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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.

REPLY BRIEF OF PETITIONER MRR PICKENS, LLC

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INTRODUCTION

Respondent Pickens County (County) gets one thing right in its brief: "[t]he issue presented for appeal is a narrow one for the Court to decide." Resp't's Br. at 4. But it is not one of the many misdirected issues the County raises. The principal issue presented to this Court is whether Opinion No. 5707 (Opinion) of the Court of Appeals, which disregarded and does substantial damage to the State's precedent on actual notice, will be left to stand and interested parties like the County will be permitted to sit on their rights and wait more than 15 days after receiving actual notice of a Department of Health and Environmental Control (DHEC) decision (or here, at least 99 days) before appealing. The answer necessarily is "no," and any other standard, including the newly-announced standard of the Opinion, elevates form over substance and is incompatible with this Court's prior precedent. Actual notice controls and provides an outer limit as to when the period to seek review begins to run. The failure to timely act *after* receiving actual notice cannot be excused by concocting claims[1] that a permittee or DHEC did not comply with some *earlier* procedural requirement.

Every other holding of the Opinion derives from the Court of Appeals' attempt to justify its departure from the controlling concept of actual notice. In that respect, the Opinion's holdings as to the distinctions between minor and major modifications under DHEC's regulations—which failed to accord DHEC deference to its inherently discretionary decision and abide by this Court's precedent on same—as well as its pre-emptive *de novo* findings of fact on issues not reached by the Administrative Law Court (ALC), presents a textbook example of Maslow's Hammer

[1] After leveling a litany of demonstrably false allegations of collusion and "surreptitious and bad faith actions" against MRR and DHEC in their return to the petition for certiorari, the County has conspicuously and understandably abandoned any such false claims in their response brief. There is no such evidence in the record.

manifesting itself as a solution in search of a problem. Looking for a reason to justify its belief that the County *should have* been involved in the request for modification of MRR's permit, the Court of Appeals disregarded the undisputed fact that the County failed to timely act even after receiving actual notice of the Minor Modification. If this Court adheres to its prior precedent on actual notice, it need not—and should not under an appellate standard of review—wade into unpreserved questions of publication notice, minor-versus-major permit modifications, agency deference, the appellate court's *de novo* findings of fact, *et cetera*. But should this Court nevertheless determine that actual notice does not start the clock, the answer remains the same, as the Opinion and the County's arguments on the merits of these issues are wrong as a matter of law.

The Opinion rests on a number of legal errors, from matters of administrative review to the constitutional limitations of appellate jurisdiction in actions at law. The County's brief doubles down on these errors and encourages this Court to sanction a result that the County admits provides no guideposts for the ALC and practitioners and would otherwise wreak havoc on administrative and appellate practice in this State. Here, MRR will address four central failings of the Opinion and the County's arguments which exemplify why reversal in this case is necessary: (1) the County's effort to fully overrule the actual notice rule; (2) the County's support of an unconstitutional scope of appellate review allowing appellate courts can make *de novo* findings of fact in cases at law on issues not presented to or ruled upon by the lower court; (3) the County's failure to rebut the merits of MRR's argument that the Court of Appeals misconstrued the pleadings reviewed by the ALC on a motion to dismiss; and (4) the County's attempt to upend the established doctrine of agency deference.[2] For the reasons explained herein and in MRR's opening

[2] In not identifying or rebutting every misstatement of factual and legal error by the County, of which there are many, MRR expressly does not admit or acknowledge the truth or accuracy of

brief, this Court should reverse the Opinion and reinstate the order of the ALC dismissing the County's challenge as untimely.

ARGUMENT

I. The County's actual knowledge of the Minor Modification is undisputed and dispositive of the County's challenge.

At the heart of this appeal is the County's rather astounding position that "[a]ctual [n]otice is [i]rrelevant to the [s]tatutory [l]imitations [p]eriod." Resp't's Br. at 18. This, in turn, was seemingly adopted by the Court of Appeals in the Opinion. Op. at p.13 ("[N]othing in § 44-1-60 suggests the fifteen day period for appealing a DHEC staff decision begins to run upon a party's simply learning of a permit action."). This stance by the County is borne out of necessity, for it indisputably failed to seek board review of the Minor Modification within 15 days of receiving actual notice of it. Indeed, the County waited months after receiving actual notice to commence these proceedings. Having failed to avail itself of the statutory process, the County instead focused its efforts and arguments at claiming a corrupted system, suggesting that pre-decision notice of an application for modification would have cured its post-decision failure to take timely action. However, notice is notice. The County's arguments regarding the type and timeline of such notice are distinctions without differences in the face of the County's failure to act in a timely manner upon receipt of actual notice. *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 County's tarrying is not a reason to cast aside actual notice as the outer limit of when the review period begins to run. This Court therefore must reject the County's position.

