

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM LEXINGTON COUNTY  
Court Of Common Pleas

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The Honorable William P. Keesley

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**RECEIVED**

MAR 29 2012

**S.C. Supreme Court**

Civil Action No.: 2009-CP-32-04260  
Ct. App. Op. No. 4932, filed January 25, 2012  
Order denying Petition for Rehearing, filed March 2, 2012

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Margie Kay Black.....Petitioner

vs.

Lexington Co. Board of Zoning Appeals,  
Bill Reilly and Reitech, LLC .....Respondents

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**APPENDIX**

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- Record on Appeal
- Appellant's Final Brief
- Final Brief of Respondents Bill Reilly and Reitech, LLC
- Respondent Lexington County Board of Zoning Appeals Final Brief
- Appellant's Final Consolidated Reply Brief

**THE STATE OF SOUTH CAROLINA**  
**In The Court of Appeals**

Margie Kay Black, Appellant,

v.

Lexington County Board of  
Zoning Appeals, Bill Reilly,  
and Reitech, LLC, Respondents.

---

Appeal From Lexington County  
William P. Keesley, Circuit Court Judge

---

Opinion No. 4932  
Heard December 7, 2011 – Filed January 25, 2012

---

**AFFIRMED**

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Tobias Ward, Jr. and J. Derrick Jackson, both of  
Columbia, for Appellant.

James Edward Bradley, of West Columbia, and  
Jeffrey M. Anderson, of Lexington, for  
Respondents.

**LOCKEMY, J.:** Margie Kay Black appeals the circuit court's affirmation of the Lexington County Board of Zoning Appeals' (Board) approval of Reitech, LLC's application for a zoning variance. We affirm.

### **FACTS**

On July 7, 2009, Bill Reilly, on behalf of his company, Reitech, applied for a zoning variance for property (the Property) owned by Reitech in Leesville, South Carolina. Reitech operates a steel fabrication business on the Property.<sup>1</sup> The Property is a rectangular shape and is approximately 300 feet wide at its widest point. Reitech requested the zoning variance to bring an existing paint shed on the Property into compliance with the buffering restrictions in the Lexington County Zoning Ordinance (Zoning Ordinance). Reitech also sought the variance to accommodate a proposed sandblasting shed. Reilly asked the Board to grant a reduction in buffer from 125 feet to 31 feet, a reduction in setback from 250 feet to 31 feet, a reduction in total screening from 200 feet to 31 feet, and a reduction in partial screening from 300 feet to 31 feet.

On August 18, 2009, the Board held a public hearing to address the requested variance. Two of three adjoining property owners signed waivers agreeing to the variance, provided the sandblasting shed be constructed to lower the noise levels of the sandblasting equipment. At the hearing, Reilly admitted to the Board that after he received the waivers he constructed the sandblasting shed without a building permit. Black, the third adjoining property owner, opposed Reitech's variance request. Dave Almeida, Black's son-in-law, spoke on her behalf at the hearing, and expressed Black's concerns that the variance would lower the value of her property. Black was also concerned that Reilly built the sheds before applying for a building permit. After hearing arguments and comments, the Board voted to grant the variance request. In its Findings of Fact and Conclusions of Law, the Board found the variance was in compliance with Section 122.60 of the Zoning

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<sup>1</sup> The former owner of the Property began operating a steel fabrication business on the Property in 1982. In 2001, the area was zoned for manufacturing (intermediate). According to the Board, the pre-existing activity and buildings on the Property qualify as a legal non-conformity.

Ordinance which provides that the Board should not grant a variance unless it finds:

- a. There are extraordinary and exceptional conditions pertaining to the particular piece of property.
- b. These conditions do not generally apply to other property in the vicinity.
- c. Because of these conditions, the application of the ordinance to the particular piece of property would effectively prohibit or unreasonably restrict the utilization of the property; and
- d. The authorization of a variance will not be of substantial detriment to adjacent property or to the public good, and the character of the district will not be harmed by the granting of the variance.

On September 18, 2009, Black appealed the Board's decision to the circuit court. The circuit court affirmed the Board, finding Reitech presented sufficient evidence to support the variance as required by section 6-29-800 of the South Carolina Code (Supp. 2010).<sup>2</sup> The circuit court further determined the Board's decision was reasonable, correct as a matter of law, and was not arbitrary, capricious, or an abuse of its discretion. Thereafter, Black filed a motion to alter or amend the judgment. Black argued the circuit court failed to specifically address each of her arguments on appeal. The circuit court denied Black's motion in a supplemental order addressing her arguments. This appeal followed.

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<sup>2</sup> Section 6-29-800(A)(2) provides, "[a] variance may be granted in an individual case of unnecessary hardship if the board makes and explains in writing the following findings" and lists the same four factors as Section 122.60 of the Zoning Ordinance. S.C. Code Ann. § 6-29-800(A)(2) (Supp. 2010).

## STANDARD OF REVIEW

On appeal, the findings of fact by the Board shall be treated in the same manner as findings of fact by a jury, and the court may not take additional evidence. S.C. Code Ann. § 6-29-840(A) (Supp. 2010). "In reviewing the questions presented by the appeal, the court shall determine only whether the decision of the Board is correct as a matter of law." Austin v. Bd. of Zoning Appeals, 362 S.C. 29, 33, 606 S.E.2d 209, 211 (Ct. App. 2004). Furthermore, "[a] court will refrain from substituting its judgment for that of the reviewing body, even if it disagrees with the decision." Restaurant Row Assocs. v. Horry Cnty., 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999). "However, a decision of a municipal zoning board will be overturned if it is arbitrary, capricious, has no reasonable relation to a lawful purpose, or if the board has abused its discretion." Id.

## LAW/ANALYSIS

### I. Unnecessary Hardship

Black argues the circuit court erred in affirming the Board's decision where Reitech claimed an unnecessary hardship based on conditions it created and zoning restrictions enacted before it purchased the Property. We disagree.

