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S.C. SUPREME COURT

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.

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

In the interest of economy and brevity, the South Carolina Coastal Conservation League ("Petitioner") submits this combined Reply in support of its Motion to Strike Materials From Respondents' Designations of Matter filed by Respondent KDP, II, LLC and KRA Development, LP (hereinafter collectively "KDP") and Respondent, South Carolina Department of Health and Environment Control ("DHEC") and Return to Respondent, DHEC's Motion to Take Judicial Notice of Case No. 2009-CP-10-2847 Pleadings and Order.

DISCUSSION

- I. None of the Documents at Issue were Presented to the Trial Court and Rule 210 Mandates that They be Stricken.**

In both of their respective returns, KDP and DHEC concede that they failed to even offer into evidence the materials that are the subject of Petitioner's Motion to Strike at any point in this case. KDP states that Petitioner is correct that the 2016 Amended Order "was not introduced into evidence before the close of the hearing." KDP Return at p. 7. KDP then insinuates that the 2016 Amended Order was presented to the ALC in the context of post trial motions when it states "KDP specifically reference[d] it in its Response to the League's Motion for Reconsideration." Id. Reference to a document in another filing alone does not satisfy the requirement that it be "presented to the lower court or tribunal[]" in order to be included in the record on appeal. Rule 210 (c), SCACR. KDP fails to acknowledge that it did not attach this 2016 Amended Order as an Exhibit to its Response to Petitioner's Motion for Reconsideration or offer it to the ALC in another filing. Nor did KDP request that the ALC take judicial notice of the 2016 Amended Order at any time while this matter was before the ALC. In short, the 2016 Amended Order was never "presented to the lower court or tribunal." SCACR 210 (c). Perhaps recognizing the lack of authority for such a proposition, KDP stops short of explicitly arguing, as DHEC does, that merely referencing a document fulfills the presentation requirement of SCACR 210 (c).

DHEC asserts that Rule 210 (c)'s presentation requirement is satisfied and allows documents from an entirely different case to be added to the record on appeal if the other litigation was mentioned in passing during testimony. DHEC Return at p. 3. Of course, nothing in the testimony referenced by DHEC specifically or even generally relates to the separate regulatory takings case. The more reasonable conclusion is that the "back and forth litigation" phrase relates to the numerous administrative challenges and appeals that have attended KDP's repeated attempts to develop Captain Sam's Spit over the past several years. Similarly, DHEC argues that if an admitted document

alluded to another document then the document alluded to was “presented” to the trial court and may be included in the appellate record. DHEC Return at p. 4. DHEC has, of course, failed to offer any justification for this tortured construction of the word “presented” beyond a need to defend its designation.

Acceding to DHEC’s interpretation of “presented” would contravene the rules of evidence, upend the entire purpose of appellate courts and also be unfair to opposing parties on appeal. Why risk offering irrelevant or inadmissible evidence at the trial court level if one can merely mention it through testimony or allude to it in another admitted document and then rely on this unadmitted, unoffered and untested evidence on appeal? The appellate court must confine its review of the administrative law judge’s order “to the record.” S.C. Code Ann. § 1-23-610(B). Among the many items which comprise the record of a contested case by statute are the following: “(1) all pleadings, motions, intermediate rulings, and depositions; (2) evidence received or considered; (3) a statement of matters officially noticed; (4) questions and offers of proof, objections, and rulings on the contested case; (5) proposed findings and exceptions; [and] (6) any decision, opinion, or report by the officer presiding at the hearing.” S.C. Code Ann. § 1-23-320 (G) (1)-(6). Conspicuous by their absence are documents referred to by counsel in other filings, documents alluded to or mentioned in other documents and documents from another case that were not specifically mentioned in testimony. DHEC’s interpretation would expand the appellate court’s review to materials the trial court did not and could not have considered because the materials were never admitted or offered into evidence at the trial court level.

Counsel has identified several decisions in which appellate courts have refused to allow a litigant to supplement the record on appeal with materials that were not offered before or admitted

by the trial court even if referenced below. See, e.g., Norris v. Ferre, 315 S.C. 179, 183 (1993) (motion “to supplement record on appeal with deposition testimony from an unrelated action” was denied because the matter was “not presented to the trial judge”); Fountain v. Fred’s, Inc., 2020 WL 698352, App. Case No. 2017-000688 at *3, *9, n.18 (S.C.App. February 12, 2020) (settlement agreement stricken from appeal because not presented to circuit court even though parties referred to settlement agreement and trial court specifically found that the settlement agreement was reasonable and entered into without fraud).

As the Court of Appeals has stated, “This Court does not sit as a trial court to receive evidence on disputed issues of fact; our function is to review the judgment of the circuit court for reversible error based on the issues **and evidence presented to that court.**” Sanders v. Salley, 283 S.C. 458, 460, 322 S.E.2d 829, 830 (S.C.App. 1984) (citing S.C. Code Ann. §14-8-200; Mackey v. Kerr-McGee Chemical Co., 280 S.C. 265, 312 S.E.2d 565 (S.C.App. 1984))(emphasis added). None of the designated documents that are the subject of Petitioner’s Motion were presented to ALC. None of the designated documents satisfy Rule 210 (c). All of the designated documents should be excluded from the record on appeal.