The controlling facts are, at this point of briefing, familiar to this Court. Nevertheless, and

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any such statements, assertions, or argument by the County, and MRR specifically denies and contests any claim not specifically addressed herein.

to reiterate what is undisputed, DHEC issued the Minor Modification on August 10, 2015. **(App. pp. 73-79)** The County learned of the Minor Modification, at the latest,[3] during a meeting with DHEC on December 15, 2015, and then received a complete copy of it on January 11, 2016.[4] **(App. pp. 545-546 ¶ 5, 549 ¶ 6, 553)** Over the next two months, the County used the Minor Modification to terminate its land use authorization for the landfill and as a sword against MRR in the company's appeal of the County's land-use termination in Circuit Court. **(App. pp. 545-548, 552-553, 566)** Only *after* all of this did the County seek further review of the Minor Modification before DHEC's Board.

MRR consequently does not argue that the County's challenge is untimely because the County did not request review within 15 days of DHEC mailing the Minor Modification to MRR.

[3] The County's brief suggests that the County may have actually learned of the Minor Modification even earlier. The December 15 meeting apparently followed an earlier FOIA request submitted by the County to DHEC "in an attempt to learn what was going on with the landfill." Resp't's Br. at 10. The County clearly was aware enough of the fact that DHEC had taken some action with respect to the landfill in order to submit such a request, but it studiously avoids saying how much it knew prior to the meeting. On this record, this fact may not be material given the County's failure to act in a timely manner regardless of when it received actual notice of the modification, but certainly any earlier notice now-admitted by the County would inure to its detriment with respect to the timeliness of its challenge.

[4] At times, the County dismissively referred to receiving an actual copy of the Minor Modification directly from DHEC as "DHEC mails them something else in January," "something else gets mailed in the month of January," "whatever mailing occurred on January 11," and "whatever the County was furnished in January." **(App. p. 149, lines 14-15, p. 152, lines 18-19, p. 161, line 10, p. 163, lines 16-17)** This is an attempt to mask the fact that the record indisputably shows that DHEC sent the County the minor modification decision on January 11, 2016. The County also suggests that DHEC told the County that "there was nothing [the County] could do and no right to appeal." Resp't's Br. at 10. This last statement comes from the County's litigation counsel reading from a note the County Attorney handed to him during the hearing before the ALC. **(App. p. 162, lines 16-22)** This is not evidence and cannot be considered. *See, e.g.*, *Shinn v. Kreul*, 311 S.C. 94, 102, 427 S.E.2d 695, 700 (Ct. App. 1993) (arguments of counsel are not evidence). It is also contrary to the record, as seen by the January 11, 2016 E-mail transmitting the permit decision to the County. **(App. p.483)** Even if such arguments could be considered as evidence, ignorance of the law is not a defense to untimeliness. *Morgan v. S.C. Budget & Control Bd.*, 377 S.C. 313, 320, 659 S.E.2d 263, 267 (Ct. App. 2008) (parties are presumed to know the law and are charged with exercising reasonable care to protect their interests) (citation omitted).

Rather, MRR contends, and the ALC found, that the County's challenge is untimely under *any scenario* because the County failed to act even upon receiving actual knowledge of the Minor Modification.[5] The question before this Court therefore is simply whether the law excuses the County for its independent failure to timely challenge the Minor Modification despite its actual knowledge. It does not.

A. Actual notice has always set the outer limit of timeliness for a request for review under § 44-1-60.

Until the Opinion, a challenge to a DHEC decision has never been allowed to proceed if it was filed more than 15 days after receipt of actual notice that the decision had been made. The Administrative Law Court has recognized as much. *See, e.g., Amisub of S.C., Inc. v. S.C. Dep't of Health & Envtl. Control*, No. 08-ALJ-07-0063-CC, 2008 WL 4879672, at *4 (S.C. Admin. Law Ct. Oct. 3, 2008) ("Therefore, I find that in instances in which the Department makes a determination without any formal review process and with no notice to an 'affected person,' the affected person has fifteen days from the date it received actual or constructive notice of the decision."). The Court of Appeals, prior to the instant case, has recognized as much. *See, e.g., A.O. Smith Corp. v. S.C. Dep't of Health & Envtl. Control*, 428 S.C. 189, 205, 833 S.E.2d 451, 460 (Ct. App. 2019). There may be instances where the clock starts running *before* actual notice is given. Such was the case in *South Carolina Coastal Conservation League v. S.C. Dep't of Health & Envtl. Control*, 390 S.C. 418, 702 S.E.2d 246 (2010), where this Court held the 15-day

[5] The County did not file its request for review with the DHEC Board until March 23, 2016. **(App. pp. 203-14)** This was 99 days after the County received actual notice of the modification, 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 in violation of its contracts with MRR and state law, 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.

period commences upon mailing of the notice to an affected party and not on when it received actual notice. *Id.* at 426-27, 702 S.E.2d at 250-51. But under no circumstances has a challenge been allowed to proceed when the request for review is filed more than 15 days after the challenger received actual notice of the decision.

