

**THE STATE OF SOUTH CAROLINA
In the Supreme Court**

**APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Roger Young
Circuit Court Judge**

**On Certiorari to the Court of Appeals of South Carolina
Opinion No. 4616 (S.C. Ct. App. filed September 9, 2009,
withdrawn, substituted and refiled November 24, 2009)**

Too Tacky Partnership,.....Petitioner,

v.

**South Carolina Department of Health
and Environmental Control and
Mayo Read, Jr.,Respondents,**

PETITIONER'S MOTION TO STRIKE

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Attorneys for Petitioner**

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S.C. SUPREME COURT

Petitioner Too Tacky moves this Court, pursuant to Rule 240, SCRCP, to strike the Respondents' unauthorized supplements to the Appendix and any of Respondents' arguments relying on the same. Too Tacky would show the following in support of its motion:

The Respondents submitted their joint brief to this Court on or about March 30, 2012. The last eight pages of this brief are styled as the "Appendix to the Respondents' Joint Brief", and contain unauthenticated copies of a January 6, 2011 deed from Too Tacky to Kelly Albers and a printout from the Charleston County Auditor's office. The Respondents' joint brief also includes several new arguments based on their supplemental Appendix. (*E.g.* Resp. Brief. p. 2 n. 2; p. 5 n. 13; p. 31-32 n. 83).

The South Carolina Rules of Appellate Procedure allow for supplementation of the record upon the motion of a party:

(b) By a Party. With the written consent of all attorneys of record, a party may supplement the Record on Appeal at any time before argument commences. Without such consent or after argument commences, a party desiring to supplement the Record on Appeal must move the appellate court for leave to do so. In response to that motion, the other party(s) shall designate any supplemental materials which that party desires to add if the Court grants the motion.

Rule 212(b), SCACR. The supplementary materials must have been presented to the trial judge to be included in the supplementary record. Norris v. Ferre, 315 S.C. 179, 432 S.E.2d 491 (Ct. App. 1993); accord Rule 212(a), SCACR (allowing the court to *sua sponte* request supplementation of the record of matters before the court below).

The Respondents unilaterally supplemented the Appendix without the consent of Too Tacky's counsel, and without filing a motion under Rule 212(b), SCACR. This

supplement is improper and should be struck on procedural grounds.¹ Because the Respondents have based several arguments upon this improper record, these arguments should also be struck from their joint brief.


The consideration of these documents is also substantively improper. As a threshold matter, the documents in the supplement have not been authenticated. More importantly, the documents are being presented without the opportunity for Too Tacky to present materials in response, as is allowed under Rule 212(b) and is required under principles of due process of law. The documents contained in the supplemental Appendix are also completely irrelevant to this Court's analysis of this appeal. The standard of review specified by S.C. Code § 1-23-380(A) (Pet. Brief p. 6) only allows this Court to review the decision of the lower court in light of the record that was presented before it, not the record parties would like to have presented before it.

Similarly, Respondents' arguments² utilizing these documents were never presented to any court or tribunal below, and were not presented to this Court prior to their brief. It is improper for the Respondents to "ambush" Too Tacky, and this Court, with these arguments now, and they should therefore be struck from their brief.

¹ These documents are also wholly inappropriate for Appellate Judicial Notice, as they are not being introduced to prove indisputable facts. See Masters v. Rodgers Dev. Group, 283 S.C. 251, 321 S.E.2d 194 (Ct. App. 1984).

² Too Tacky notes that one of the Respondents' justifications for supplementing the record is clothed as a challenge to subject matter jurisdiction on standing grounds, *i.e.* Too Tacky has no "personal stake". (Resp. Brief p. 2 n. 2). While reserving its right to fully respond to this argument if this Court chooses not to strike it, Too Tacky would point out to the Court that the warranties and covenants in the deed in the supplemental Appendix appear to create a sufficient "personal stake" for Too Tacky to proceed with this appeal.

Respondents' attempt to, in effect, re-open the ALC record *six* years after hearing and supplement the application of Mayo Read, Jr., *seven* years after the permit was issued must be rebuffed by this Court. Accordingly, Too Tacky asks this Court to strike the "Appendix to the Respondents' Joint Brief" and all the arguments that rely upon it.³ (E.g. Resp. Brief. p. 2 n. 2; p. 5 n. 13; p. 31-32 n. 83).



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27 April 2012

³ To the extent this Court wishes to explore the documents submitted and the arguments relied upon by the Respondents' supplemental Appendix, Too Tacky would request an opportunity to submit a supplemental brief or memorandum on these issues and designate supplemental materials in opposition. See Rule 212, SCACR.

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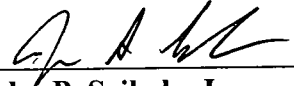
Too Tacky Partnership,.....Petitioner,
v.
South Carolina Department of Health
and Environmental Control and
Mayo Read, Jr.,.....Respondents,

CERTIFICATE OF SERVICE

I certify that I have served the *Reply Brief of Petitioner* and *Petitioner's Motion to Strike* on the Clerk of the Supreme Court and on counsel for the Respondents by serving copies of the same via U.S. Mail on 27 April 2012 to the following:

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April 27, 2012

Daniel E. Shearouse, Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

RE: Too Tacky Partnership, Petitioner v. South Carolina Department of Health and
Environmental Control and Mayo Read, Jr., Respondents
Supreme Court Case Tracking No.: 2009-149126
Case No.: 2007-CP-10-1520
Our File No.: 6058-19

Dear Mr. Shearouse:

Enclosed please find for filing an original and six copies of the Petitioner's Motion to Strike, an original and fourteen copies of the Reply Brief of Petitioner and Certificate of Service on the Respondents.

Also enclosed is our firm's check for \$25.00 representing the required filing fee for the Petitioner's Motion to Strike. We would appreciate your filing the original and copies and returning one filed-stamped copy to us in the enclosed envelope.

As per the enclosed Certificate of Service, the above documents were served on all parties on April 27, 2012.

Please do not hesitate to call if you have any questions.

With kind personal regards, I remain

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APR 30 2012

S.C. SUPREME COURT

pm 4-27-12

Sincerely yours,

SEIBELS LAW FIRM, P.A.

Sharon D. Harris

Sharon D. Harris
Legal Assistant

/sdh

Enclosures

cc: (via US Mail) (w/encl.)

Bradley D. Chudar, Esquire & Jackie Dickman, Esquire
Richard L. Tapp, Jr., Esquire & Stephen P. Groves, Sr., Esquire