Pursuant to section 6-29-800(A)(2) of the South Carolina Code (Supp. 2010), "[a] variance may be granted in an individual case of unnecessary hardship if the board makes and explains in writing" certain findings. Black argues Reitech cannot claim an unnecessary hardship as a matter of law. Citing Rush v. City of Greenville, 246 S.C. 268, 143 S.E.2d 527 (1965), Black argues "a claim of unnecessary hardship cannot be based upon conditions created by the owner nor can one who purchases property after the enactment of a zoning regulation complain that a nonconforming use would work an unnecessary hardship upon him." 246 S.C. at 278, 143 S.E.2d at 532. In Rush, Rush sought to rezone a portion of his property to construct a driveway for commercial use through a residential lot. 246 S.C. at 271, 143 S.E.2d at 528. Rush knew the property at issue was zoned residential when he purchased it, and he later tried to convert it to commercial use. 246 S.C. at

278, 143 S.E.2d at 532. Our supreme court determined Rush "failed to establish that the acts of the City Council of Greenville, in refusing to rezone the property in question or to grant a variance, were arbitrary, unreasonable and unjust." 246 S.C. at 282, 143 S.E.2d at 534. Similarly, Black has failed to show that the Board's decision to grant the variance was arbitrary or capricious.

## **II. Expansion of an Existing Business**

Black argues the circuit court erred in affirming the Board's decision where the requested zoning variance was for the expansion of an existing business. We disagree.

In its zoning variance application, Reitech stated it was requesting the variance because the layout of the Property will not allow any "new expansion." Black contends the Board's decision to grant the variance request should be overturned because a variance cannot be granted for an expansion. Citing section 6-29-800(A)(2)(d)(i), Black argues the "fact that property may be utilized more profitably, if a variance is granted, may not be considered grounds for a variance." S.C. Code Ann. § 6-29-800(A)(2)(d)(i) (Supp. 2010). We find Black's argument is without merit. The Board did not find that by granting the variance request, the Property could be utilized more profitably. Instead, the Board determined the variance would allow for a reduction in the noise produced by the sandblasting equipment, and would create "an improvement for the adjacent properties, the public good, and the character of the district."

## **III. Prohibit or Restrict the Use of Property**

Black argues the circuit court erred in affirming the Board's decision because the application of the Zoning Ordinance does not effectively prohibit or unreasonably restrict the use of the Property. We disagree.

Pursuant to Section 122.60(c) of the Zoning Ordinance and section 6-29-800(A)(2)(c) of the South Carolina Code (Supp. 2010), a zoning board should not grant a variance unless "the application of the ordinance to the particular piece of property would effectively prohibit or unreasonably

restrict the utilization of the property." Here, the Board determined sandblasting was a "normal and necessary accessory activity to a steel fabrication business" and that "without the structure to contain or reduce the noise," the activity would "continue to be in violation of the [Zoning] Ordinance." According to the Board, this would result in "continued persecution and the possible revocation of the Zoning Permit, which would therefore restrict the utilization of the [P]roperty as it was intended prior to zoning of the area." Black argues that if Reitech is seeking to "expand an existing business" by adding the paint and sandblasting sheds, then the Zoning Ordinance is not prohibiting or unreasonably restricting the use of the property.

We find the application of the Zoning Ordinance would effectively prohibit or unreasonably restrict the utilization of the Property. As the Board determined, sandblasting is a "normal and necessary" activity in a steel fabrication business. If Reitech was unable to build its sheds, it would be unable to control the noise and fumes from the sandblasting and painting, and it would be in violation of the Zoning Ordinance. This would restrict Reitech from using the Property for steel fabrication. Accordingly, we find the Board's determination is correct as a matter of law and is not arbitrary, capricious, or an abuse of its discretion.

#### **IV. Exceptional and Extraordinary Condition**

Black argues the circuit court erred in affirming the Board's decision where the Property's dimensions are not extraordinary or exceptional, and the same conditions generally apply to other property in the area. We disagree.

Pursuant to Section 122.60(a)-(b) of the Zoning Ordinance and section 6-29-800(A)(2)(a)-(b) of the South Carolina Code (Supp. 2010), a zoning board should not grant a variance unless it finds "there are extraordinary and exceptional conditions pertaining to the particular piece of property" at issue, and "those conditions do not generally apply to other property in the vicinity." Here, the Board found the Property had an extraordinary and exceptional condition because the fabrication facility existed prior to the zoning of the area. The Board determined the buffering restrictions in the Zoning Ordinance created setbacks that made it "impossible for any feasible

expansion or improvements." The Board further noted the Property contained the only steel fabrication facility in the area, and because the immediate area was "largely residential improved, rural unimproved, agricultural, and/or light commercial use, the same intense buffering restrictions do not apply to other properties in the vicinity." Black argues there are no exceptional or extraordinary conditions which pertain to the Property. Black also maintains there are a number of lots in the vicinity which are of a similar size and shape.

We find the Board's determination is correct as a matter of law and is not arbitrary, capricious, or an abuse of its discretion. Although other lots in the area may be of a similar size and shape, the Property contains the only steel fabrication operation in the area and that operation existed prior to the zoning of the area. Furthermore, other lots in the area are of residential, rural, agricultural, and light commercial use, and therefore, the same conditions do not apply to them. Because the buffering restrictions prevent Reitech from building the sheds, we find the Property is subject to an extraordinary and exceptional condition.

### **CONCLUSION**

Accordingly, the decision of the circuit court is

**AFFIRMED.**

**HUFF and PIEPER, JJ., concur.**

THE STATE OF SOUTH CAROLINA  
In The Court Of Appeals

APPEAL FROM LEXINGTON COUNTY  
Court Of Common Pleas

The Honorable William P. Keesley

Civil Action No.: 2009-CP-32-04260

Opinion No. 4932

Heard December 7, 2012 – Filed January 25, 2012

SC Court of Appeals

FEB 08 2012

RECEIVED

Margie Kay Black.....Appellant

vs.

Lexington Co. Board of Zoning Appeals,  
Bill Reilly and Reitech, LLC .....Respondents

PETITION FOR REHEARING

The Appellant, Margie Kay Black ("Black") hereby petitions the court pursuant to Rule 221 SCACR for a rehearing of its Opinion No. 4932, filed January 25, 2012. The Appellant believes this court erred when it overlooked or misapprehended the following points:

1. THE COURT OVERLOOKED OR MISAPPREHENDED CONTROLLING SOUTH CAROLINA SUPREME COURT PRECEDENT THAT THE RESPONDENT CANNOT CLAIM AN UNNECCESARY HARDSHIP BASED ON CONDITIONS IT CREATED AND ZONING REGULATIONS ENACTED BEFORE IT PURCHASED THE PROPERTY.

COPY

[1]

In its opinion, the court acknowledges the South Carolina Supreme Court precedent of *Rush v. City of Greenville*, 246 S.C. 268, 143 S.E.2d 527 (1965), but then fails to discuss or apply the controlling principle of *Rush*. Indeed, this court fails to follow even its own precedent in interpreting *Rush*.

