517)** The liner simply is an environmental upgrade. **(App. p. 517)** Perhaps unsurprisingly, DHEC did not identify a reason why a request to add greater environmental protection to a Class 2 landfill, prior to construction, would be controversial or warrant denial. **(App. p. 734, lines 13-22)**

On August 10, 2015, after determining the modification to give MRR the option to install a liner to be minor, DHEC staff issued the Minor Modification. **(App. pp. 73-79)** It mailed the Minor Modification to MRR the same day. **(App. p. 73)** Prior to issuing its decision, DHEC did not publicly notice or provide a comment period on its decision because DHEC interpreted its regulations in its discretion, as it is charged by law to do, to provide that MRR's requested modification qualified as "minor" within S.C. Code Reg. 61-107.19, Part I, B. 48a. **(App. p. 513)** DHEC explained that the addition of a liner and associated leachate collection system under these circumstances qualified as a minor modification because it was an environmental upgrade, it would *not* substantially change the operations of the landfill (once constructed), it would *not* allow the facility to accept non-Class 2 (*i.e.*, Class 3) waste, it would *not* allow the facility to accept additional quantities of waste, and the landfill remained permitted as a Class 2 facility. **(App. p. 517)** As the County neither requested any further notifications regarding the Permit nor to be treated as an "affected party," DHEC did not mail a copy of the Minor Modification to the County on August 10, 2015.

II. The County's knowledge of and belated challenge to the Minor Modification.

According to the record, the County obtained actual knowledge of the Minor Modification in December 2015 and, at the latest, in January 2016, and used the Minor Modification against MRR in separate litigation in February 2016. These facts are not in dispute:

- On December 15, 2015, DHEC staff met with representatives from the County and discussed the Minor Modification "at length" **(App. pp. 542-43 ¶ 5; 546 ¶ 6)**;
- On January 11, 2016, DHEC e-mailed the County a copy of the Minor Modification **(App. p. 550)**;
- On January 11, 2016, the County issued a Land Use Approval Termination Letter to MRR confirming its knowledge and receipt of the Minor Modification **(App. pp. 552-53)**;
- On February 17, 2016, Gerald Wilson, an employee of the County, signed an affidavit attesting that he was aware of the Minor Modification **(App. pp. 545-48)**; and
- On February 18, 2016, the County attached a copy of the Minor Modification as an exhibit to a brief submitted to the circuit court in litigation stemming from the County's Land Use Approval Terminal Letter **(App. p. 566)**.

III. The County's failure to exhaust its administrative remedies before commencing an untimely and improper contested case proceeding.

Despite its actual knowledge and use of the Minor Modification, the County did not file its request for review with the DHEC Board until March 23, 2016. **(App. pp. 203-14)** This was 226 days after DHEC staff issued the Minor Modification, 99 days after the County received actual notice of it, 72 days after it indisputably received a copy of it, 72 days after it used the Minor Modification to terminate MRR's ability to begin ramping up construction on the landfill via county land use laws, 35 days after former County Administrator signed an affidavit admitting the County's knowledge of the Minor Modification, and 34 days after the County submitted the Minor Modification as evidence in other court proceedings.

Following the County's belated request for a final review conference, DHEC staff issued a recommendation that the Department deny the request for review as untimely because the County did not file it within the 15-day window imposed by § 44-1-60(E)(2). **(App. pp. 513-543)** The

staff memorandum explained that "the Department determined that the application met the regulatory definition of a minor permit modification" and as a result "a public notice and comment period was not required prior to issuance of the permit modification by the Department." **(App. p. 513)** The DHEC Board declined the request for review on April 21, 2016. **(App. pp. 201-02)** The County thereafter commenced a contested case on May 19, 2016. **(App. p. 200)** Petitioners each moved to dismiss the County's Request for Contested Case Proceeding on the narrow ground that the County's request for review was untimely, meaning both that the County failed to exhaust its administrative remedies and that the ALC was deprived of jurisdiction to hear the matter. **(App. pp. 215-32, 488-639)** During the hearing on Petitioners' motions, the ALC admonished the parties against presenting evidence and arguments related to the merits of the County's underlying claim that the modification was major and thus, notice was required. **(App. p. 168, lines 13-22)**

Following oral argument, the ALC granted Petitioners' motions. The ALC's order was appropriately limited to the discrete issues presented. In pertinent part, the ALC held as follows:

- "[The County] was given various forms of notice over a period of months. However, [the County] still waited months before filing a request for review." **(App. p. 44)**
- "In part, the County argues that it did not have the opportunity to take action because DHEC improperly classified the matter as a minor permit modification, which exempted the Department from the public notice and comment procedure followed for major modifications and new constructions. Whether the Department improperly classified the modification, and whether it should have granted the modification, is a matter that can only be decided in a hearing on the merits of this case. However, the matter currently before the Court is [Petitioners'] motions to dismiss this case on procedural grounds." **(App. pp. 44-45)**
- "[The County] also argues that DHEC's failure to comply with the notice requirements in the regulation is the reason it filed the request for review months late. However, this argument is foreclosed by the fact that Petitioner received actual notice on multiple occasions and still failed to take prompt action." **(App. p. 45)**
- "Using the last possible date of notice still renders [the County's] request untimely." **(App. p. 45)**

- Equitable tolling is inapplicable because "the County had actual notice of the decision made by DHEC, but failed to pursue the available administrative remedies in a timely fashion, and has not stated a legally valid or compelling reason for its failure." **(App. p. 45)**

The ALC emphasized both at hearing and in its resulting Order the fact the County gave no legitimate reason for not filing its request for final review with the DHEC Board within 15-days of receiving actual notice of the Minor Modification. **(App. pp. 45, 163, 174-76, 181)** As a consequence, the ALC dismissed the contested case as untimely under § 44-1-60(E)(2). **(App. p. 45)** The ALC made no other findings of fact.

