

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Administrative Law Judge

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NOV 10 2014

Appellant Case No. 2014-000847

SC Court of Appeals

Preservation Society of Charleston, Historic Charleston Foundation,
Historic Ansonborough Neighborhood Association, South Carolina
Coastal Conservation League, Charlestowne Neighborhood Association,
Charleston Chapter of the Surfrider Foundation, and Charleston
Communities for Cruise Control.....Appellants,

vs.

South Carolina State Ports Authority and South Carolina Department of
Health and Environmental Control.....Respondents.

JOINT MOTION TO STRIKE

TO: THE COURT AND COUNSEL FOR THE APPELLANT.

PLEASE TAKE NOTICE that Respondents South Carolina Department of Health and Environmental Control (“Department”) and the South Carolina Ports Authority (Ports Authority) (collectively Respondents) jointly move the Court to issue an Order either striking a portion of the Appellants’ Amended Initial Brief or requiring the Appellants to delete the offending portion from their Final Brief. On page 47 of the Appellant’s Amended Initial Brief, they discuss an August 12, 2014 letter from Lieutenant Colonel John T. Litz (Commander and District Engineer of the Corps of Engineers, Charleston

District) to Jim Van Ness of the South Carolina Ports Authority dated.¹ This letter was drafted more than *four months after* issuance of the summary judgment order being appealed in this case.

According to Rule 210(h), SCACR the appellate court will not consider any fact which does not appear in the Record on Appeal. Rule 210(c), SCACR requires that evidence not previously presented to the lower court or tribunal be excluded from the Record on Appeal. In applying this limitation, the Supreme Court held that

“[t]his Court will not consider any fact which does not appear in the transcript of record nor will any fact stated in an exception be considered unless it appears from the record that it is true. Likewise, counsel is prohibited from embodying in their briefs any fact which does not appear in the record.”

S.C. State Highway Dep’t v. Meredith, 241 S.C. 306, 311, 128 S.E.2d 179, 182 (1962) (internal citations omitted); see also Norris v. Ferre, 315 S.C. 179, 183, 432 S.E.2d 491, 493 (Ct. App. 1993) (refusing to consider matters that were not presented to the lower court); State v. White, 372 S.C. 364, 387, 642 S.E.2d 607, 619 (Ct. App. 2007) (“Morris’ statement was not presented to the lower court and cannot be properly included in the Record on Appeal.”), *aff’d*, 382 S.C. 265, 676 S.E.2d 684 (2009); Exhibit A, S.C. Coastal Conservation League v. S.C. Dep’t of Health & Env’tl. Control, Case No. 2009-113526 (Order dated April 19, 2010) (striking brief that contained reference to and attached matters not presented to the lower tribunal).

¹ The pertinent section on page 47 of the Appellant’s Amended Initial Brief reads as follows: “However, the Corps has stated that it will *not* consider SPA’s project for [Nationwide Permit] NWP 3 coverage and has required SPA to apply for an individual permit. Letter from John T. Litiz, Commander and District Engineer, Charleston District, Corps of Engineers to Jim Van Ness, South Carolina Ports Authority on August 12, 2014 (notifying the Ports Authority that the Corps exercised its ‘discretionary authority under 33 C.F.R. 330.1(d) to require an individual permit for the proposed [cruise terminal] project’).”

Based on the abovementioned authority, it was improper for the Appellants to premise any arguments in their Initial Brief on this August 12, 2014 letter or to even include any reference to this letter in their Initial Brief. Accordingly, the Respondents respectfully file this motion to either strike that portion of the Appellant's Amended Initial Brief on page 47 referencing the August 12, 2014 letter or requiring the Appellants to delete the offending portion from their Final Brief.

[SIGNATURE PAGE FOLLOWS]

Respectfully submitted,



Bradley D. Churdar, Chief Counsel

**South Carolina Department of
Health and Environmental Control**

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South Carolina Department of Health
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November 5, 2014
North Charleston, South Carolina

The Supreme Court of South Carolina

South Carolina Coastal
Conservation League,

Respondent/Petitioner,

v.