In *Witherspoon vs. City of Columbia*, 291 S.C. 44, 351 S.E.2d 903, 904 (Ct. App. 1986) this court notes as follows:

However, *Rush*, in less restrictive language, states unequivocally "...nor can one who purchases property after the enactment of a zoning regulation complain that a nonconforming use would work an unnecessary hardship upon him. 143 S.E.2d at 532.

Rather than discuss or apply this principle to the facts of this case, this court's opinion merely states, "Similarly, Black has failed to show that the Board's decision to grant the variance was arbitrary or capricious." This court should grant this petition and set forth how the legal principle set forth by the South Carolina Supreme Court in *Rush* and applied by this court in *Witherspoon* apply to this case.

**2. THE COURT OVERLOOKS THAT A VARIANCE SHOULD NOT BE USED TO MAINTAIN OR EXTEND A NONCONFORMING USE WHICH IS CONTRARY TO THE ZONING FOR THE AREA.**

S.C. Code Ann. 6-29-800(a)(2)(d) provides,

(d) the authorization of a variance will not be of substantial detriment to adjacent property or to the public good, and *the character of the district will not be harmed* by the granting of the variance.

*(emphasis added.)* S.C. Code Ann. 6-29-800(a)(2)(d)(i) further provides,

The board may not grant a variance, the effect of which would be to allow the establishment of a use not otherwise permitted in a zoning district, to extend physically a nonconforming use of land or to change the zoning district boundaries shown on the official zoning map. The fact that property may be utilized more profitably, if a variance is granted, may not be considered grounds for a variance.

The foregoing statutes in the Enabling Act make clear that the legislature did not intend the variance power to be used to create or extend a nonconforming use. A nonconforming use by definition is operating contrary to the planned zoning for the area. Indeed, the overall policy as reflected in limitations on repairs and polices on abandonment is to reduce or eliminate non-conforming uses when possible. The Board found and this court acknowledged that the Respondent's property contained the only steel fabrication business in the entire general area (R. 18) and was a nonconforming use. So, if the Applicant cannot continue to operate the business in conformity with the code requirements including decibel levels for noise, the non-conforming use should no longer be allowed and not be preserved (and in this case extended and enlarged) by the Zoning Board granting a variance. This court should grant the petition and amend its opinion accordingly.

**3. THE COURT OVERLOOKS THAT THE EXCEPTIONAL AND EXTRAORDINARY CONDITIONS REQUIRED BY SC CODE ANN. § 6-29-800(A)(2)(a) PERTAIN TO THE PROPERTY ITSELF AND NOT RESPONDENT'S NONCONFORMING USE.**

This court found that the "exceptional and extraordinary condition" pertaining to the property was that the property was used for a steel fabrication plant. However,

Black believes that the "exceptional conditions" which do not generally apply to other property in the area (See S.C. Code Ann. §6-29-800(2)(a) & (b) ) must relate to the condition(s) of property itself and not its nonconforming use. If "use" of the property were the proper standard, then every person with a nonconforming use could claim that exceptional and unique conditions affect their property so they are entitled to variances to avoid zoning requirements.

*Groves vs. Board of Adjustment City of Charleston*, 226 S.C. 459, 85 S.E.2d 708

(1955) provides an example of how this requirement is analyzed. In *Groves*, the applicant applied for a variance to construct a restaurant in an area zoned for a residential use. The Zoning Board granted the variance, and neighboring owners appealed. The court noted,

Another consideration of prime importance is the fact that it is not shown that this particular piece of property suffers a singular disadvantage through the operation of the zoning regulation involved. There is nothing to indicate that this site is in anywise unique or different from all other waterfront property in this particular residential zone. The Special Referee and the learned Circuit Judge each found and held that there was a large area of land owned by the State Ports Authority located within this 'B' residential district similar to the lot in question.

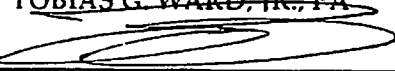
it affirmatively appears that any disadvantage to the same is suffered generally by the entire area of which this is but a small part. Quoting again from 62 C.J.S., Municipal Corporations, § 227(11), p. 536, 'It is necessary that the property suffer some unusual hardship from application of the regulation different from, and greater than, that suffered by other property in the district,

*Groves*, 85 S.E.2d at 711. In this case, as noted in Black's initial brief (an on appeal to the circuit court), there is nothing unique about this property and there are

other lots at similar disadvantage throughout the area. The fact that the Applicant used the property for steel fabrication does not make the property unique or exceptional. This court should grant this petition and amend its opinion accordingly.

WHEREFORE, having set forth the grounds therefore, Black prays that this court grant the Petition for a Rehearing and amend its opinion as set forth herein.

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February 8, 2012

THE STATE OF SOUTH CAROLINA  
In The Court Of Appeals

APPEAL FROM LEXINGTON COUNTY  
Court Of Common Pleas

The Honorable William P. Keesley

Civil Action No.: 2009-CP-32-04260

SC Court of Appeals

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Margie Kay Black.....Appellant

vs.

Lexington Co. Board of Zoning Appeals,  
Bill Reilly and Reitech, LLC .....Respondents

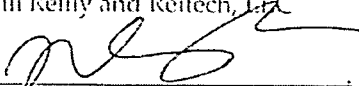
PROOF OF SERVICE

I certify that I have served the Appellant's Petition for Rehearing and Proof of Service on Bill Reilly and Reitech, LLC and Lexington County Board of Zoning Appeals by depositing a copy in the United States Mail, postage prepaid, on February 8, 2012, addressed to the attorneys of record:

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February 8, 2012

  
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# The South Carolina Court of Appeals

Margie Kay Black,

Appellant,

v.

Lexington Co. Board of Zoning  
Appeals, Bill Reilly, and Reitch, LLC,

Respondents.

The Honorable William P. Keesley  
Lexington County  
Trial Court Case No. 2009-CP-32-04260

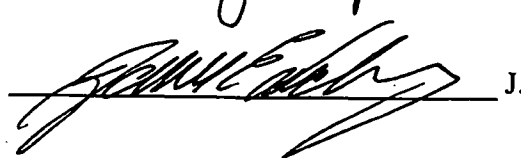
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## ORDER DENYING PETITION FOR REHEARING

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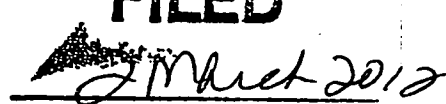
PER CURIAM: After a careful consideration of the Petition for Rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded and hence, there is no basis for granting a rehearing.

It is, therefore, ordered that the Petition for Rehearing be denied.