IV. *De novo* findings of fact and other errors of law in the Opinion.

The County thereafter appealed the ALC's dismissal to the Court of Appeals. The Court of Appeals reversed primarily based on its conclusion that the time to file a request for review does not begin running "upon a party's simply learning of a permit action,"[3] but instead "begins to run only after DHEC issues a staff decision in compliance with applicable statutory and regulatory notice safeguards." **(App. p. 13)**

According to the Opinion, resolution of that question hinges on whether DHEC's modification to the permit was "minor" or "major," a question the ALC specifically did not and declined to answer. *See id.* Rather than adhere to the standard of determining whether substantial evidence exists to support the findings of the ALC or, in the alternative, remand for further consideration and fact finding on this issue, the Court of Appeals made *de novo* findings of fact that largely adopted, in full, the County's version of facts as set forth in its pleadings and during

[3] Of course, the County here did not "simply learn[] of a permit action." It had an in-depth discussion with DHEC regarding the Minor Modification, obtained a copy of it directly from DHEC, and used it to take adverse action against MRR in separate litigation, all well in advance of filing the request for review.

oral arguments.[4] Critically, these were findings on issues that the ALC expressly declined to reach—in particular whether the modification is major or minor and what notice is required—involved hotly disputed issues which MRR and DHEC did not have a full opportunity to rebut under the posture of this case, were based on an incomplete record, and in substantial part were based solely on arguments of the County's counsel, not actual evidence. These findings include those related to contested issues and allegations in an ongoing legal dispute in a circuit court case that has not been tried and in which the evidence has not been presented for final resolution.[5] Finally, these *de novo* findings by the Court of Appeals, in addition to being incorrect, are also irrelevant due to the County's actual knowledge of the Minor Modification. The Court of Appeals' actions and findings in this regard were improper, deny MRR due process in this and the other litigation, and should be vacated in full.

Lastly, the Court of Appeals further held that the ALC "improperly accepted evidence from outside of the pleadings." **(App. p. 14)** The court did not identify what evidence the ALC "improperly accepted" aside from a generalized statement that "[t]he ALC failed to notify the parties that it would consider affidavits and extra-pleading evidence," and incorrectly framed Petitioners' motions to dismiss as motions under Rule 12(b)(6), SCRCP, that were improperly converted to summary judgment. **(App. p. 14)** As evidenced by the record, Petitioners actually sought relief under Rule 12(b)(1), SCRCP, for a lack of jurisdiction based upon the timeliness of the County's request.

[4] The County attached to its pleadings exhibits from a case in Pickens County between the County and MRR. These documents contain information not before DHEC when it interpreted its regulations to construe MRR's application as minor, and contained false statements that MRR was not given the opportunity to rebut at the ALC or the Court of Appeals.

[5] Petitioners identified other inaccurate, incomplete, and flawed *de novo* findings made by the Court of Appeals in their Petition for Rehearing. **(App. pp. 23-27,** Pet Reh'g**)**

STANDARD OF REVIEW

The Administrative Procedures Act explicates this Court's standard of review for cases decided by the ALC and is set forth in Section 1-23-610(B) of the South Carolina Code:

> The review of the administrative law judge's order must be confined to the record. The court may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact. The court of appeals may affirm the decision or remand the case for further proceedings; or it may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is:
>
> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority of the agency;
> (c) made upon unlawful procedure;
> (d) affected by other error of law;
> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

A decision of the ALC should be upheld, therefore, if it is supported by substantial evidence in the record. "The decision of the [ALC] should not be overturned unless it is unsupported by substantial evidence or controlled by some error of law." *Original Blue Ribbon Taxi Corp. v. S.C. Dep't of Motor Vehicles*, 380 S.C. 600, 604, 670 S.E.2d 674, 676 (Ct. App. 2008). Further, "[w]here a point has not been decided by the lower court, we will not consider the point on appeal." *Timms v. Timms*, 286 S.C. 291, 293, 333 S.E.2d 74, 75 (Ct. App. 1985). In an action at law such as this one, an appellate court may not make its own findings of fact and instead may only determine whether the ALC's findings lack evidentiary support. *Jordan v. Holt*, 362 S.C. 201, 205, 608 S.E.2d 129, 131 (2005). If further fact finding is needed, the only recourse is to remand to the ALC for further proceedings. *See Fox v. Newberry Cty. Mem'l Hosp.*, 319 S.C. 278, 282, 461 S.E.2d 392, 395 (1995) ("[T]he merits of this issue should have never been addressed by the Circuit Court or the Court of Appeals, but instead the case should have been remanded to the Commission for findings of fact….").

ARGUMENT

The record before this Court demonstrates that the jurisdictional issue decided by the ALC was limited and discrete: did the County file a timely request for final review conference with the DHEC Board after receiving actual notice of the permitting decision by DHEC? The question of timeliness was the sole question for which the ALC received evidence and argument, and was the sole question on which the ALC ruled. In deciding that discrete issue, the ALC expressly declined to consider the factual and legal arguments attendant to the County's underlying permit challenge, including whether DHEC staff's decision to treat MRR's permit modification application as a minor modification request, versus major, was legally correct or entitled to deference.