II. This Court Should Decline to Take Judicial Notice of the Irrelevant Documents.

In an effort to avoid the consequence of their failure to comply with Rule 210 (c), both Respondents invoke judicial notice. At the outset, the following reasoning of the Court of Appeals on this issue warrants mention:

Appellate courts are generally reluctant to notice adjudicative facts even when those facts may be absolutely reliable. [] Notice of ‘facts’ for the first time on appeal may deny the adverse party the opportunity to contest the matters noticed; it may also violate the general principle that appellate review should be limited to the record.

[] Finally, appellate courts, limited to the ‘cold’ record, cannot be as sensitive to the appropriateness of judicial notice as the trial judge. [] For the foregoing reasons we hold that original judicial notice of adjudicative facts at the appellate level should be limited to matters which are indisputable.

Masters v. Rodgers Development Group, 321 S.C. 194, 197, 283 S.E.2d 251, 256 (1984) (internal citations omitted). There is no reason in this matter to depart from the customary practice that appellate courts should not take judicial notice of facts. Inherent in any evidentiary issue, including judicial notice, is that the fact in question must be relevant or adjudicative. The requirement for relevance is reinforced by Rule 209’s limitation of record designations to material relevant to the appeal. SCACR 209 (b). These limitations defeat Respondents’ requests here.

As noted in Petitioner’s initial Motion, KDP repeatedly argued that the prior decisions related to the development of Captain Sam’s Spit were irrelevant to this matter. Now it claims that Petitioner’s argument for collateral estoppel and res judicata necessitates the inclusion of the 2016 Amended Order. First, nothing about Petitioner’s arguments related to these principles require examination of the 2016 Amended Order. As Petitioner’s Brief and Reply show, the portions of the prior rulings that are relevant to the appeal in this case are found in the prior rulings of this Court, not the 2016 Amended Order.

Second, it is obvious that the 2016 Amended Order is not relevant to this appeal because KDP never attempted to offer it while this case was before the ALC. All KDP can muster in support of its relevance argument is its statement that the “Amended Order is critical to the disposition of the issues the League raised after the hearing and now raises in this appeal.” KDP Return at p. 6. Not only is the conclusory statement insufficient, it also undercuts KDP’s argument. If the 2016

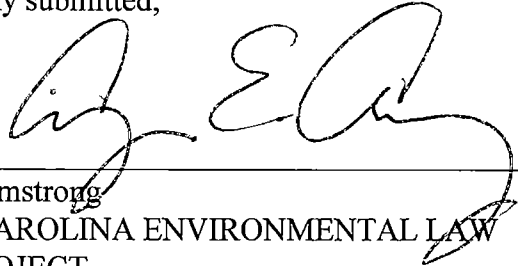
Amended Order had been relevant or “critical” for a determination of these issues, KDP would have proffered the document during the hearing. Even by KDP’s reckoning there is no dispute that collateral estoppel and res judicata are squarely before the ALC at the time of Petitioner’s Motion for Reconsideration yet KDP again failed to offer the Amended Order or sought to have the ALC take judicial notice at that time. KDP’s continued neglect of the 2016 Amended Order belies its characterization as “critical.”

DHEC’s attempt to rely on judicial notice likewise fails because none of the documents at issue were offered into evidence or even mentioned in testimony. The closest any of the documents at issue come is that the Coastal Zone Consistency Certification mentions the existence of the Planned Unit Development. DHEC Return at p. 4. Again, if this or any of the other documents had been relevant to any issue at trial, and therefore relevant to any issue on an appeal, they would have been introduced into evidence if relevant and admissible or attempted to be introduced into evidence failing that. These documents fit neither category. DHEC notes Petitioner’s relevance argument under SCARC 209 (c), but does not argue that the documents subject to Petitioner’s Motion are relevant. DHEC Return at p. 2, n. 2.

Instead, we are presented with another instance of parties attempting to “introduce evidence through the back door of judicial notice[.]” Masters, 321 S.C. at 257. None of the documents at issue contain facts “so notorious that the court may properly assume its existence without proof.” Id. at 255 (citing Moss v. Aetna Life Insurance Co., 267 S.C. 370, 228 S.E. 2d 108 (1976); State v. Broad River Power Co., 177 S.C. 240, 181 S.E. 41 (1935)). Respondents’ request that this Court take judicial notice of the documents at issue in their respective Designations of Matter should be denied.

WHEREFORE, for the reasons stated herein and those stated its initial Motion, the South Carolina Coastal Conservation League respectfully requests that this Court strike Item #1 from KDP's Designation of Matter and Items #1, #31 and #32 from DHEC Designation of Matter.

Respectfully submitted,



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