 J.  
 J.  
 J.

Columbia, South Carolina

cc: Tobias Ward, Jr., Esquire  
J. Derrick Jackson, Esquire  
James Edward Bradley, Esquire  
Jeffrey M. Anderson, Esquire

**FILED**  
  
2 March 2012

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THE STATE OF SOUTH CAROLINA  
In The Court Of Appeals

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APPEAL FROM LEXINGTON COUNTY  
Court Of Common Pleas

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The Honorable William P. Keesley

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Civil Action No.: 2009-CP-32-04260

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Margie Kay Black.....Appellant

vs.

Lexington Co. Board of Zoning Appeals,  
Bill Reilly and Reitech, LLC ..... Respondents

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RECORD ON APPEAL

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ORIGINAL

STATE OF SOUTH CAROLINA )

COUNTY OF LEXINGTON )

MARGIE KAY BLACK, )

Petitioner, )

-vs- )

LEXINGTON COUNTY BOARD )  
OF ZONING APPEALS, ET AL, )

Respondents. )

IN THE COURT OF COMMON PLEAS

ORDER ON RECONSIDERATION

Case Number 2009-CP-32-04260

RECEIVED

AUG 13 2010

SC Court of Appeals

WH

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#1

On February 12, 2010, the court entered an Order affirming the decision of the Lexington County Board of Zoning Appeals which granted a variance to property being used as a metal fabrication facility. The petitioner filed a motion under Rule 59, SCRPC, seeking to have the court reconsider and to alter or amend the judgment. This motion was decided upon written submissions. While the court does not agree that there was anything inadequate about the prior order, the court has reconsidered the issues raised and declines to change the ruling of the prior order. To the extent that any further explanation of the prior ruling would be mandated, the court submits this order as a supplement to the prior one.

The petitioner asserts that the court failed to follow the requirements of the South Carolina Appellate Court Rules and the South Carolina Rules of Civil Procedure because the order does not contain findings of fact and conclusions of law. The petitioner also claims that the court failed to properly set forth its analysis of the legal issues, citing as the only example a failure of the court to specifically address the argument that the law does not allow a property owner to obtain a variance using a claim of unnecessary

hardship based on conditions created after the enactment of the zoning ordinance, nor can one who purchases property after the implementation of the zoning ordinance seek a variance based on hardship.

The case of *Clear Channel Outdoor vs. City of Myrtle Beach, et al.*, 372 S.C. 230, 642 S.E.2d 565 (2007), contains the following explanation of the standards applicable to a circuit court's review of the decision of a zoning board:

Under S.C. Code Ann. § 6-29-840(A) (Supp. 2005), "[t]he findings of fact by the board of appeals must be treated in the same manner as a finding of fact by a jury, and the court may not take additional evidence." In reviewing questions presented on appeal, the court must determine only whether the decision of the board is correct as a matter of law. *Id.* A court will refrain from substituting its judgment for that of the reviewing body, even if it disagrees with the decision. *Restaurant Row Assocs. v. Horry County*, 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999). However, a decision of a city zoning board will be overturned if it is arbitrary, capricious, has no reasonable relation to a lawful purpose, or if the board has abused its discretion. *Id.*

WP  
#2

This court's reading of that precedent is that the circuit court is to review the findings of fact on appeal; not make them. There appears to be a difference of opinion as to the petitioner's interpretation of the rules regarding what the order of the circuit court must contain regarding findings of fact in this case. While the court does not agree that it was necessary to go to the lengths of explanation that are included in this order, it will do so.

Here, the record contains a document that has a cover sheet entitled "Lexington County Board of Zoning Appeals Findings of Fact and Conclusions of Law." It has very specific, clearly stated findings of fact and conclusions of law made by the Zoning Board of Appeals.

Those findings of fact include that the property that is subject to the request for a variance had an existing fabrication facility on it when it was purchased by the applicant on March 13, 2007. They reflect that several of the buildings had previously been permitted and that the fabrication activity had been conducted prior to the implementation of the zoning ordinance. It indicates that the ordinance requires certain additional requirements in order for the activity to be continued for more than 5 years after the ordinance was enacted. The initial contact came about as a result of a complaint about noise. Zoning staff discovered that there was an unpermitted paint shed that had been constructed and that the owner had plans to construct a sandblasting shed. The board found that sandblasting is an integral part of the metal fabrication process. Waivers were obtained from two of the three adjoining property owners. Those waivers included an additional requirement regarding the decibel levels that could emanate from the sandblasting being conducted on the property. So, the building of the new sandblasting shed would intrude into the normal setback lines, but would control the volume of noise. The request for a variance was then filed. It was granted, with conditions that the construction that would be built within the setback area must conform to specific requirements for noise reduction.

WPA  
#3

The record reflects that Lexington County Zoning Ordinance, §122.60 sets forth the standard for variances, and it tracks S.C. Code Ann. §6-29-800(A)(2). In the board's conclusions of law, it lists each of the requirements, using the same division of subsections used in the Code, and it gives an explanation as to why the board decided that the requirement had been met. It reflects the correct law.

It noted the unique nature of the property in question (Subsection 1 for the "extraordinary and exceptional conditions pertaining to the particular piece of property.") It found that the property is only slightly wider than the setbacks imposed by the zoning ordinance.

It analyzed the uses of other property in the area (Subsection 2 for the "conditions do not generally apply to other property in the vicinity") and noted that this fabrication facility was the only one in the area and that the application of these setbacks to this use amounted to "intense buffering."

The longest evaluation dealt with the third subsection: "Because of these conditions, the application of the ordinance to the particular piece of property would effectively or unreasonably restrict the utilization of the property." The board found that the property was being used as a fabrication facility prior to zoning – it was already there. It found that sandblasting is a "normal and necessary" part of the process. It found that allowing the variance on this small piece of property would allow the noise levels to come into compliance with the performing standards of the zoning ordinance (addressing the initial complaint that caused the evaluation). So, not allowing the variance would deprive the landowner of the ability to continue operations on this property and "restrict the utilization of the property as it was intended prior to zoning of the area." It would prevent the property from being utilized for the purpose it was developed before the zoning ordinance was adopted.

WPK  
#4

Finally, the board dealt with the provision that the variance "will not be of substantial detriment to adjacent property or to the public good, and the character of the district will not be harmed by granting the variance." Here, the board noted that the

structure that existed prior to the adoption of the zoning ordinance (where the sandblasting was already occurring) was further into the setback area than the proposed new sandblasting shed. The new shed would be less of an intrusion physically and would contain additional noise reduction elements. So, allowing the variance would result in a lesser degree of encroachment. Further, it would provide a means to reduce noise, which would benefit the owners of adjacent property, the public, and the character of the district.