Four undisputed facts demonstrate actual notice by the County and should be dispositive of this appeal: (1) DHEC issued the Minor Modification on August 10, 2015; (2) DHEC informed the County of the Minor Modification on December 15, 2015; (3) DHEC provided the County with a hard copy of the Minor Modification on January 11, 2016; and (4) the County did not seek review of the Minor Modification until March 23, 2016, 72 days after receiving a copy of it and 99 days after receiving actual notice. Under S.C. Code Ann. § 44-1-60(E)(2), the County's challenge to the Minor Modification is untimely as a matter of law. The Court of Appeals nevertheless went far afield and greatly exceeded its powers under the APA, S.C. Code Ann. §§ 1-23-310, *et seq*. It ruled on unnecessary issues, ruled on issues that were not preserved, failed to adhere to this Court's precedents, and set the stage for certain DHEC determinations to be challenged at any future time despite the challenger's actual notice of the decision months (or perhaps years) in the past. This Court should reverse the Opinion, affirm the decision of the ALC, and restore this Court's precedent that actual notice is the outer limit for timeliness of a request for review of a permit decision.

I. The Court of Appeals erred in looking beyond the County's undisputed actual knowledge of the Minor Modification of the Permit in determining whether the County's challenge was timely.

The sole issue before the Court of Appeals was whether substantial evidence supported the ALC's findings and conclusions that the County's request for final review of the Minor Modification by the DHEC Board was untimely. The ALC's conclusion in that respect was based on the undisputed evidence of the County's receipt of actual notice of the Minor Modification decision and the date upon which it first instituted this challenge. The Court of Appeals did not cite or apply the applicable standard of review in the Opinion, which failure alone constitutes reversible error. *See State v. Moore*, 415 S.C. 245, 253, 781 S.E.2d 897, 901 (2016) (finding reversible error in circumstances in which "while the court of appeals' panel majority properly set forth the standard of review, it failed to follow the standard of review"). Indeed, this appeal can be resolved without any reference to the method or level of notice required based upon the undisputed facts before the ALC: the County's action is untimely, even using the last possible date upon which the County received actual notice of the Minor Modification.

The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). If the language is plain, unambiguous, and conveys a clear and definite meaning, courts have no right to go beyond the text and import a different meaning. *Id.* The court is "confined to what the statute says" and has "no right to modify a statute's application 'under the guise of judicial interpretation.'" *Grier v. AMISUB of S.C., Inc.*, 397 S.C. 532, 540, 725 S.E.2d 693, 698 (2012). It is "improvident to engraft extra requirements to legislation." *Id.*

Here, the purpose of the notice provisions of the applicable statutory sections is the giving of actual notice. Section 44-1-60(E) is plain, unambiguous, and controls this question. It first

requires that "[n]otice of the department decision must be sent by certified mail, return receipt requested to the applicant, permittee, licensee, and affected persons who have requested in writing to be notified." S.C. Code Ann. § 44-1-60(E)(1). DHEC mailed the Minor Modification to MRR, and it is undisputed that the County did not request to be notified of any action with respect to the Permit after its initial notification of the 2008 permit.[6] DHEC therefore fully complied with this provision. Section 44-1-60(E) goes on to provide that "[t]he staff decision becomes the final agency decision fifteen calendar days after notice of the staff decision has been mailed to the applicant, unless a written request for final review accompanied by a filing fee is filed with the department by the applicant, permittee, or affected person." There are two options to determine the date the Minor Modification became final: (1) fifteen days after it was mailed to MRR and any "affected persons," or (if the Court of Appeals is correct that the lack of public notice mattered), fifteen days after it was mailed to the party now complaining of the DHEC decision – the County. Under both scenarios, the Minor Modification became final before the County filed its request for review to the DHEC Board. Thus, the decision became final. *See S.C. Coastal Conservation League v. S.C. Dept. of Health & Envtl. Control*, 390 S.C. 418, 426, 702 S.E.2d 246, 250 (2010) ("The clear and unambiguous language in the statute provides that the staff decision becomes final 'fifteen days after notice of the department *has been mailed* ....'").

[6] In the past, the County has pointed to a provision in the Host Agreement between MRR and the County to allege that MRR is required to send all "reports" submitted to or from DHEC simultaneously to the County. **(App. p. 404)** Whether this is true, and MRR avows it is not, is irrelevant; DHEC is not a party to the Host Agreement, and these "reports" relate solely to the *annual operation* of the constructed landfill, the requirement appearing under a heading titled "Landfill Operations". **(App. p. 403)** It is undisputed that the Highway 93 Landfill is unconstructed and non-operational; thus, the any reporting requirement in the Host Agreement has not arisen but is irrelevant and indicative of nothing. If the General Assembly felt all host counties should be notified of all permitting modification decisions, it could have required that in the applicable solid waste permitting laws at issue here, but did not.

Over the years, our appellate courts have examined whether exceptions to this rule exist. *E.g.*, *id.*; *Bursey v. S.C. Dep't of Health & Envtl. Control*, 369 S.C. 176, 631 S.E.2d 899 (2006); *A.O. Smith Corp. v. S.C. Dep't of Health & Envtl. Control*, 428 S.C. 189, 833 S.E.2d 451 (Ct. App. 2019). Until now, a request for review has never been deemed timely if was filed more than fifteen days after receipt of actual notice. The Court of Appeals recognized as much in *A.O. Smith Corp*. There, the subject permits were issued for the Town of McBee to operate and modify water wells. *A.O. Smith Corp.*, 428 S.C. at 196-97, 833 S.E.2d at 455. The petitioner, A.O. Smith, had actual notice that these permits had been issued; nevertheless, it waited until after final approval had been granted to file a request for review. *Id.* at 197-99, 833 S.E.2d at 456-57. The Court of Appeals affirmed the dismissal of the challenge to the permits as untimely, finding A.O. Smith had actual knowledge of the permits and its failure to act was fatal. *Id.* at 205, 833 S.E.2d at 460.