Our courts have long rejected the position urged by the County here, which is that the clock runs only when an interested party believes that every "t" has been crossed and every "i" has been dotted with respect to statutory and regulatory notice procedures, as such a rule would allow a party to usurp DHEC and its decision-making authority. It is well-established that a limitations period to bring a claim commences merely when "the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist." *Snell v. Columbia Gun Exch.*, 276 S.C. 301, 303, 278 S.E.2d 333, 334 (1981). A person is on notice that he has a claim not only upon receipt and actual knowledge of *all* facts, but also upon knowledge of facts "sufficient to put him on inquiry" that pursuing them "with due diligence . . . would lead to other undisclosed facts."[6] *Strother v. Lexington Cty. Recreation Comm'n*, 332 S.C. 54, 63 n. 6, 504 S.E.2d 117, 122 n. 6 (1998). To be sure, DHEC fully complied with § 44-1-60 and the exercise of its inherent discretion under S.C. Code Ann. Regs. 61.107.19, Pt. 1, B.48. But even if the County was entitled to *other* notice under DHEC regulations, disregarding the County's *actual* notice impermissibly elevates form over substance. The County's knowledge of the issuance of the Minor Modification and its

[6] The County is fully knowledgeable of the solid waste permitting regulations and DHEC procedures associated therewith, as it too holds a Class 2 Landfill permit in Pickens County. **(App. p.400)** (referring to the County-owned Easley Class Two Landfill)

terms is sufficient to put the County on notice that it should seek review, even if the County was *also* entitled to some other earlier form of notice (which it was not).[7]

As previously argued by MRR, disregarding the actual notice rule leaves permits and modifications open to perpetual challenge and deprives permittees of finality so long as someone can conjure up an argument, no matter how thin, that he was entitled to some other form of notice or there was some other claimed procedural error. While the County claims this is not so, it offers little in the way of a guiding principle for where the line is drawn. In the County's view, the line is somewhere between at least 99 days (as in this case) and "several years" (as in *A.O. Smith*). Resp't's Br. at 22-24. Indeed, the County concedes that there must be some outer limitation and that the Opinion provides none; it simply argues that no limitation, wherever it is placed, applies to them.[8] This conveniently Potter Stewart-esque "I know it when I see it" approach appears nowhere in the Opinion, which on its face leaves non-publicly noticed decisions forever open to challenge. It also is unworkable and guarantees prolonged litigation over threshold matters of timeliness. This case is proof positive of why the actual notice rule matters and has real world implications to private parties seeking permits or modifications. Heretofore, the law has had clear standards on the timeliness and finality of a request for review, which the actual notice rule has provided. The Opinion disregarded that standard based on false allegations advanced by the

[7] This is yet another reason why the County's attempt to engraft the requirements of § 44-1-60(A)-(D) into subsection (E) as a condition precedent to starting the 15-day period fails. Under the County's formulation, a would-be challenger who believes a decision was made in violation of subsection (B) can just sit on his rights in contravention of these principles.

[8] During the hearing before the ALC, the County, when continually pressed by the Court as to why it did not file a timely request for Board review after receiving actual notice of it concedes that "I agree with Your Honor, it would have been better to have filed that request sometime in January, February or thereabouts once they … [t]he County was trying to figure out what to do." **(App. p.160)** Thus, the County even acknowledges that it had an obligation to file a timely challenge of the modification upon receipt of actual notice of it, but did not.

County on a purposefully incomplete record. And the County now eschews such clear boundaries because it sat on its rights; instead seeking to protect a judicially-created pass from compliance with the law created by the Opinion. This Court must reject the County's invitation to upset established practice and should return the law to its *status quo ante* the Opinion.

Finally, the County has not demonstrated that it would have received more information regarding DHEC's *decision* on the modification had the major modification *pre-decision* notice procedures been used. Of course, the pre-decision notice process is different for a major modification than it is for a minor modification. And the County's argument regarding DHEC's "concession" before the ALC rings misleadingly hollow. *See* Resp't's Br. at 15. A close review of the context of the County's cherrypicked reference reveals that counsel for DHEC was merely stating a truism: DHEC did not follow the notice procedures for a major modification, because DHEC staff, as it is entitled to do under the applicable regulation and does on a regular basis, reviewed MRR's application for modification and determined in its discretion that the application was appropriately characterized as "minor," negating any requirement that it follow the notice procedures for major modification. **(App. pp.151-55)** As counsel explained, those procedures were not followed "because we did not issue a major modification, it was a minor modification." *Id.* Regardless, those procedures merely provide a means to be involved in the pre-decision process. There is no right to request department review during that process, nor is any reviewable decision made. Once the decision is made, those who were involved and request notice will receive notice of it. *This is exactly what the County received here.* And only then can review be requested. For all the County's bluster, following the major modification notice procedures would have left the County in exactly the same position it was here—receiving actual notice of the Minor

Modification after it was issued.[9] The major modification notice process is a red herring that this Court need not chase.

B. The County misconstrues the holdings of prior case law.

The County's efforts to distinguish the case law upon which MRR relies is unavailing. With respect to *A.O. Smith*, the County claims that "MRR's assertion that the decision in *A.O. Smith* rested on 'actual notice' is inaccurate." Resp't's Br. at 21. Respectfully, it is the County's statement which is inaccurate. The analysis section of the opinion has a heading titled "Timeliness," and the court concluded:

> While the court recognizes that public notice was not required for the permits, [A.O. Smith] had notice and the opportunity to make comments or request notification as an affected person pursuant to section 44-l-60(E) and to challenge those decisions to the Board.' …. Because A.O. Smith did not file a request for a contested case hearing after the issuance of the permits in the time required, the ALC did not err in finding A.O. Smith's motion for a contested hearing untimely.