WP  
KS

The circuit court reviewed the record, including the zoning board's findings, and found that the decision was not arbitrary or capricious or lacking a reasonable relation to a lawful purpose or an abuse of discretion. The findings and conclusions were all reasonably supported by the record. The board set forth reasoning that was logical, rational, and quite well-stated. All of the board's determinations are in writing and clearly documented in the record. It is the belief of this court that the South Carolina Court of Appeals, the Supreme Court of South Carolina, and any other court reviewing the order of February 2010 would have a proper record to consider in deciding whether this court was in error.

As stated in *Clear Channel*, the role of the circuit court is to determine if the decision of the board was correct as a matter of law. This court determined that it was. The petitioner maintains that this court did not set forth any legal analysis that would allow the appellate courts to evaluate this court's decision. Again, this court respectfully believes that the petitioner's reading of the requirements for a circuit court order in this instance are incorrect. The court ruled that the decision was correct as a matter of law.

Nonetheless, the court will address the arguments in the Memorandum filed in support of reconsideration.

It is perfectly appropriate (and required to preserve appellate issues) for a litigant to assert a motion under Rule 59 where the litigant feels that an issue is raised before the circuit court, but not ruled upon. The court made the ruling. The challenge is that it did not set forth its reasoning. The court has now gone through and recited the findings of fact and conclusions of law made by the board, all of which were in the record. As for the assertion that there is no legal analysis, the court feels that citing the statutes and the scope of review, and referring to the record were sufficient. However, the petitioner believes that the court was required to distinguish precedent set forth on the last page of her Memorandum.

WSP  
#6

The only specific issue raised in the Rule 59 motion is the petitioner's claims that the court did not set forth any evaluation of the principle that the law does not allow a property owner to obtain a variance using a claim of unnecessary hardship based on conditions created after the enactment of the zoning ordinance, nor can one who purchases property after the implementation of the zoning ordinance seek a variance based on hardship. Assuming that the "hardship" standards are applicable here, the court will specifically address the petitioner's argument.

In support of its position, the petitioner cites three cases. The first is *Rush v. City of Greenville*, 246 S.C. 268, 143 S.E.2d 527 (1965). In that case, a circuit judge under the law that existed at that time found that the zoning officials acted arbitrarily, unreasonably, and unjustly in denying a claim for a variance that would have granted a commercial user to create a driveway through property zoned for residential use or to

convert the residential property to a commercial use. The case is distinguishable on its facts from the case currently before the court. To principle lifted from *Rush* is contained in the following language found at 143 S.E.2d 532:

The respondent here knew, or should have known, when he purchased the lot of land fronting on Old Augusta Road, that such was restricted to residential use under the existing zoning ordinance of the City of Greenville. He likewise knew, or should have known, at the time of such purchase, that a lot zoned for residential purposes could not be subdivided so as to destroy its use for residential purposes and, thereafter, use such portion so purchased for commercial purposes in violation of the zoning ordinance. He now asserts that the refusal of the City of Greenville to rezone said lot or to grant him permission to use same as an access way into the back parking area located on his commercial property imposes upon him an unnecessary hardship. Ordinarily, a claim of unnecessary hardship cannot be based upon conditions created by the owner nor can one who purchases property after the enactment of a zoning regulation complain that a nonconforming use would work an unnecessary hardship upon him. A self-created or self-inflicted hardship intentionally created by an owner of premises for the purpose of laying a basis for an application for a variance cannot be considered for such purpose. 58 Am.Jur., Zoning, Sections 208, 209, pages 1053 and 1054. Where one purchases realty with intention to apply for variance, he cannot [246 S.C. 279] contend that restrictions caused him such peculiar hardship that entitles him to special privileges which he seeks. *Gleason v. Keswick Imp. Ass'n.*, 197 Md. 46, 78 A.2d 164.

WPA  
#7

The court in *Rush* repeatedly refers to the fact that the person seeking the variance knew that the property was zoned residential when he purchased it, then tried to convert residential property to a commercial use. It is quite different from the present situation where the landowner purchased an existing fabrication facility that was in operation before the enactment of the zoning laws and sought a variance in setback lines after a noise complaint in order to be able to meet noise restrictions that would benefit the adjoining landowners. Moreover, the language in *Rush* reciting the principle advanced by the petitioner is more qualified than what is contained in the Memorandum. *Rush* uses

the word "ordinarily" as a limitation on an absolute statement, and the creation of the condition in *Rush* is clearly different in many respects from what is being proposed here. The landowner in that case wanted to create a commercial traffic thoroughfare on land that was zoned residential. He was seeking to rezone the property or to have a variance that would effectively do the same thing. The landowner here wanted a variance in setback lines on a piece of property barely bigger than the setback lines to make the pre-existing use of the property more tolerable for adjoining landowners.

WPH  
48

A stronger case cited in support of the petitioner's position regarding its interpretation of *Rush* is *Witherspoon v. City of Columbia*, 291 S.C. 44, 351 S.E.2d 903 (SC Ct.App. 1986). The Court of Appeals reversed the circuit court's decision to overturn the zoning board's decision. The board had refused a variance for an existing tri-plex building, purchased by the landowner after enactment of the zoning ordinance, that did not meet the minimum requirements for square footage of land per unit. The landowner had purchased two such buildings, which adjoined each other. Four years after he purchased them, zoning officials cited him for one of the buildings being non-compliant, but he was granted a variance. Three years later, he applied for a similar variance for the building next door and was denied. The circuit judge found that the refusal to grant the variance was unreasonable and an abuse of discretion.

The Court of Appeals reviewed the circuit court's interpretation of *Rush*. The circuit judge in *Witherspoon* was trying to distinguish *Rush* from the facts before him, thus supporting his decision to reverse the zoning board, by noting that the landowner in *Rush* purchased the property with the intention of applying for a variance, which was not the situation in *Witherspoon*. The Court of Appeals states:

The circuit court distinguished *Rush* from this case by finding, here, unlike in *Rush*, *Witherspoon* did not purchase the property with the intent to apply for a variance. We hold the application of *Rush* is not restricted to cases where a petitioner, with knowledge of the zoning requirements, buys a piece of property with the intention at the time of purchase to apply for a variance.