This Court's opinion in *Coastal Conservation League*, upon which the County and the Court of Appeals rely, does not compel a different result. In that case, this Court clarified that applicants, permittees, licensees, and affected persons who request in writing to be notified of a decision have fifteen days from the "latest date of mailing" per § 44-1-60(E)(1) to file a request for review, and for this statutory subset of individuals, the date notice was received will not operate to extend or limit this notice period. *Coastal Conservation League*, 390 S.C. at 426-27, 702 S.E.2d at 250-51. Because the League had requested to be notified of the decision, the fifteen-day period began upon mailing of the decision to it (not the permittee). But because the County is not one of those specified individuals, *Coastal Conservation League*'s holding that the fifteen-day period begins upon mailing of the decision to a party that meets the definition of an "affected party" offers it no respite. And critically, unlike the County here, the League filed its request within fifteen days of receiving actual notice. This Court was not presented with the question of timeliness when the

challenger fails to timely file even after having actual notice of the decision.

The County received actual notice of the Minor Modification 99 days before filing its challenge, and the County received a copy of it 72 days beforehand. **(App. pp. 542-43 ¶ 5, 546 ¶ 6, 550)** These were facts found by the ALC, are undisputed, were not challenged in this appeal, were not reversed in the Opinion (nor could it have been), and are supported by substantial evidence. Cementing the County's knowledge of the Minor Modification and its legal consequence, the County used the Minor Modification against MRR on the same day it received the document via e-mail, and then used it against MRR in other litigation over one month before it sought review before DHEC. **(App. pp. 545-48, 552-53, 566)** Even under the most permissive view existing before the Opinion, the County's request for review was untimely by a long shot.

The Court of Appeals recognized that the actual notice rule is "logical." **(App. p. 11)** Yet, in direct contravention of § 44-1-60(E)(2), this Court's precedent, and its own precedent, the Court of Appeals held that the clock to file a request for review never runs if DHEC fails to provide public notice, even for a party with actual notice. This holding is erroneous for numerous reasons. First, it disregards and effectively overrules the actual notice test. Second, the Court of Appeals improperly read all of § 44-1-60(A) through -(D)'s requirements into § 44-1-60(E)(2). **(App. pp. 12-13)** The critical portions of these subsections merely state a truism: DHEC must comply with its own rules and regulations when issuing a permit.[7] But this does not provide a challenger a "get out of jail free" card when that person has actual knowledge of a permit decision but still sits on his or her rights. The Opinion has the practical effect of overruling the doctrine of exhaustion of administrative remedies for DHEC permit challenges under this section. The Court of Appeals

[7] *E.g.*, S.C. Code Ann. § 44-1-60(A) ("All department decisions involving the issuance, denial, renewal, suspension, or revocation of permits . . . must be made using the procedures set forth in this section.").

does not have the authority to judicially engraft these requirements into § 44-1-60(E)(2) in contravention of the statute's plain language and binding precedent.

Under the holdings of the Opinion, parties have permission to raise a host of untimely challenges to DHEC permit decisions. The Court of Appeals held that actual notice cannot be a gatekeeper to any earlier agency notice failures (real or imagined). Per the Opinion, "the time period [to file a request for review] begins to run *only* after DHEC issues a staff decision in compliance with the applicable statutory and regulatory notice safeguards." **(App. p. 13)** If allowed to stand, this will permit contested cases to be instituted long after non-publicly noticed DHEC decisions are made, regardless of whether the challenger had actual notice of the decision. This will be true even if a challenger knows about the decision all along, as actual notice is rendered a nullity. This would needlessly consume public resources, have the potential to be abused, could clog the courts' dockets, and stagnate development by permit holders. Most importantly, DHEC will have to decide whether or not to publicly notice all decisions—even "minor" ones not required to be publicly noticed by state law—in order to ensure permit decisions are not open to challenge in perpetuity. This is not the law of our state and could not have been the intent of the General Assembly in enacting § 44-1-60 and the APA. Lastly, the Opinion removes from permitting law the established exhaustion of remedies doctrine. These deleterious downstream effects of the Opinion alone warrant reversal.

Finally, this confusion is entirely unnecessary. The Court of Appeals has no power to *sua sponte* determine whether the County should have received earlier notice based on the discretionary designation of the modification application as "major" or "minor," as the County's action is untimely even under the actual notice test that would apply in its stead. The County's undisputed actual notice in this case renders its arguments regarding the difference between notice

provided for major versus minor modification applications a red herring and a distinction without a difference. Even if DHEC had designated the modification as "major" and proceeded with the notice provisions and public hearing attendant to that designation, the County would have been in precisely the same position that it found itself on January 11, 2016: in possession of actual knowledge of DHEC's minor modification of the Permit. Yet, as the County's conduct in this case conclusively demonstrates, the fact that a person is in receipt of actual notice of an application does not guarantee that the person will take any timely action on that knowledge.[8] Nor does it protect the interested person if no timely action is taken.

The standard of review under which the ALC's decision *should* have been reviewed does not permit the Court of Appeals to go down the rabbit hole issues of minor versus major modifications, coal ash, and review of incomplete evidence, each of which and collectively constitutes reversible error. *See I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000) ("[A] court usually should refrain from deciding unnecessary questions."). Because a party's actions are governed by its actual notice under the precedent of this state, under no scenario can the County's action be deemed timely. The Court of Appeals erred in concluding otherwise, and this Court should reverse.