A.O. Smith, 428 S.C. at 205, 833 S.E.2d at 460 (quotation omitted). The County also incorrectly submits that this Court's decision in *Bursey v. S.C. Dep't of Health & Envtl. Control*, 369 S.C. 176, 631 S.E.2d 899 (2006), "hinged on the Department's compliance with the applicable notice requirements." Resp't's Br. at 21. In fact, it was just the opposite—DHEC staff did not tell the putative challenger that the decision was final and delayed providing him information despite numerous requests. *Bursey*, 369 S.C. at 187-89, 631 S.E.2d at 905-06. Because he nevertheless filed within the applicable time period after he learned that a final DHEC decision had been made

[9] The County obliquely suggests for the first time, but does not outright assert, that the appeal period began running on March 8, 2016, following former DHEC employee Kent Coleman's deposition in a wholly different lawsuit. *See* Resp't's Br. at 10. However, the County knew well beforehand that the permit had been modified, had a copy of it, and it knew that the Minor Modification was issued without public notice and an opportunity for comment. The County therefore already was on notice that it should seek review of the Minor Modification if it desired. *See* n.8, *supra*.

(received actual notice), the challenge was timely. *Id.* at 189, 631 S.E.2d at 906. This is in stark contrast to the County here, which had actual knowledge of a final department decision and still waited months to seek review of it.

The County's attempt to draw parallels between this case and *Coastal Conservation League* is particularly noteworthy. After quoting language from this Court's opinion that the Coastal Conservation League was not required to specifically request in writing that it be notified because it was "not an obscure or unknown party" and "had been involved in this particular permitting process from the beginning," the County makes the following comparison in characteristically hyperbolic fashion:

> Pickens County was involved in the initial permitting process for this landfill at least to extent of the Coastal Conservation League in that case, and Pickens County should and would have received notice of a properly classified major permit modification under section 44-1-60(E).[] To insist that the County should have submitted an additional, formal written request for notice to DHEC under these circumstances constitutes the most extreme example of form over substance.

Resp't's Br. at 17. Yet the County suggested the opposite before the ALC and urged the court to distinguish *Coastal Conversation League* because the County was *not* involved in the permitting process:

> If I may comment on that particular case, Your Honor. That case was very, very fact specific and involved a group that had been *previously involved*. In this case, neither the County, the landowners, the public, affected persons, *none of them had been involved* in the process. So that case is easily distinguishable as being fact specific to that particular situation.

(App. p. 184, lines 4-12) (emphasis supplied)

The County was speaking the truth the first time. The County cites only two layers of its "involvement": (1) the County was on DHEC's "mailing list for matters related to the original landfill permit," and (2) the County's "Host Agreement" and "Development Agreement" for the

landfill. Resp't's Br. at 17. As to the first, the County was not on a mailing list "for matters *related to* the original permit"; it was on a mailing list for notice *of the issuance of the original permit.* **(App. pp. 110, 709-710)**

As to the second, DHEC was a party to neither the Host Agreement nor the Development Agreement. **(App. pp. 402-421)** The County's argument in this challenge is that *DHEC* has failed to comply with the notice provisions of its Regulations, not that *MRR* was somehow in violation of the Host Agreement. The County has frequently cited language in the Host Agreement that "[a]ll reports required to be submitted to DHEC by MRR Pickens, LLC must be simultaneously submitted to the County Administrator." **(App. p. 404)** This appears under the heading "Landfill Operations," and these "reports" thus relate solely to the *annual operation* of the constructed landfill. **(App. p. 403)** The landfill is not constructed; thus, there are no "reports" that MRR is obligated to prepare or submit, and the County assigns a meaning to this provision of the Host Agreement that does not exist. Moreover, this language has nothing to do with modifications to the permit before the landfill becomes operational, and it certainly does not obligate DHEC to give the County notice of anything. Simply put, there is nothing in the record supporting the County's contention that it "participat[ed] extensively in the process through which the original permit was created and issued." *See* Resp't's Br. at 17. The County's resultant contention that "it would have been illogical and indeed bizarre for the County to turn around and formally ask again in writing for notification related to that permit" falls completely flat. *See id.*

The County also contends that this Court held in *Coastal Conservation League* that the 15-day period in § 44-1-60(E) only began running once DHEC "corrected its error" in providing notice to the League, the implication being that the 15-day period here never ran because DHEC has not followed the major modification notice procedures. Resp't's Br. at 18 & n. 4. Respectfully,

that is not what this Court held. Under § 44-1-60(E)(1), notice of a decision is to be mailed to an affected person who requested in writing to be notified. This Court first found that the League was, indeed, such an affected person. *Coastal Conservation League*, 390 S.C. at 428, 702 S.E.2d at 252. Next, this Court interpreted § 44-1-60(E)(2) to require that notice be mailed simultaneously to the applicant and such affected persons, and the 15-day period runs from the latest date of mailing if it is not simultaneous. *Id.* at 429, 702 S.E.2d at 252. Because the League filed its requests for review within 15 days of the latest mailing date (in that case, an E-mail to the League directly), its challenge was timely under this standard. *Id.* at 430-31, 702 S.E.2d at 253. Importantly, the League also filed it requests well within 15 days of receiving actual notice of the decisions. *Id.* at 422, 702 S.E.2d at 249. The League therefore satisfied both criteria—actual notice and § 44-1-60(E). *Coastal Conversation League* simply does not stand for the position urged by the County here, which is that the 15-day period runs only when all formal notice requirements have been met *irrespective* of when the challenger received actual notice.

