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Jan 06 2026

SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Judge

Docket Nos. 24-ALJ-07-0088-CC to 24-ALJ-07-0131-CC

Appellate Case No. 2025-000379

South Carolina Coastal Conservation League, Appellant,

v.

South Carolina Department of Environmental Services and

Pulte Homes, LLC..... Respondents.

MOTION TO STRIKE EXTRA RECORD EVIDENCE

TO: ALL PARTIES AND THE COURT OF APPEALS:

PLEASE TAKE NOTICE that the Appellant, South Carolina Coastal Conservation League (“League”), hereby moves this Court to strike certain evidence and argument from the Respondents South Carolina Department of Environmental Services’ (“DES”) Initial Brief. DES alleges facts that were not presented to the lower court, are not part of the record in this case and were not included in its Designation of Matters to be included in the Record on Appeal.

SCACR Rule 210(c) states that the “Record shall not, however, include matter which was not presented to the lower court or tribunal.” Subsection (h) similarly provides, “the appellate court will not consider any fact which does not appear in the Record on Appeal.” Read together, SCACR Rule 210 limits what may be presented and argued to only those matters which were presented to the lower court.

South Carolina’s appellate courts have consistently recognized that SCACR Rule 210 limits matters included in the record on appeal to those that were presented to the lower tribunal. *See State v. White*, 372 S.C. 364, 643 S.E.2d 607 (Ct. App. 2007) (only matters presented to the lower tribunal may be included in the Record on Appeal); *see also Helms Realty v. Gibson-Wall Co.*, 363 S.C. 334, 611 S.E.2d 485, (2005) (declining to review a jury charge not in the Record on Appeal), *Croft as Trustee of James A. Croft Trust v. Town of Summerville*, 428 S.C. 576, 837 S.E.2d 219 (Ct. App. 2019) (citing Rule 210(c) in noting that the court previously struck items from designation of matter which were not part of the record on appeal).

In its Initial Brief at page 6, DES asserts, “Since 2020, SCDHEC and the Department has received... .” This is extra-record evidence and argument and nothing in DES’ Designation of Matters for Inclusion in the Record on Appeal supports this. DES’ statements about the number and type of permits issued over time was never presented in the lower proceeding, even though it would have been available to the Department because it purports to reflect historic data. Of course, that data that was not subject to any scrutiny in the administrative process.

Next, DES states that “[i]n September of 2025, the Department began to publicly post the information of applications and permits for the construction and installation of individual septic tank systems with peak flow less than 1,500 gpd of domestic wastewater by utilizing the Department’s ePermitting Program.” Initial Brief of Respondent DES, p. 7. DES goes into great

detail as to how the ePermitting program works, including the process they allege a member of the public can follow to receive notifications of individual septic tank permit applications (“a public user will need to enter in their e-mail address in the “Email Address” on the main page for Event Alerts and click the “Submit” button.”) *Id.* The Statement of Facts describes the information included in the e-mails DES alleges will be sent to an individual who follows this process, such as “the form type, the submission reference number of the application, the date and time the Department received the application, the facility name and Site name, the county where the application is located, the applicant’s name, and the applicant’s organization.” *Id.* p. 8. DES summarily concludes, without any evidentiary support, either within or without the matters designated for inclusion in the Record on Appeal, that “the Department has provided the public the ability to electronically receive and timely access to information regarding the applications and permits for the construction and installation of individual septic tank systems with peak flow less than 1,00 gpd... .” *Id.* p. 10. However, the Administrative Law Court did not make a factual determination evaluating of the sufficiency of the notification process, such as its reliability, nor whether the inability for a member of the public to provide public comment meets due process rights. None of these alleged facts have been determined by a trier of fact.

Starting on page 7 of its Initial Brief with, “In September 2025... ,” Respondent DES launches into an argument that the issue on appeal is moot based on alleged and contested facts that have arisen subsequent to the lower court proceedings in this case, including subsequent to the issuance of the Administrative Law Court’s Order Granting Respondents’ Motion for Summary Judgment on December 18, 2024. These “facts” continue through page 10, and DES’ argument that these facts make the case moot picks up on page 17 through page 21. In short, DES’ entirely new facts and argument are not in the record, were not raised before the lower court and

are vigorously disputed by the Appellant. The issue of whether DES has complied with the constitutional requirements of due process is a central issue in this appeal. These recent series of alleged events DES set forth have not been verified or are able to be verified. It would be an extremely prejudicial to set to take Respondent's "word" that the process described in its Initial Brief is as simple or as complete as they make it out to be. Clearly, if Appellant agreed that DES had taken steps to resolve its failure to provide public notice and an opportunity to be heard (and such ability to provide public comment plainly does not exist), it would have and could have withdrawn its appeal ground on the due process claims. It did not.