[8] The County's argument that it would have received different notice during the application process is irrelevant. First, it presumes (as the County's entire argument does) that the modification is major and not minor, which it is not. Second, those *pre*-decision notices do not concern the timeliness of a *post*-decision challenge. And third, the County received direct and actual notice and still did not act for months, thereby refuting any assertion that it would have acted any differently had other notice been given. *McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987) ("[W]hatever doesn't make any difference, doesn't matter."). The ALC found this fact to be dispositive in its timeliness analysis, and expressly declined to consider additional evidence and make additional findings of fact beyond that discrete issue. The Opinion disagreed that actual notice controls, but instead of remanding the issue for further findings on issues neither raised to nor ruled upon by the ALC, the Opinion disregarded the standard of review and pre-emptively decided the issues on an incomplete record.

II. The Court of Appeals exceeded its authority under the APA by reaching issues not ruled upon by the ALC and making *de novo* findings of fact unsupported by the record.

To allow the County's challenge to proceed despite its failure to timely act after receiving actual notice of the Minor Modification, the Opinion wholly re-writes the appellate standard of review from decisions of the ALC, making *de novo* findings of disputed facts on an incomplete record and on dispositive questions addressing the merits well beyond the timeliness question before the ALC, and failing to defer to DHEC's interpretation of its own regulations.

a. There is no exception to the limited standard of review under the APA.

The General Assembly intended the APA to "provide a uniform procedure for contested cases and appeals from administrative agencies." *S.C. Coastal Conservation League*, 390 S.C. at 429, 702 S.E.2d at 252 (quoting 2006 Act. No. 387 § 53). Section § 1-23-610(B) details the narrow standard of review applicable to appeals from a contested case proceeding requiring that "[t]he review of the administrative law judge's order must be confined to the record" and the appellate court "may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is . . . clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." The Court of Appeals cited, but did not apply, this standard here. Again, this alone constitutes reversible error. Instead, the court erroneously took new matters alleged into its own hands.

It is a bedrock principle of appellate practice that the court's review "must be confined to the record" and that "[w]here a point has not been decided by the lower court, we will not consider the point on appeal," *Timms*, 286 S.C. at 293, 333 S.E.2d at 75. The ALC's order was narrow: (1) the County had actual knowledge of Minor Modification by January 11, 2016, at the latest; (2) the County did not file its request for review until March 23, 2016, beyond the deadline § 44-1-

60(E)(2); and (3) there were no grounds to invoke equitable tolling of the deadline. The ALC expressly declined to rule on whether DHEC otherwise complied with the notice requirements and, relatedly, whether the permit modification was minor or major. Indeed, the ALC admonished the parties against presenting argument on that very issue. **(App. pp. 118-19, 145, 151-52)**; *Original Blue Ribbon Taxi Corp.*, 380 S.C. at 604, 670 S.E.2d at 676 ("The decision of the [ALC] should not be overturned unless it is unsupported by substantial evidence or controlled by some error of law.").

Despite this, the predominate legal and factual issues decided *de novo* in the Opinion were these very issues which the ALC expressly refused to consider. This requires reversal. *E.g.*, *Moore*, 415 S.C. at 253, 781 S.E.2d at 901 (holding that it constitutes reversible error if the Court of Appeals "reweighed the facts and substituted its *de novo* judgment" as "[t]he question before the court of appeals was whether there was any evidence to support the trial court's finding of reasonable suspicion—not the court of appeals' independent view of the facts.").

b. <u>The Opinion erred in making *de novo* findings to reach the unpreserved issue, rather than remanding the case to the finder of fact.</u>

The facts which the Court of Appeals found *de novo* are relevant, not to the issues before them on timeliness and jurisdiction, rather to the ultimate issue presented in this case: whether DHEC's decision to modify the permit (whether minor or major) should be upheld. As a result, these "facts" severely prejudice DHEC and MRR. This is especially true given the undeveloped state of the record on these issues. The Opinion found facts against MRR and DHEC even though they followed the ALC's instructions to *not* present contrary argument on those points. It found these facts even though the County itself argued doing so was premature because further discovery

was needed.[9] According to the County's Prehearing Statement the "Issues to be Presented for Determination" at a final hearing included whether the modifications were major or minor, and whether the modifications had the effect of adding Class 3 Landfill features to a Class 2 Landfill, and other issues that the Court of Appeals reached *sua sponte*. **(App. pp. 56-57)** The County further requested that the Minor Permit Modification be declared null avoid because, *inter alia*, it was issued without notice to the County. **(App. pp. 57-58)** The Court of Appeals obliged, further exceeding its powers on review by deciding the permit modification was "major" despite the fact that the ALC never ruled the permit modification was minor or major. Therefore, this issue was not yet before the Court of Appeals and could not have been considered. Yet knowing that the ALC did not allow MRR and DHEC to fully present its case on these issues and that discovery on them had been stayed, the Court of Appeals finally and improperly determined these facts. This deprived MRR and DHEC of its due process rights and an opportunity to be heard. *See Kurschner v. City of Camden Planning Comm'n*, 376 S.C. 165, 171-72, 656 S.E.2d 346, 350 (2008).

The Court of Appeals also erred in making these findings *de novo*, rather than remanding, because the ALC is the "ultimate finder of fact" in contested cases. *Risher v. S.C. Dep't of Health & Envtl. Control*, 393 S.C. 198, 207, 712 S.E.2d 428, 433 (2011). In an action at law such as this one, an appellate court may not make its own findings of fact and instead may only determine whether the ALC's findings lack evidentiary support. *Jordan*, 362 S.C. at 205, 608 S.E.2d at 131; *see also* § 1-23-610(B)(e) (allowing an appellate court to reverse an ALC if the decision is "clearly

[9] The County argued discovery was not complete on issues "necessary for the ALC to properly resolve the question of administrative exhaustion, including: whether the permit modification was minor or major, the nature of notice required for such modification, and the nature of the notice provided for such modification." **(App. p. 28**, Pet. Reh'g**)** By the County's own admission, the record was incomplete and these facts cannot be determined. But the Court of Appeals finally determined these facts nonetheless.

erroneous in view of the reliable, probative, and substantial evidence on the whole record"). If further fact finding is needed, the only recourse is to remand to the ALC for further proceedings. *See Fox*, 319 S.C. at 282, 461 S.E.2d at 395 ("[T]he merits of this issue should have never been addressed by the Circuit Court or the Court of Appeals, but instead the case should have been remanded to the Commission for findings of fact….").

