

RECEIVED

MAR 26 2020

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

S.C. SUPREME COURT

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Ralph King Anderson, III, Administrative Law Judge

Appellate Case No. 2019-000074

South Carolina Coastal Conservation League Appellant,

v.

South Carolina Department of Health and Environmental Control, KDP II, LLC,
and KRA Development, LP, Respondents.

**MOTION TO STRIKE MATERIALS FROM
RESPONDENTS' DESIGNATIONS OF MATTER**

TO: ALL PARTIES AND THE SOUTH CAROLINA SUPREME COURT:

PLEASE TAKE NOTICE that the Appellant South Carolina Coastal Conservation League ("League") hereby moves this Court to strike certain materials from the Respondents South Carolina Department of Health and Environmental Control and KDP II, LLC, and KRA Development, LP's Designations of Matter.

The basis for this motion is that both Respondents filed Designations of Matter which include materials that were not presented to the Administrative Law Court and thus should not be included in the record on appeal. SCACR Rule 209 requires counsel to certify that a designation does not include "matter which is irrelevant to the appeal," and further requires that the designation only include matters "which may be properly included in the Record on Appeal [See

Rule 210(c)].” SCACR Rule 210(c) states that the “Record shall not, however, include matter which was not presented to the lower court or tribunal.” Read together, Rule 210(c) limits what counsel can designate under Rule 209 to only those matters which were presented to the lower court.

Respondent KDP II, LLC, and KRA Development, LP’s Designation of Matter lists as item #1 an Amended Order and Decision on Remand, filed March 22, 2016 in consolidated cases #09-ALJ-07-0029-CC and 09-ALJ-07-0039-CC (“Amended Order”). This Amended Order was issued in relation to a separate case, which culminated in this Court’s Opinion in Kiawah Development Partners, II, Inc. v. S.C. Dep’t of Health & Env’tl. Control, 422 S.C. 632, 813 S.E.2d 691 (2018). However, the Amended Order was never discussed with, much less presented to, the Administrative Law Court during the course of the seven day hearing. Instead, counsel for KDP repeatedly argued to the ALC that the case from which it is now seeking to include the Amended Order in the record was irrelevant to the pending case. Counsel referred to that case as “a separate case that has been in the courts for nine years, different fact, different circumstances” (Tr. 1141, lines 3-5) and stated that the separate, prior case is “irrelevant; it’s a collateral attack; it’s unnecessary; it’s a separate permit proceeding. . . what went on in that other case is irrelevant, and this is a de novo hearing on this application. We’re not going to try that case again” (Tr. 1142, lines 19-25). Exhibit A, attached.

Moreover, this Court’s Opinion modified the Amended Order on the basis that it was not supported by substantial evidence because it was “contrary to the reliable, probative evidence contained in the record.” Id. at 636. As such, the relevance of the Amended Order is questionable, even if it had been presented to the ALC.

Respondent DHEC's Designation of Matter lists three documents that were never offered or presented to the Administrative Law Court, much less admitted into evidence. Those materials include: Item #1, the Planned Unit Development, dated December 5, 2013; Item #31, a 2009 Summons and Complaint in case No. 2009-CP-10-2847; and Item #32 a third Amended Consent Order for Stay in case No. 2009-CP-10-2847.

Counsel for the League has not identified a single instance where any of these documents were discussed in the hearing transcript, except for the mention that a planned unit development agreement exists. As such, it should go without saying that none of these documents were moved or admitted into evidence. Similarly, none of these documents were included with any of the filings before the ALC.

South Carolina's appellate courts have consistently recognized that SCACR Rule 210(c) limits matters included in the record on appeal to those which were presented to the lower tribunal. Fountain v. Fred's Inc, 2020 WL 698352 (Ct. App.) (citing Rule 210(c) in striking a settlement agreement from the record on appeal because it was never presented to the lower court); State v. White, 372 S.C. 364, 643 S.E.2d 607 (Ct. App. 2007); (citing Rule 210(c) that only matters presented to the lower tribunal may be included 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); Argabright v. Argabright, 398 S.C. 176 (2012).

Counsel for the League consulted with counsel for both Respondents by email on March 19, 2020, stating that the above-referenced materials should not be included in the record on

appeal for the reasons discussed in this motion. Counsel for KDP II, LLC and KRA Development, LP, responded indicating that item #1 in its Designation is relevant and must be included in the record on appeal. Counsel for DHEC never responded. Based on these communications, or lack thereof, counsel is informed and believes that Respondents object to the requested relief.

WHEREFORE, the Coastal Conservation League requests that this Court strike Item #1 from KDP II, LLC's Designation of Matter and Items #1, #31 and #32 from DHEC's Designation of Matter.

Respectfully submitted,

Amy E. Armstrong
SOUTH CAROLINA ENVIRONMENTAL LAW
PROJECT

Mailing address: Post Office Box 1380
Pawleys Island, SC 29585

Office address: 430 Highmarket Street
Georgetown, SC 29440

Telephone (843) 527-0078

FAX (843) 527-0540

Attorney for the Appellant South Carolina Coastal
Conservation League

Georgetown, South Carolina

March 23, 2020

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Ralph King Anderson, III, Administrative Law Judge

Appellate Case No. 2019-000074

South Carolina Coastal Conservation League Appellant,

v.

South Carolina Department of Health and Environmental Control, KDP II, LLC,
and KRA Development, LP, Respondents.