In sum, the County's undisputed actual knowledge of the Minor Modification and failure to seek review of it within 15 days of gaining that knowledge compel reversal of the Opinion. This is not a case where a party filed within 15 days of gaining actual knowledge, and there is a dispute as to whether the challenge should have been brought earlier. Consequently, MRR does not seek to "shield[]" a DHEC "decision issued without the appropriate notice," as the County contends. *See* Resp't's Br. at 20. Here, the County has been given every benefit of the doubt and it still failed to file a timely challenge even under the most permissive standard. *Coastal Conservation League* does support the County's position or compel a different result. The Opinion therefore should be reversed.

C. Many of the County's arguments and aspersions are irrelevant.

With the issue properly defined, significant portions of the County's brief are of no moment. For one, this Court can readily reject the County's continued vilification of MRR and DHEC as irrelevant, in addition to being patently false and unsupported by any evidence. *E.g.*, Resp't's Br. at 4 (claiming MRR and DHEC "attempt[ed] to subvert these public notice and participation requirements"). This Court can similarly reject the County's narrative that MRR sought to "effectively convert the Class 2 landfill reflected in the 2008 Permit into a Class 3 landfill." Resp't's Br. at 7-8. This too is irrelevant, and it is undisputed that MRR's desire to add a liner and leachate system was an environmental upgrade that did not "convert" the landfill into a Class 3 facility. **(App. pp. 517, 733, lines 6-10, 736, line 24-p. 737, line 7)** Furthermore, the additional language included within the Minor Modification regarding "other wastes" simply incorporates updated language now used in *all* Class 2 permits and was not substantive. **(App. pp. 735, line 9-p. 737, line 7)** It also bears repeating that this case *does not involve a DHEC decision on coal ash*. As stated in MRR's opening brief, DHEC has stated emphatically numerous times that the landfill, even with the modification, cannot accept Class 2 coal ash without receiving additional regulatory approval, of which the County has now requested to be notified. MRR Br. at 6-7, 25-26; **(App. pp. 478, 81, line 25 - 82, line 36)** This is undisputed.

The County has tried in vain to make this case into something it is not. These and other distractions are designed only to muddy the waters and draw attention away from the central question of the County's failure to act upon its undisputed receipt of actual notice.

II. If actual notice is not the proper standard, then remand is required for the ALC to determine in the first instance whether the permit modification was minor or major.

The County's entire argument is premised on its unfounded conclusion that the modification MRR sought and received was major and not minor. A proper application of the actual notice rule eliminates the need to address this issue. But if actual notice does not control, a proper application of appellate standard of review also eliminates the need to address it.

The County ignores the fundamental distinction between a question of law and a question of fact. The question of law presented here is what rule governs timeliness—is it actual notice to the challenger or something else? That is reviewed de novo. *S.C. Dep't of Revenue v. Blue Moon of Newberry, Inc.*, 397 S.C. 256, 260, 725 S.E.2d 480, 483 (2012). The question of fact is whether the County satisfied the standard of demonstrating that MRR's application should have been deemed major by DHEC.[10] The ALC expressly refused to accept evidence on this very question and declined to engage in factfinding on that point.[11] An appellate court reviews an ALC's factual findings only for whether they are "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." S.C. Code Ann. § 1-23-610(B)(e). The South Carolina Constitution prohibits appellate courts from making de novo factual findings in cases at law. S.C. Const. art. 5, § 4; *see also Parnell v. Carolina Coca-Cola Bottling Co.*, 231 S.C. 426, 428, 98

[10] The County again erroneously contends that "MRR erroneously classified the permit modification as minor, thereby eliminating the required notice provisions." Resp't's Br. at 27. MRR is incapable of doing any such thing and did not here. Like all applicants for permits, MRR simply submitted an application, and DHEC, as provided by the applicable Regulations, undertook its statutory review of the application, including any attendant classification of the application as minor or major. *See* discussion, *infra*.

[11] The County further erroneously characterizes the Court of Appeals' actions in the Opinion as merely "correct[ing] the ALC's error or law, a function entirely within its appellate review," *see* Resp't's Br. at 27, ignoring the fact that to reach this "question of law," the Court of Appeals necessarily made *de novo* findings of fact on the very questions and evidence the ALC refused to consider.

S.E.2d 834, 835 (1957) (holding an appellate court constitutionally is "without jurisdiction" to weigh evidence in an appeal of a case at law). And it is axiomatic that an appellate 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 v. Timms*, 286 S.C. 291, 293, 333 S.E.2d 74, 75 (Ct. App. 1985). Thus, a remand for further factual finding is required if the lower court applies the wrong legal standard; an appellate court cannot simply take up that mantle itself. *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….").