The Court of Appeals' failure to remand to the extent the major/minor distinction is relevant, which it is not, was extremely prejudicial to MRR. Specifically, the Opinion first recounts and unquestioningly adopts the County's narrative that MRR misled the County and that DHEC facilitated this action. **(App. p. 4)** This simply is not true and perfectly exemplifies the Court of Appeals' folly in making its own findings of fact, which it did not have the power to make in the first instance, on an incomplete record. In addition to being irrelevant to the issue of actual notice and timeliness, if given the opportunity, MRR would have presented evidence to rebut these false assertions and insinuations, including but not limited to a copy of MRR's cover letter to the County for a land use permit expressly seeking permission to build a "lined landfill." **(App. p. 26,** Pet. Reh'g**)**

Second, the Opinion recounts only limited snippets from the cross-examination portion of deposition of Kent Coleman, the then-director of DHEC's Division of Mining and Solid Waste Management,[10] in order to find that "DHEC's own representative has admitted that the [Minor] Permit Modification meets the regulatory definition of a major modification" and "DHEC failed to comply with the notice procedures applicable to its decision to, in reality, permit a Class III

[10] This deposition was not taken in this case but in another case pending in the circuit court. Furthermore, the Opinion's recitation of Mr. Coleman's testimony came effectively verbatim from the County's brief, and in particular from counsel's conclusory statements of their version of the facts. **(***Compare* **App. pp. 6-8,** Opinion), *with* **App. pp. 924-25** (Br. of County at 9-10)**)**

landfill." **(App. p. 14)** The *de novo* finding was made by the Court of Appeals on an issue the ALC declined to address and on evidence the ALC expressly declined to consider. Further, it treats mere snippets of the deposition taken out of context as gospel, without having the benefit of the remainder of the deposition; neither the ALC nor the Court of Appeals had a complete copy of Mr. Coleman's deposition from the other litigation. The Court of Appeals should have allowed the ALC to consider the entire transcript and hear directly from Mr. Coleman—as a true factfinder would—but it did not. Second, the Court of Appeals ignored portions of the record that were before it. Perhaps most importantly, Mr. Coleman remained of the opinion that the modification MRR requested was minor and not major. **(App. p. 302, lines 13-18)** As to the statement that DHEC "in reality" permitted a Class 3 landfill, the undisputed evidence is that the type and amount of waste the Highway 93 Landfill can accept did not change and the landfill remains a Class 2 landfill. **(App. p. 517; p. 733, lines 6-10; p. 736, line 24-p. 737, line 7)** Further, although the County gave great emphasis to other changes to the language of the Permit, to which it assigned a nefarious purpose and intent; in fact, DHEC provided evidence that those other changes to the language of the Permit were simply to incorporate the updated language now used in *all* Class 2 permits issued today and were not substantive. **(App. pp. 735, line 9-p. 737, line 7)** Finally, DHEC testified in writing in its staff response to the DHEC Board that the modification was deemed to be minor under the regulation and that DHEC would testify as such if able to present its position again. **(App. pp. 513-20)**; *see also* discussion, *infra* (regarding deference).

Similarly, the Court of Appeals appears to have made findings of fact through wholesale adoption of portions of the County's brief. Specifically, the Court of Appeals uses direct quotes (without attribution) of conclusory statements regarding the changes authorized by the Minor Modification from the County's brief, as written and argued by counsel to the County. **(*Compare***

App. pp. 4-5, *with* App. pp. 8-9); *but see Sessions v. Withers,* 327 S.C. 409, 414, 488 S.E.2d 888, 891 (Ct. App. 1997) (explaining "statements of fact appearing only in argument of counsel [are not] considered" evidence). The County itself cites to incomplete documents to support its claims. **(App. pp. 8-9, p. 517)**

Further, much like the County, the Court of Appeals perseverated on the issue of coal ash and thus, made findings of fact related to it that have nothing to do with the issues before the court. The entire discussion on coal ash in the Opinion is a non sequitur, as the Highway 93 Landfill is not currently constructed and cannot accept coal ash **without additional regulatory approval**. **(App. p. 739, line 25-p. 740, line 6)**; *contra* **(App. p. 165, lines 1-4; p. 194, lines 7-11)** (wherein the County repeatedly—and disingenuously—suggested that the landfill is "on the verge of receiving thousands of tons of coal ash"). The notion that the Minor Modification alone allows for the receipt of coal ash is a tall tale advanced by the County with zero factual support, and in fact, is directly contradicted by the record and the law. Relatedly, the Opinion concludes that "[c]oal ash requires special handing" and it qualifies as "special waste." **(App. p. 8 n.11)** This is not a correct statement of the law, and there is not a shred of testimony or support in the record for that finding. In fact, DHEC does not consider coal ash to be "special waste" as that term is defined in the South Carolina Solid Waste Policy and Management Act and its attendant regulations. **(App. p. 321, lines 9-16);** *see also* 80 Fed. Reg. 21301 (April 17, 2015) (wherein EPA defines coal combustion residuals or coal ash as a non-hazardous solid waste, not a hazardous waste). From all of this, the Opinion concludes that "DHEC failed to comply with the notice procedures applicable to its decision to, in reality, permit a Class III landfill." **(App. p. 14)** However, a Class 3 landfill is not a Class 2 landfill with a liner, but is a designation for a landfill that is allowed to accept Class 3 waste (*i.e.* municipal) and for which there must be a geographical need. S.C. Reg. 61-107.19,

Pt. V. No such need has been demonstrated, because the Highway 93 Landfill is not a Class 3 landfill and MRR has never sought such a classification. In an effort to bend over backwards in favor of the County, the Opinion gets these important issues in a highly technical and specialized field wrong, time and again.