South Carolina Department of
Health and Environmental
Control and South Carolina
State Ports Authority,

Respondents,

of whom South Carolina
Department of Health and
Environmental Control is

Petitioner/Respondent.

and

South Carolina Coastal
Conservation League,

Respondent/Petitioner,

v.

South Carolina Department of
Health and Environmental
Control, South Carolina
Department of Transportation
and South Carolina State Ports
Authority,

Respondents,

of whom South Carolina
Department of Health and
Environmental Control, is

Petitioner/Respondent.

The Honorable John D. Geathers
Trial Court Case No. 2007-AL-07-00107
2007-AL-07-00108

ORDER

In response to the amici curiae brief of South Carolina Wildlife Federation, Upstate Forever, Deerfield Plantation Phase II-B Property Owners Association, Engaging and Guarding Laurens County's Environment, Save Our Saluda, and National Wildlife Federation, Respondent South Carolina Ports Authority has filed a brief which contains various exhibits. All of these exhibits are dated after the Administrative Law Court (ALC) issued its orders in this matter.

Since nothing in the South Carolina Appellate Court Rules allows for the inclusion of exhibits in a brief and this Court cannot consider evidence that was not considered by the lower court or tribunal in making its decision,¹ the brief is hereby stricken. Respondent South Carolina Ports Authority may

¹ Sanders v. Allis Chalmers Mfg. Co., 235 S.C. 259, 111 S.E.2d 201 (1959) (affidavit included in brief could not be considered because it was not before the trial judge).

serve and file an amended brief which does not contain any exhibits within ten (10) days of the date of this order.

IT IS SO ORDERED.



A.C.J

FOR THE COURT

Toal, C.J., and Hearn, J., not participating.

Columbia, South Carolina

April 19, 2010

cc: Carlisle Roberts, Jr, Esquire
Davis Arjuna Whitfield-Cargile, Esquire
J. Blanding Holman, IV, Esquire
W. Jefferson Leath, Esquire
Beacham O. Brooker, Jr, Esquire
Mitchell Willoughby, Esquire
Randolph R. Lowell, Esquire
Philip L. Lawrence, Esquire
Derk Van Raalte, IV, Esquire
James B. Richardson, Jr, Esquire
James S. Chandler, Jr., Esquire
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Communities for Cruise Control,Appellants,

vs.

South Carolina Department of Health and
Environmental Control and South Carolina
State Ports Authority,Respondents.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date she has served the *Respondents' Joint Motion to Strike* in this matter upon the following, by placing copies of same in the United States Mail, first class postage prepaid, addressed to:

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

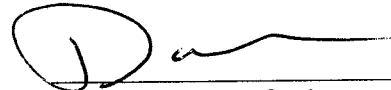
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Southern Environmental Law Center
43 Broad Street, Suite 300
Charleston, SC 29401



M. Denise Crawford

November 6, 2014



Catherine B. Templeton, Director

Promoting and protecting the health of the public and the environment

November 6, 2014

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re: *Preservation Society of Charleston v. S. C. State Ports Authority & SCDHEC;*
Appellate Case No. 2014-000847

Dear Ms. Kitchings:

Please find enclosed the original and seven (7) copies of the Respondents Joint Motion to Strike in the above referenced case. I would appreciate your returning a clocked copy in the enclosed envelope.

By copy of this letter, I am serving all parties of the same.

Very truly yours,

Bradley D. Churdar
Chief Counsel

Enclosure
BDC/mdc

cc: Amy Armstrong, Esquire
Jessie White, Esquire
Jefferson Leath, Esquire
Randolph Lowell, Esquire
Tracey C. Green, Esquire
Chad N. Johnston, Esquire
Blanding Holman, Esquire
Phillip Lawrence, Esquire

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SC Court of Appeals

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

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SC Court of Appeals

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Carolina Court of Appeals
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