This is particularly true in the context of an administrative permitting decision under South Carolina law, where the ALC is "the ultimate finder of fact," *see Risher v. S.C. Dep't of Health & Envtl. Control*, 393 S.C. 198, 207, 712 S.E.2d 428, 433 (2011), and, as quasi-judicial member the Executive Branch, its decision is considered "the final agency decision" on permitting questions, *see Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control*, 411 S.C. 16, 56, 766 S.E.2d 707, 729 (2014).[12] In a tactic admission that the Court of Appeals did not adhere to these black letter principles, the County urges the recognition of a "timeliness" exception to this constitutional, statutory, and long-standing rule. *See* Resp't's Br. at 28 & n. 7. No such exception exists at law or in logic. The County attempts to deflect this reality by falsely claiming that it is "unable to find any cases within this Court's jurisprudence where a statute of limitations or timeliness defense was appealed from a lower court and then remanded without ultimate resolution of that issue." *Id.* at

[12] It is thus doubly problematic here that the Court of Appeals usurped the ALC's role as the fact finder and final agency decision arbiter on the question of whether MRR's application qualified as a minor modification under the Regulations given that the ALC expressly declined to reach that issue and could not have done so in any event at the motion to dismiss stage without a complete record.

28 n. 7. The County made this assertion in its Return to MRR and DHEC's Petition for Certiorari. Return to Pet. for Cert. at 20. In reply, MRR provided a string cite of cases where this Court and the Court of Appeals have done *just that*—remanded for consideration of timeliness without ultimate resolution of that issue.[13] Reply to Return to Pet. for Cert. at 11 & n. 8. The County's regurgitation of the same argument here claiming to be unaware of *any* cases where this has occurred after MRR provided a list of cases to it is simply untrue.

Further, the County repeatedly argued that the record was *insufficient* for a court to determine whether the modification was minor or major—that is, of course, until the Court of Appeals ruled in its favor on the question. For example, the County throughout this litigation argued that:

- To the ALC: MRR could not introduce evidence further demonstrating that the notice available to the County of the Minor Modification without affording the County an opportunity for discovery. **(App. p. 117, line 14-p. 119, line 20)**
- To the ALC: Under the heading "Need for Discovery Related to the Motion to Dismiss and for Full Hearing by this Court," that the County "is in need of reasonable discovery regarding issues pertinent to [MRR and DHEC's] Motion to Dismiss, to include: issues of determination of 'major' modification and whether the changes are 'major' pursuant to regulation . . . . Reasonable discovery, as to the issues pertinent to the Motion, is necessary." **(App. p. 260)**
- To the ALC: In response to MRR's motion to stay discovery during the pendency of the motion to dismiss, that "in order for a full record to be presented to this Court for

[13] *E.g.*, *Gary v. State*, 324 S.C. 627, 557 S.E.2d 662 (2001); *Blyth v. Marcus*, 335 S.C. 363, 517 S.E.2d 433 (1999); *Garner v. Houck*, 312 S.C. 481, 435 S.E.2d 847 (1993); *McAlhany v. Carter*, 415 S.C. 54, 781 S.E.2d 105 (Ct. App. 2015).

its consideration of the Motions to Dismiss, the following issues require discovery and must be fully developed prior thereto: (1) all issues regarding whether the Permit Modification was a 'major' or 'minor' Modification . . . ." **(App. p. 880)**

- To the Court of Appeals: That the ALC erred in dismissing the case with affording the County an opportunity to conduct discovery "to properly resolve the question of administrative exhaustion, including: whether the permit modification was minor or major." **(App. p. 943)**
- To the Court of Appeals: "Appellant seeks remand to the ALC for full discovery and a hearing on the merits of the Permit Modification for this project." **(App. p.954)**
- To the Court of Appeals: "Discovery should have been allowed before deciding on dismissal." **(App. p. 1055)**

The ALC repeatedly admonished the parties against presenting evidence on these points, **(App. pp. 118-19, 145, 151-52)**, and the County (candidly) admits that the ALC ruled "without hearing testimony or accepting any evidence" on what it terms the "central" issue of "the appropriate classification of the proposed permit modification," Resp't's Br. at 5.

Predictably, however, the County's overall tune on this issue changed after the Court of Appeals issued the Opinion fully and finally deciding that very issue in the County's favor. No longer is discovery necessary on the major/minor modification distinction. Now that the shoe is on the other foot, the County unabashedly changes course and contends it was proper for the Court of Appeals to "[f]ully [r]esolve the [q]uestion of [t]imeliness," including finally determining that the modification was major, without allowing for the very discovery the County previously

claimed was necessary. Return to Pet. for Cert. at 20; Resp't's Br. at 28.[14]

Here as well, the County had it right the first time. If actual notice is not the standard for timeliness in this case, then the matter must be remanded for discovery and fact finding as to whether DHEC erroneously classified the requested modification as minor and the effects of that decision. The County repeatedly argued that the record is incomplete on this very point, and appellate courts are constitutionally prohibited from making factual determinations in cases such as this. There is no basis on which the Court of Appeals could have or should have made the "major vs. minor" determination on its own accord, and the Opinion therefore must be reversed.

III. MRR's argument that the Court of Appeals erroneously limited the scope of "pleadings" subject to review on a motion to dismiss in the ALC is preserved for review.