It is undisputed here that the ALC, the ultimate fact finder, expressly declined to make any findings on whether earlier notice was required and any attendant issues such as the distinction between minor and major modification permits, *et cetera*. It was entirely improper for the Court of Appeals to take up that mantle and make those findings itself, and even more so based upon a record that even the County argued was incomplete. The Opinion's engagement in this fact finding is entirely incongruous with its holding that the ALC improperly ruled "while denying the County the right to undertake discovery." **(App. p. 15)**; *see also* discussion, *infra*. To the extent that this Court believes that distinction between minor and major, or the issues of special waste and what constitutes a Class 3 landfill, are relevant to the question of exhaustion of administrative remedies, the Opinion should still be vacated and the matter remanded to the ALC for factual development and findings.

c. The Opinion erred in failing to defer to DHEC's interpretation of its regulations.

Finally, even if the issue of what qualifies as a major verses minor permit was properly before the Court (which it was not), the Court of Appeals was required to give substantial deference to DHEC's interpretation of its own regulations and failed to do so here. *Kiawah Dev. Partners, II v. S.C. Dept. of Health & Envtl. Control*, 411 S.C. 16, 34-35, 766 S.E.2d 707, 718 (2014) ("[W]here an agency charged with administering a statute or regulation has interpreted the statute or regulation, courts, including the ALC, will defer to the agency's interpretation absent compelling reasons. We defer to an agency interpretation unless it is 'arbitrary, capricious, or manifestly

contrary to the statute.'") (citation omitted). Courts give such deference to administrative agencies "both because they have been entrusted with administering their statutes and regulations and because they have unique skill and expertise in administering those statutes and regulations." *Id.*

The major/minor permit modification distinction is found in DHEC's regulations promulgated under the South Carolina Solid Waste Policy and Management Act of 1991, S.C. Code Ann. §§ 44-96-10, *et seq.* A minor modification is one "that keeps the permit current with routine changes to the facility or its operations, or an administrative change," whereas a major modification is "a change that *substantially alters the facility or its operations*, e.g., tonnage increase above 25%, any volumetric capacity increase, alternate designs *that vary from the design prescribed in this regulation.*" S.C. Code Ann. Regs. 61.107.19, Pt. 1, B.48 (emphasis added). The installation of a liner and leachate collection system does not qualify under the definition of a major modification. It is not enough to say that the addition of a liner was a design change as the County asserts; any proposed change must also "substantially alter[] the facility or its operations" or "vary" from the regulations. Nor is it enough to say that liners and leachate collection systems are features of Class 3 landfills, ergo a modification request that seeks to add these features necessarily involves a change to a Class 3 landfill. As discussed above, the distinction between Class 2 and Class 3 landfills relates to the different waste streams that they receive and are not solely determined by their features. The use of the terms "substantially alters" and "vary" in the regulation confers inherent discretion on DHEC to make the determination as to whether the proposed modification is substantial (an undefined term) or varies from the designs approved under the regulation. No such deference was given to DHEC by the Opinion. And there are no facts int eh record which would support such a *de novo* determination by the Court of Appeals, even if such findings were permitted, which they are not.

As is pertinent here, these regulations impose heightened notice requirements for new construction and major modification permits. S.C. Code Ann. Regs. 61-107.19, Pt. I, D.2.c. DHEC determined in its discretion that the MRR's requested modification was a minor, not major, modification and therefore not subject to these additional requirements. **(App. pp. 515-17; p. 737, line 17-p. 737, line 11)** DHEC was not forming a "judicial function," as has been suggested by the County, to deem a request for review untimely; DHEC staff were interpreting its solid waste regulations in making the discretionary decision of whether an application is characterized under the applicable regulations as minor or major. As specifically detailed and described by DHEC:

> Inclusion of a liner is not considered a major modification for the following reasons: 1) addition of a liner is not an alternate design of the required design criteria; (2) addition of a liner does not substantially change the operations of the landfill; and, (3) the addition of a liner does not allow the facility to accept additional waste types (i.e., Class 3 waste) or quantities of waste. Likewise, the minor permit modification does not change the existing landfill from a Class 2 to a Class 3 landfill.
>
> In accordance with R.61-107.19, Part IV, Section D.1, the design criteria for a Class 2 Landfill requires a 2-foot separation between the landfill base grade and the seasonal high water table. If an applicant wanted to reduce the 2-foot separation requirement, then it must request an alternate design in lieu of the 2-foot separation, which would be considered a major modification. The Department does not consider the installation of the liner and associated leachate collection system an alternate design that would be a major modification requiring a public notice because the 2-foot of groundwater separation is being maintained. The installation of a liner would be voluntary and is considered an upgrade from the prescribed regulation.

(App. p. 517) That determination is one of "unique skill and expertise in administering those statutes and regulations" made by DHEC, *see Kiawah Dev. Partners, II*, 411 S.C. at 34, 766 S.E.2d at 718, not the applicant.