Further, this Court should not allow the admission of this extra-record evidence on the grounds it is entitled to take judicial notice of these alleged facts. The South Carolina Rules of Evidence, Rule 201, only permits the taking of judicial notice of an adjudicative fact, which is "one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." SCRE Rule 201(a), (b). "A trial court may take judicial notice of a fact only if sufficient notoriety attaches to the fact involved as to make it proper to assume its existence without proof. A fact is not subject to judicial notice unless the fact is either of such common knowledge that it is accepted by the general public without qualification or contention, or its accuracy may be ascertained by reference to readily available sources of indisputable reliability." *Eadie v. H.A. Sack Co.*, 322 S.C. 164, 171-172, 470 S.E.2d 397, 401 (Ct. App. 1996), citing *Moss v. Aetna Life Ins. Co.*, 267 S.C. 370, 228 S.E.2d 108 (1976); *Masters v. Rodgers Dev. Group*, 283 S.C. 251, 321 S.E.2d 194 (Ct.App.1984). Adjudicative facts are "facts about the particular event which gave rise to the lawsuit and . . . [help] explain who did what, when, where, how and with what motive." C. McCormick, McCormick on Evidence 328 and 331

(4th ed. 1992). Indeed, the number of septic tank permits issued over time is not dispositive to the issue before this Court, nor even relevant to the legal question.

In *Bowers v. Bowers*, the lower court took judicial notice of the fact that home values had been rising as evidence in support of a spouse's own valuation of their home in a divorce action. The Court of Appeals rejected this, concluding that the valuation of the home was one of the main issues for determination. "Here, the valuation of the marital residence, or any appreciation therein, was one of the primary issues in dispute. Any finding concerning the value of the home, particularly a valuation outside the realm of competent evidence offered at trial, required proof. The record is completely devoid of any such proof." *Bowers*, 349 S.C. 85, 94, 561 S.E.2d 610, 615 (Ct. App. 2002).

DES will assert that this Court can take judicial notice of such facts; however, DES makes a general and conclusory statement that such "facts" are publicly accessible. Counsel for Appellant searched for the information, which is reflected only in a press release on the DES website.

Appellant submits that these facts and argument should be stricken from DES' Initial Brief. Nevertheless, if the Court is inclined to consider extra-record evidence on this issue, Appellant is prepared to submit countering evidence as to the inadequacy of the allegedly sufficient public notice process, along with questions not answered by this one-sided characterization of that process.

Counsel for Appellant has consulted with counsel for Respondent DES, who does not consent to its request these matters be stricken.

WHEREFORE, the Coastal Conservation League requests that this Court strike any description of the online procedures described by DES, statements relating to their processing of

septic tank application which are not in the record, and that the argument relating to mootness be stricken.

Respectfully submitted,

s/ Leslie S. Lenhardt
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Attorneys for Appellant

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Pulte Homes, LLC..... Respondents.

PROOF OF SERVICE

I hereby certify that on this date I served Appellant’s Motion to Strike Extra-Record Evidence on all parties by emailing a copy of same on January 6, 2026, to the Attorney Information System provided email addresses below, via attached e-mail:

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Our Mission We use our legal expertise to protect land, water and communities across South Carolina.

January 6, 2026

VIA E-FILING

Honorable Jenny Abbott Kitchings
Clerk, S.C. Court of Appeals
P.O. Box 11629
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Re: *South Carolina Coastal Conservation League v. South Carolina Department of
Environmental Services and Pulte Homes, LLC* (Appellate Case No. 2025-000379)

Dear Ms. Kitchings:

Attached for filing please find Appellant's Motion to Strike Extra-Record Evidence, along with a Proof of Service. The filing fee for this motion is being sent under separate cover. Thank you for your kind assistance.

Sincerely,

s/ Leslie S. Lenhardt

Leslie Lenhardt
Senior Managing Attorney

Attachments
cc: Counsel of Record

Board of Directors- Jerry Schulze, Chairperson, J. Mac Bennett, Keith Bowers, Janelle Ellis,
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