In its opening brief, MRR described how the Court of Appeals' analysis under the heading "Discovery" (a) has nothing to do with discovery, and (b) erroneously restricts the ALC's review on a motion to dismiss to the allegations contained in a petitioner's request for final review and its prehearing statement. MRR Br. at 29-31. As to the latter, the Opinion advances a fundamental misunderstanding as to the nature of "pleadings" filed in contested cases before the ALC. Most notably, an ALC may consider *all* parties' prehearing statements when ruling on a motion to dismiss, not just that of the moving party. *See Preservation Soc'y of Charleston v. S.C. Dep't of Health & Envtl. Control*, No. 13-ALJ-0056-CC at 4, Order Denying Motion to Dismiss (Dec. 2,

[14] The County contends in passing that the Court of Appeals "did not engage in factual findings." Resp't's Br. at 28. MRR is at a loss as to how the County arrives at this conclusion. The Court of Appeals patently engaged in fact finding by, among others, copying verbatim arguments of counsel from the County's brief regarding supposed "admissions" of DHEC's staff from incomplete deposition excerpts without undergoing the requisite analysis itself. *Compare* Opinion at p.6 (**App. p. 6)**, *with* Final Br. of Appellant at 9-10 **(App. pp. 924-25)**

2013) (Anderson, J.), *rev'd on other grounds*, 430 S.C. 200 (2020). The Opinion thus drastically alters settled administrative practice.

The County does not address the merits of this argument. It simply makes a one-sentence argument that this issue is not preserved because MRR did not raise the issue in its petition for rehearing. Resp't's Br. at 25. This argument fails for two independent reasons. First, the County waived this objection by not asserting it in response to MRR and DHEC's Petition for Certiorari, *see, e.g.*, *Scott v. Porter*, 340 S.C. 158, 167, 530 S.E.2d 389, 393 (Ct. App. 2000) (holding that in order to be timely, an objection usually must be made at the earliest possible opportunity), and this Court granted certiorari on the issues as presented by MRR. Second, the issue was sufficiently raised in the petition for rehearing. There, MRR and DHEC specifically noted that "the Court of Appeals erred in finding the ALC considered evidence outside the pleadings," that "[t]he ALC only made findings of fact regarding notice and timeliness of the appeal," and that the Court of Appeals "cites to no area where the ALC Order considered evidence outside the pleadings." **(App. p. 31 n. 9)** The argument is thus preserved.

IV. The Opinion erred in disregarding DHEC's determination regarding the interpretation of its regulations and for failing to abide by and apply this Court's standards and procedures of deference.

The Opinion fails to acknowledge, much less make the requisite findings and engage in the necessary analysis to overturn, the fact that the General Assembly has conferred on DHEC the authority and inherent discretion to interpret and apply the implementing regulations which it oversees. In its return, the County misses the mark on this issue, confusing the analysis with the suggestion that agency deference is impacted by what type of motion *the ALC* was considering (here, a motion to dismiss), rather than what deference *DHEC* is entitled to in the interpretation and application of its implementing regulations. Resp't's Br. at 28. The County's resulting

argument is untenable and attempts to create a category of "judicial functions" of DHEC to which no deference is owed, suggesting that DHEC is only entitled to deference if it relates expressly to permitting decisions. Resp't's Br. at 29 ("[DHEC] is not owed deference as to its regulatory interpretation in relation to the normal judicial function of determining whether a case has been filed."). This argument, in addition to not being faithful to the law, is a mischaracterization of the deference question before the Court.

The question of deference in this appeal relates to DHEC's interpretation of its solid waste regulations by staff in making the discretionary decision of whether an application is characterized under the applicable regulations as minor or major, *not* DHEC's arguments regarding timeliness determinations of administrative challenges. In fact, a determination of timeliness does not require interpretation of DHEC's regulations; either a challenge is instituted within the period set forth in the statute, or it is not. There was—and is—no "judicial function" related to the timeliness of the County's challenge to the modification and none is asserted here.

However, the County now admits, as it must, that "[DHEC] is owed deference as to its regulatory interpretation in relation to permitting decisions." Resp't's Br. at 29. The deference the County describes necessarily includes DHEC's discretionary review of applications that it receives in order to determine whether it falls under the regulatory category of a minor application, or a major application, *i.e.*, one that the County acknowledges is "in relation to permitting decisions." *Id.* DHEC's determination *at the application stage* that the requested modification was minor, and therefore not subject to public notice, based on its application of its own regulations to the facts before it at the time it made the decision, is a matter solely within its purview and discretion. *Kiawah Dev. Partners, II*, 411 S.C. at 34-35, 766 S.E.2d at 718 ("[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.*

Regulation 61-107.19 defines major modifications as '"major modification' means 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. Reg. 61-107.19. Part I.B.48(a)-(b). The County argues that MRR's requested modification—the option to install a liner in a Class 2 landfill—is an "alternate design" under the regulations and thus, must be treated as major. However, the County ignores the rest of the definition of major modification, which states that, to be major, the alternate design must also "vary from the design prescribed in this regulation." *Id.* The "design" requirements for a Class 2 Landfill are set forth in Regulation 61.107.19, Part IV.D, ("Design Criteria for Class Two Landfills) which is limited to the following "design" criteria: "Bottom Elevation: the estimated deflected (or settled) bottom elevation of the landfill base grade shall be a minimum of two feet above the seasonal high-water table elevation as it exists prior to the construction of the disposal area."[15]

[15] Here, DHEC staff expressly found that:

> 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.