Under established precedent, this decision can only be overturned by a court if it is arbitrary, capricious, or manifestly contrary to the statute and regulations. The Court of Appeals did not make this finding, did not give DHEC any of the deference it was due, and did not even

engage in the necessary analysis of whether deference is owed. Instead, the court simply substituted its judgment for that of DHEC, *de novo*, based on an incomplete record. *See Moore*, *supra*. This was fundamental and reversible error.

III. The Court of Appeals' finding that the ALC considered evidence outside of the pleadings is based on a misapprehension of administrative practice and procedure and is unsupported by the record.

Finally, in a section entitled "Discovery," the Opinion finds additional reversible error in the ALC's alleged consideration of evidence from outside of the "pleadings."[11] **(App. p. 14)** On this issue, the Opinion is incorrect on both the substance and the law governing administrative practice and procedure. The Opinion holds that the only evidence the ALC may consider in reviewing a motion to dismiss under the equivalent of Rule 12(b)(1) is *the County's* request for final review to the DHEC Board and *the County's* prehearing statement to the ALC. This holding fundamentally misapprehends the practice and procedure before the ALC and constitutes an error of law. In contested cases, parties are not required to file traditional civil pleadings such as a complaint. In fact, in 2013, the ALC Rules of Procedure were amended to eliminate the rule regarding the filing of a Petition and an Answer, filings that resembled traditional civil pleadings. *Compare* SCALC Rule 18 (eff. May 1, 2011) *with* SCALC Rule 18 (eff. May 1, 2013); *see also* Notes to 2013 Amendments to Rule 18, SCALC ("Former Rule 18, which provided for pleadings, has been repealed. . . . In lieu of pleadings, the Court may order the submission of prehearing statements.")). However,

> The Request for Contested Case Hearing along with the Prehearing Statements establish a core statement of the facts and issues for determination that is comparable to the pleadings in a civil trial. Thus, since the Court's review [on a motion to dismiss] is limited to the 'pleadings,' the Court must limit its review to the Request for Contested Case Hearing and Prehearing Statements to determine

[11] Despite being labeled as a discovery issue, the discussion and holding have nothing to do with the ALC's stay of discovery.

> whether Petitioners have failed to state facts sufficient to state a claim unless otherwise provided by law.

Preservation Soc'y of Charleston v. S.C. Dep't of Health & Envlt. Control, No. 13-ALJ-0056-CC at 4, Order Denying Motion to Dismiss (Dec. 2, 2013) (Anderson, J.) (rev'd on other grounds, Op. No. 27949 (S.C. Sup. Ct. filed Feb. 19, 2020) (Shearouse Adv. Sh. No. 8 at 43)). Thus, while there are no "pleadings" at the ALC, the court considers the request for contested case and *each of the respective prehearing statements* as the operative "pleadings" in considering a motion to dismiss. The ALC therefore did not err in considering the respective prehearing statements of DHEC and MRR, including their attachments, as a part of their motions to dismiss. Nor did such consideration require any special notice to the County in order to avoid conversion of the motions to dismiss into motions for summary judgment.

The Court of Appeals' misapprehension that the ALC's review was limited only to the County's request for DHEC Board review and contested case can be traced directly to the County's misstatement of the law to that effect in its primary brief to the Court. **(App. pp. 26-29)** The County states that it was error for the ALC to have "accepted" anything other than the "County's allegations that the permit modification is 'major,' that the county did not receive notice due for a 'major' modification, and that the purpose of mischaracterizing the modification was to avoid such public notice," citing its request for final review to the DHEC Board. **(App. p. 27)** The County further cites the fact that only argument regarding "actual notice" appears in the submittals of the Petitioners, which the ALC improperly weighed against the County. **(App. p. 27)** However, the arguments regarding notice were properly made by DHEC and MRR in their respective prehearing statements to the Court, *see* **(App. pp. 66-70, 82-83)**, which are appropriately considered by the ALC in a motion to dismiss. The facts regarding the timeliness of the County's filings are also easily discernable from the County's own submissions, as the County cited the date on which the

Minor Modification was issued, August 10, 2015, and the County's requests to the DHEC Board and the ALC were dated and submitted on March 23, 2016, and May 19, 2016, respectively. Reference to MRR and DHEC's prehearing statements is thus not even required. Accordingly, the Opinion's holding that the motion to dismiss was converted into a motion for summary judgment by virtue of the ALC's consideration of Petitioners' respective prehearing statements and the undisputed facts regarding the timing of the County's filings, constitutes an error of law that independently warrants reversal.[12]

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court reverse the Opinion, affirm the decision of the ALC, and restore this Court's precedent that actual notice is the outer limit for timeliness of a request for review of a permit decision.

[SIGNATURE PAGE FOLLOWS]

[12] It should also be noted that the Opinion's holding that the County was not "fairly apprise[d]" of the fact that the Court would consider material outside of the pleadings in resolving a motion to dismiss is equally a head scratcher, and wholly unsupported by the record. **(App. p. 14)** Indeed, the County's argument that "[t]he ALC also failed in alerting the parties that it would consider affidavits and extra-pleading evidence, hearing the 12(b)(6) motions as motions for summary judgment," is an utterly astonishing attempt at revisionist history. **(App. p. 29)** A simple reference to the record demonstrates that *the County* submitted no less than twenty-three exhibits to its response in opposition to the motion to dismiss, including twelve affidavits and a deposition transcript, and the transcript of the motion to dismiss hearing is replete with the County's arguments and citations, over Petitioners' repeated objections, to its response and accompanying exhibits. **(App. pp. 143, 154-55, 189, 194)** The suggestion, apparently accepted by the Court of Appeals, that the County was somehow caught off guard or prejudiced by the Court's consideration of evidence beyond the County's "pleading" is illogical and unsupported by the record.

Respectfully submitted,

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