CERTIFICATE OF SERVICE

I hereby certify that on this date I served the foregoing Motion to Strike Materials from the Respondents' Designations of Matter on all parties by placing copies of same in the U.S. Mail addressed to:

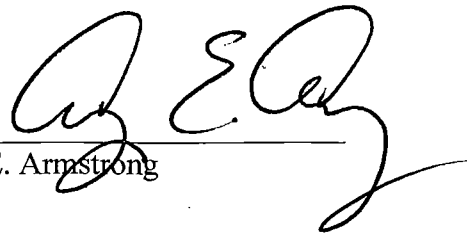
Brad Churdar
S.C. Dept. of Health and Env'tl. Control
1362 McMillan Avenue, Suite 400
Charleston, SC 29405

Trenholm Walker
Thomas Gressette
Walker Gressette Freeman & Linton, LLC
P.O. Drawer 22167
Charleston, SC 29413

RECEIVED

MAR 26 2020

S.C. SUPREME COURT



Amy E. Armstrong

Georgetown, South Carolina

March 23, 2020

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Administrative Law Judge

Appellate Case No. 2019-000074

South Carolina Coastal Conservation League Appellant,

v.

South Carolina Department of Health and Environmental Control, KDP II, LLC,
and KRA Development, LP, Respondents.

CERTIFICATE OF SERVICE

I hereby certify that on this date I served the foregoing Motion to Strike Materials from the Respondents' Designations of Matter on all parties by placing copies of same in the U.S. Mail addressed to:

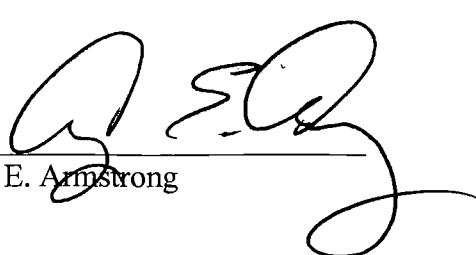
Brad Churdar
S.C. Dept. of Health and Envtl. Control
1362 McMillan Avenue, Suite 400
Charleston, SC 29405

Trenholm Walker
Thomas Gressette
Walker Gressette Freeman & Linton, LLC
P.O. Drawer 22167
Charleston, SC 29413

RECEIVED

MAR 26 2020

S.C. SUPREME COURT



Amy E. Armstrong

Georgetown, South Carolina

March 23, 2020

1 **A:** **Yes.**

2 **Q:** **And what did you understand was the purpose of**
3 **the bulkhead revetment structure?**

4 **A:** **To halt the erosion on the Kiawah River**
5 **shoreline by Captain Sam's Spit.**

6 **Q:** **And are you the person that conducted the review**
7 **of that permit application for compliance with**
8 **the applicable provisions?**

9 **A:** **Yes.**

10 **Q:** **Did you go to the spit in connection with your**
11 **review?**

12 **A:** **Yes.**

13 **Q:** **What did you observe on your visits to the spit?**

14 **A:** **That there was an erosion problem along the**
15 **Kiawah River shoreline, I don't think that's in**
16 **dispute. I would also characterize that sandy**
17 **beach as being utilized by the public. You**
18 **would see kayaks pulled up and people walking**
19 **along that beach. I would also characterize the**
20 **general area as a pristine, undeveloped portion**
21 **of a barrier island.**

22 **Q:** **And when you talk about the area, how are you**
23 **defining the area?**

24 **A:** **I'm ---**

25 **MR. WALKER:** **Objection. We're on a different permit**

Exhibit A

1 application. What's going on is an effort to
2 undermine the staff's decision in this case on
3 the consistency by going back to a separate case
4 that has been in the courts for nine years,
5 different facts, different circumstances. Mr.
6 Eiser was not the one who made the decision in
7 this case. This is a de novo hearing. It's
8 irrelevant what went on in that case. In this
9 case, the staff made a determination that was
10 affirmed by the DHEC Board through not granting
11 a review conference, so the DHEC Board, in
12 essence, has adopted the staff position here.
13 What is going on is an effort to collaterally
14 attack that, but it doesn't tend to prove or
15 disprove any fact at issue. Mr. Eiser was not
16 listed as an expert. He can't render an opinion
17 in this case. He may have had something to do
18 with the processing of this application. If he
19 did, that would be pertinent testimony, but it's
20 entirely irrelevant what he did in a separate
21 permitting provision -- excuse me, in a separate
22 permit application that we all know about that's
23 hotly contested, different facts, different
24 result. Even if she elicited the testimony,
25 which I think she's headed or trying to get,

1 that he came to a different conclusion than
2 staff now, that doesn't make any fact in this
3 case more or less probative. It's your
4 determination as to whether there's consistency
5 and he can't talk about, can't render, and
6 qualified as he may be, he's not listed as an
7 expert, and he can't render an opinion on
8 consistency in this case. So we think it's
9 irrelevant; we think it's also an effort to
10 impeach a witness with extrinsic evidence. They
11 have the project manager or the Coastal Zone
12 Consistency Director, Curtis Joyner, under
13 subpoena. He's the one who was the head at the
14 time this decision was made. And I say that
15 because they're putting up this witness to put
16 up testimony contrary to his testimony about a
17 different application or maybe what he would
18 have done differently and that witness hasn't
19 testified. So it's irrelevant; it's a
20 collateral attack; it's unnecessary; it's a
21 separate permit proceeding. The DHEC Board has
22 spoken in this case, what went on in that other
23 case is irrelevant, and this is a de novo
24 hearing on this application. We're not going to
25 try that case again. Thank you.