The record shows that DHEC decided the modification was minor, in part, by specifically analyzing the design criteria for a Class 2 Landfill to see if MRR's requested modification to allow for the option of installing a liner was an alternate design "that varies from the design prescribed by [Regulation 61-107.19]." **(App. p. 520)** DHEC staff determined it was not, finding:

> Inclusion of a liner is not considered a major modification for the following reasons: 1) the 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 additional 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.

(App. p. 520) Furthermore, Mr. Coleman, former DHEC Manager of the Mining and Solid Waste Division, testified under oath that

> [W]e looked at it, and since there were no new waste streams involved, and it was an optional upgrade so to speak – it was only basically, you know, making the facility more environmental protective than we had already issued … any impact would just be positive, if they decided to install liner. And since we didn't improve any new waste streams or increase in volume or anything like that, we felt like an upgrade was with a minor modification.

(App. p. 741), Coleman Deposition p.78, lines 1-11.

As set forth above, DHEC applied the factors appearing in the regulation for determining whether an application called for a "major" modification, compared them to the facts in MRR's application, and determined the application was not for a "major" modification. Under *Kiawah Dev. Partners, II* and its progeny, deference to DHEC's determination in that respect is mandated

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(App. p. 520) Thus, the installation of a liner is not a design *change*, because the design criteria are being maintained regardless of the installation of a liner. *See also* S.C. Code Ann. Regs. 61.107.19, Pt. 1, B.80 (defining "structural components" of landfills under the regulation to include "liners"). The Opinion wholly ignores and disregards this reasoned analysis and application of the regulations to MRR's modification application by DHEC staff who "have unique skill and expertise in administering those statutes and regulations."

"absent compelling reasons."[16] Indeed, this Court has stated that, in order to disregard an agency's interpretation of its regulations, a court must demonstrate that the interpretation is "arbitrary, capricious, or manifestly contrary to the statute." *Id.* (quoting *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984)). The Opinion is devoid of any such analysis.

The Court of Appeals apparently fell into the trap—laid by the County—of believing that, simply because a permit application involved any "design change" or "alternate design[]" that it automatically renders the modification "major." As discussed above and to the contrary, any proposed change must also "*substantially alter*[] the facility or its operations," (emphasis supplied), or "vary from the design *prescribed in this regulation*," (*id.*). The addition of a liner does neither. Moreover, the use of the terms "substantially" and "vary" confers inherent discretion on DHEC to make a determination as to whether a proposed use of such a design feature qualifies as minor under the Regulation. As set forth in the DHEC Staff decision, *see* **(App. p. 520)**, DHEC found MRR's proposed modification is none of these things. *See Kiawah Dev. Partners, II*, 411 S.C. at 34, 766 S.E.2d at 718 (requiring deference where the determination is one of "unique skill and expertise in administering those statutes and regulations").

Therefore, deference is appropriate here, but none was given. *Contra State v. Moore*, 415 S.C. 245, 253, 781 S.E.2d 897, 901 (2016) (reversing the Court of Appeals where it "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

[16] The only reason provided by the Opinion is its *de novo* finding of fact, taken from the County's selective citation to excerpts of Mr. Coleman's deposition, that "DHEC's own representative has admitted the Permit Modification meets the regulatory definition of a major modification." **(App. pp. 13-14)** As with other examples, not only did the Court of Appeals err in reaching this conclusion *de novo*, but its conclusion is factually incorrect, as Mr. Coleman admitted no such thing. In fact, Mr. Coleman expressly remained of the opinion that the modification MRR requested was minor and not major. **(App. p. 302)**, Coleman Deposition p.121, lines 13-18.

the court of appeals' independent view of the facts."). There is no discussion about liners in Part IV of Regulation 61-107.19, neither prohibiting nor requiring them. DHEC determination that the proposed liner was more protective of the environment is therefore entirely reasonable under the circumstances and may not be set aside absent compelling reasons.

Finally, it is important to note that, while the County has attempted to blur the lines between MRR and DHEC through its spurious accusations of collusion and bad faith, the determination of whether an application is treated as "minor" or "major" is not made by MRR. Nor can it be made in hindsight by the County. Rather, this determination was made by DHEC staff, who make such interpretations on a regular basis in applying their "unique skill and expertise in administering" the landfill regulations. That analysis and interpretation is not a decision made in any quasi-judicial function by DHEC, but rather in the course of fulfilling its core statutory and regulatory obligations. The County's contrived arguments to the contrary, which were adopted *in toto* by the Opinion, must be rejected.

CONCLUSION

For the foregoing reasons and those stated in MRR's opening brief, MRR respectfully requests 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. In the alternative, if the Court finds actual notice is not definitive on the issues here, MRR requests reversal of the Opinion by remanding the case back to the ALC to make findings of fact on the issue of whether the modification was minor or major.

[SIGNATURE PAGE FOLLOWS]

Respectfully submitted,

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Columbia, South Carolina
March 9, 2021