*Rush* does contain language denying a petitioner a variance where he purchased property with the intention to apply for a variance based on a peculiar hardship caused by the zoning restrictions. However, *Rush*, in less restrictive language, states unequivocally "... nor can one who purchases property after the enactment of a zoning regulation complain that a nonconforming use would work an unnecessary hardship upon him." 143 S.E.2d at 532.

WPK  
#9

The court concedes that this last sentence, if applied blindly, would prevent a landowner from obtaining an exception to the zoning requirements for a nonconforming use based on unnecessary hardship, if the landowner bought the property after enactment of the zoning ordinance. The court does not know exactly what the Court of Appeals means by the phrase "in less restrictive language." This court does not believe that the holding of the Court of Appeals was intended to set the kind of hard-and-fast rule advanced by the petitioner, despite the presence of the language using the term "unequivocal." First, if one reads *Rush*, the language in the opinion (as set out in the discussion of *Rush* above) clearly uses the word "Ordinarily" to begin the sentence in issue. The word "ordinarily" is a term that qualifies and by definition means "not always." So, there have to be some situations where that rule would not apply. The court is troubled by the fact that the Court of Appeals left out the word "ordinarily" when it cited the language from *Rush*, because the court has to follow precedent from higher courts. Having read cases which cite *Rush*, the court does not believe that the phrase from *Witherspoon* is to be given absolute application, regardless of the facts. Such an

interpretation simply is inconsistent with the whole concept of flexibility given to zoning boards and the standards of review by the circuit courts.

The only reasonable interpretation, in this court's view, of the phrase from the *Witherspoon* opinion quoted above is to read it in context and not allow it to be divorced from the fact that the Court of Appeals was emphasizing the "strong presumption" in favor of the validity of the application of zoning laws by the local boards. It stated that the circuit courts should not overturn a decision of the zoning board "unless there is a plain violation of someone's constitutional rights." It is difficult to understand how the granting of this setback variance under these facts is a violation of the petitioner's constitutional rights.

WPC  
#10

This court reads *Witherspoon* for the proposition that even the very harsh result of the zoning board has to be upheld by the courts, despite the previous granting of a similar variance for the property next door. As justification for that holding, the Court of Appeals was explaining that the circuit court could not simply rely on those sections of the opinion in *Rush* that discussed the fact that the landowner there purchased the property with the intention of seeking to have it rezoned. The Court of Appeals was noting that the opinion also provided authority for the proposition that it was not unreasonable to enforce zoning ordinances against a purchaser who obtained the property at a time when the zoning laws were in place.

*Witherspoon* dealt with the opposite situation from the one before this court, and it is arguably very strong precedent supporting the decision of this court which yielded to the determination of the local zoning officials. The rule cannot be so absolute as to

deprive those officials of the ability to grant variances in situations which they reasonably determine to be justified under S.C. Code Ann. §6-29-800(A)(2).

The third case cited by the petitioner is *Ex Parte La Quinta Motor Inns*, 279 S.C. 598, 310 S.E.2d 438 (SC Ct.App. 1983). That case does contain a citation to *Rush* that states the principle advanced by the petitioner. The context of the citation is that the circuit court had reversed a decision of the local zoning authority which had denied a variance. To quote the Court of Appeals:

La Quinta applied for the variance to enable it to construct a sign 85 feet in height in a C-2 zoning district that had a height limitation of 45 feet. A hearing was held by the Board at which time both parties had an opportunity to present evidence. The Board thereafter issued its findings of fact and conclusions of law wherein it denied the variance. Although an adjoining property contained an 85 foot sign, the Board found that the adjoining sign was constructed prior to the effective date of the zoning ordinance and constituted a non conforming use. The Board also found that La Quinta knew or should have known when it acquired the property that a 45 foot sign would have its view obscured by the terrain and planned highway overpasses. The Board reasoned that La Quinta failed to establish special conditions and circumstances that did not result from its own actions.

WPA  
#11

For the same reasons set forth in reviewing the other cases cited by the petitioner, the court finds this case to be distinguishable. The circuit court in *La Quinta* was reversed when it failed to give the local zoning board's decision the authority to which it was entitled. The facts in the Lexington County case are far different and distinguishable, as pointed out in great detail in this order.

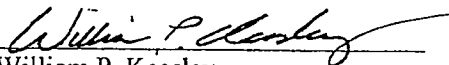
In summary, the court rules that the petitioner's interpretation of the requirements of a circuit judge's order on appeal from a decision of the zoning board are incorrect. The court believes that the prior order was sufficient. Nonetheless, the court has reconsidered the matter and, to the extent that the previous order could be interpreted as

being insufficient, the court has addressed all of the issues raised by the petitioner in the Rule 59 motion. All grounds are denied, and the decision to uphold the determinations of the Lexington County Board of Zoning Appeals is reaffirmed.

THEREFORE, IT IS ORDERED that the motion to alter or amend the order issued on February 12, 2010 has been considered. There is no basis upon which to change the prior ruling. To the extent that any issues were not sufficiently addressed, the court submits this order as supplementing the prior order.

AND IT IS SO ORDERED.

July 9, 2010

  
William P. Keesley  
Judge

#12

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2010 JUL 12 P 12:12  
BETTY L. CAMPBELL  
CLERK OF COURT  
LEXINGTON, SC

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
COUNTY OF LEXINGTON ) FOR THE ELEVENTH JUDICIAL CIRCUIT

Civil Action No.: 2009-CP-32-04260

Margie Kay Black, )  
Petitioner, )  
vs. )  
Lexington County Board of Zoning )  
Appeals, Bill Reilly and Reitech, LLC, )  
Respondents. )

ORDER

BETH A. CAHILL  
CLERK OF COURT  
LEXINGTON, SC

2010 FEB 16 A 10:30

FILED

*WJL*  
*#1*  
This matter is before the court on appeal from the Lexington County Board of Zoning Appeals in regards to requiring screening on the subject property owned by the Appellant. The record for review consists of Findings of Fact and Conclusions of Law, Transcript, and all Exhibits introduced to the Zoning Board. The Petitioner is an adjoining property owner. Respondent Reitech, LLC is the owner of the property subject to this action. Respondent Reitech asked the Zoning Board for a reduction in buffer from 125 feet to 31 feet, a reduction in setback from 250 Feet to 31 feet and a reduction in total screening from 300 feet to 31 feet. The subject property has been used as a fabrication facility. Recent additions of a paint shed and sandblasting shed to the facility caused the property owner to request a variance in order to come into compliance with the County Zoning Ordinance in regard to buffer, setbacks, and screening.

The Zoning Board heard arguments in favor of the variance from the Respondent Reitech and heard arguments against the variance. After hearing all of the arguments and comments, the Zoning Board voted to grant the variance request. The Petitioner has now appealed the Zoning Board's decision to this court.

### SCOPE OF REVIEW

In the context of zoning, a decision of the reviewing body will not be disturbed if there is evidence in the record to support its decision. A court will refrain from substituting its judgment for that of the reviewing body, even if it disagrees with the decision. Restaurant Row Associates v. Horry County, 335 S.C. 209, 516 S.E.2d 442 (1999).

A decision of the municipal zoning board will be overturned if it is arbitrary, capricious, has no reasonable relation to a lawful purpose, or if the board abused its discretion. Restaurant Row, supra.

Section 6-29-800 of the S. C. Code gives the factors to be considered by the zoning board to determine whether to grant the variance and are as follows:

A variance may be granted in an individual case of unnecessary hardship if the board makes and explains in writing the following factors:

- WPK  
#2
- a) there are extraordinary and exceptional conditions pertaining to the particular piece of property;
  - b) these conditions do not generally apply to other property in the vicinity;
  - c) because of these conditions, the application of the ordinance to the particular piece of property would effectively prohibit or unreasonably restrict the utilization of the property; and
  - d) the authorization of a variance will not be of substantial detriment to adjacent property or to the public good, and the character of the district will not be harmed by the granting of the variance.

Pursuant to S. C. Code Section 6-29-840, this court must treat the findings of the Zoning Board of Appeals in the same manner as the finding of fact by a jury. This court must only determine whether the decision of the board is correct as a matter of law.

### DISCUSSION

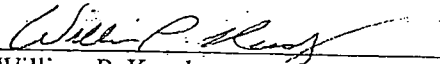
The Petitioner claims the Respondent has not met the statutory criteria in order to grant a variance. The Respondent Reitech alleges that the subject property is unique and that

the enclosed structure would benefit the neighbors as compared to performing the work in the open without any structure.

This court has reviewed the Transcript and the documents filed with the court that were presented to the board and finds that the Respondent Reitech presented sufficient evidence to support a variance as required by Section 6-29-800. This court further finds that the decision of the Zoning Board was reasonable and is correct as a matter of law and is not arbitrary, capricious, or an abuse of discretion.

For all the above reasons, this court concludes that the decision of the Lexington County Zoning Board of Appeals, which granted the variance, is hereby affirmed.

IT IS SO ORDERED.

  
William P. Keesley  
Presiding Judge Eleventh Judicial Circuit

#3

Lexington, South Carolina  
12<sup>th</sup> day of FEB., 2010.

COPY

**Lexington County Board of Zoning Appeals  
Findings of Facts and Conclusions of Law  
Zoning Variance Application #14-09**

**Findings of Fact:**

- Property Owner / Business Name: Reitech, LLC
- Property Address: 152 Hyler Rd., Leesville, SC 29070
- TMS# 005000-02-003
- Zoning Classifications: District: RD (Restrictive Development)  
Street: L (Local)
- Zoning Category: Manufacturing (Intermediate)
- Planning Area: Western – Zoned: November 14, 2001
- Applicant / Address: Bill Reilly, 137 Sharon Lake Ct., Lexington, SC 29072
- Date of Application: July 7, 2009
- Variance Request: Applicant requests a reduction in buffer from 125 feet to 31 feet, a reduction in setback from 250 feet to 31 feet, a reduction in total screening from 200 feet to 31 feet, and a reduction in partial screening from 300 feet to 31 feet.
- Date of Public Hearing: August 18, 2009
- The applicant purchased the property March 13, 2007. Several of the existing buildings had been previously permitted and were in place when the applicant purchased the property.
- A fabrication (manufacturing) activity was established at this location prior to zoning of the area. The pre-existing activity and buildings qualify as a legal nonconformity. However, the Lexington County Zoning Ordinance states in Section 111.20 – Required Conformance of Legal Nonconformities that “After five years, the activity may only continue in compliance with the applicable vision clearance, parking requirements, screening requirements and performance standards.”
- This site came to staff’s attention as a Code Enforcement, noise related issue. When staff visited the site to investigate the complaint, an unpermitted building expansion (paint shed) was discovered, thus leading to the need for the site to come into compliance with buffering restrictions of the Zoning Ordinance. During discussions regarding this issue, staff learned of plans by the applicant to construct a sandblasting shed.
- Two waivers were obtained by the applicant from adjoining property owners to the north and west reducing buffer, setback, screening, and performance standards for those properties. A stipulation of one of the waivers was that a sandblasting shed would be constructed by the applicant to lower the decibel levels of the sandblasting equipment from the adjoining property. Since a waiver was not obtained from the property owner to the south, the applicant chose to request a variance from the Board of Zoning Appeals regarding the buffering restrictions for the rural-unimproved property identified by TMS# 005000-02-032.

Page 2 of 3  
Zoning Variance Application #14-09

Conclusions of Law:

Lexington County Zoning Ordinance, Section 122.60 Standards for Variances:

The Board shall not grant a variance unless it makes findings as follows:

- a. There are extraordinary and exceptional conditions pertaining to the particular piece of property.

This is an extraordinary and exceptional condition since the activity existed prior to zoning of the area. The implementation of the buffering restrictions contained within the Zoning Ordinance for that type of activity created setbacks from adjoining properties that would make it impossible for any feasible expansion or improvements to the facilities since the property is only slightly wider than the setbacks imposed.

- b. These conditions do not generally apply to other property in the vicinity:

This property contains the only steel fabrication (Manufacturing (Intermediate)) activity in that entire general area, and since the immediate area is largely residential improved, rural unimproved, agricultural, and/or light commercial use, the same intense buffering restrictions do not apply to other properties in the vicinity.

- c. Because of these conditions, the application of the ordinance to the particular piece of property would effectively prohibit or unreasonably restrict the utilization of the property; and,

It is recognized that sandblasting is a normal and necessary accessory activity to a steel fabrication business and that due to the close proximity of adjoining residential dwellings, the sandblasting activity, not being contained within a structure, exceeded the maximum allowable sound pressure levels in decibels as stated in the Performance Standards of the Zoning Ordinance. The sandblasting structure is intended to reduce the sound pressure to acceptable levels so that the activity may come into compliance with the Performance Standards. Without the structure to contain or reduce the noise decibels, the activity would continue to be in violation of the Ordinance therefore resulting in continued prosecution and the possible revocation of the Zoning Permit, which would therefore restrict the utilization of the property as it was intended prior to zoning of the area.

**Zoning Variance Application #14-09**

- d. The authorization of a variance will not be of substantial detriment to adjacent property or to the public good, and the character of the district will not be harmed by the granting of the variance.

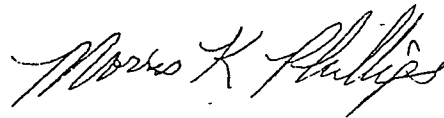
It is recognized that structures containing the fabrication activity prior to zoning of the area encroach into the buffer and setback at a much higher degree than the proposed paint and sandblasting structures would. Therefore, approval of the Variance Request would create a much lesser degree of encroachment of the buffering restrictions and would not be of substantial detriment to the adjoining property in question. It is further recognized that by providing the means for reduction of the noise produced by the sandblasting equipment allows for an improvement for the adjacent properties, the public good, and the character of the district.

Approved by:



Walt McPherson  
Zoning Administrator

Approved by:



Morris Phillips  
Board of Zoning Appeals - Chairman



## COUNTY OF LEXINGTON, SOUTH CAROLINA

**Community Development**

County Administration Building, 4<sup>th</sup> Floor  
 212 South Lake Dr, Suite 401 Lexington, SC 29072  
 (803)785-8121

ZONING VARIANCE APPLICATION # **14-09**

Address and/or description of the property for which the variance is requested:

152 Hyler Road, Leesville

Category: Manufacturing (Intermediate)

TMS#: 005000-02-003

Property Owner: Reitech, LLC Business Name: Same as owner

Explanation of the variance request: Applicant is requesting a reduction in buffer from 125 feet to 31 feet, a reduction in setback from 250 feet to 31 feet, a reduction in total screening from 200 feet to 31 feet, and a reduction in partial screening from 300 feet to 31 feet.

Reason for the request: The layout of the property will allow me to only expand to the rear and the required buffers will physically not allow any new expansion to meet current code from the side properties. The proposed shed in the rear will be used to lower the sound produced by the sandbaster at my operation.

Even though this request will be carefully reviewed and considered, the burden of proving the need for the variance and how the request qualifies in meeting the Standards for Variances (Zoning Ordinance Section 122.60) rests with the applicant.

Date of Application: 7/7/2009

Applicant: Owner ☒ Agent ☐ Other ☐

Phone #(s): cell (803) 422-3502

Signature: [Signature]

Printed Name: Bill Reilly

Street/Mailing Address: 137 Sharon Lake Ct., Lexington 29072

|         |                         |
|---------|-------------------------|
| 7/7/09  | Application Received    |
| 7/30/09 | Newspaper Advertisement |
| 7/29/09 | Notices Mailed          |

|         |                 |
|---------|-----------------|
| 7/7/09  | Fee Receipted   |
| 8/3/09  | Property Posted |
| 8/18/09 | Public Hearing  |

Board of Zoning Appeals results/comments: 6-2 Approved



## COUNTY OF LEXINGTON, SOUTH CAROLINA

### Department of Community Development

County Administration Building (803) 785-8121

212 South Lake Drive, Suite 401 Lexington, South Carolina 29072

[www.lex-co.com/Departments/CommunityDevelopment/index.html](http://www.lex-co.com/Departments/CommunityDevelopment/index.html)

June 8, 2009

Bill Reilly  
137 Sharon Lake Ct.  
Lexington, SC 29072

**RE: Reitech, LLC Expansion**

**TMS# 005000-02-003**

Mr. Reilly:

After conducting a zoning review of the above referenced project, the following area(s) require attention:

1. The proposed expansion must provide a 125 foot buffer (no portion of expansion can be within this area) from surrounding properties, the buildings must setback 250 feet from surrounding properties, and screening is required for any portion of the activity within 300 feet of surrounding properties.
2. The proposed expansion does not meet buffer, setback, and screening for the following properties: TMS 5000-02-032 (Margie Kay Black – property to South), TMS 5000-02-001 (Windol Gillian property – across Hyler Road), and TMS 5000-02-002 (Gerald Gillian property – property to North). You may seek zoning waivers from these protected property owners. Zoning waivers are forms prepared by our office that the owners may sign and reduce all or some of the buffering restrictions. Zoning waivers are \$57 each. I encourage you to contact these owners to see if they are willing to sign a waiver before requesting the forms. If a waiver is not feasible, there is a variance process in which the Board of Zoning Appeals may grant a variance to reduce all or some of the buffering restrictions. For more information on the waiver or variance process, please contact me.
3. Partial screening (vegetation) is required for TMS 3900-02-013 (Nell Hyler property – parcel to North above Gillian property). This requirement may also be waived.

If you have any questions or concerns, I may be reached by phone at (803) 785-8121 or email at [rderrick@lex-co.com](mailto:rderrick@lex-co.com). If you wish to meet in person to discuss this project, please call in advance to schedule an appointment.

Respectfully,

A handwritten signature in black ink, appearing to read "Robbie Derrick", is written over a circular stamp.

Robbie Derrick  
Zoning Assistant



COUNTY OF LEXINGTON, SOUTH CAROLINA

**Community Development**

County Administration Building, 4<sup>th</sup> Floor  
212 South Lake Dr, Suite 401 Lexington, SC 29072  
(803)785-8121

**ZONING WAIVER**

CIRCULATION DATE: 6/11/2009

APPLICANT: Bill Reilly      PHONE: (803) 422-3502

PRINCIPAL ACTIVITY DESCRIPTION: Manufacturing (Intermediate)

PRINCIPAL ACTIVITY LOCATION: 152 Hyler Rd.

TMS#: 005000-02-003

BUFFERING RESTRICTIONS and/or PERFORMANCE STANDARDS PROPOSED FOR WAIVERING:

**HEIGHT** - The maximum height for structures is an initial 20-foot vertical rise at the protected property lines plus an additional 1/4 foot of rise for each foot of setback from the protected property lines.

**BUFFER** - The minimum buffer distance from the protected property lines, within which no principal or accessory activity is permitted (with the exception of utilities or stormwater structures), is 125 feet.

**SETBACK** - The minimum setback distance for buildings or other activities from the protected property line is 250 feet.

**SCREENING** - Total screening is required for a principal or accessory activity within 200 feet of the protected property lines; additionally, partial screening is required for a principal or accessory activity within 300 feet of the protected property lines.

**Special Note:** This waiver to reduce performance standards also.

The Lexington County Zoning Ordinance requires the above-described activity to conform to the listed buffering restrictions and/or performance standards for protection of the property described below. However, the owner(s) of record, as listed below, may waive all or part of the above stated protection by signing this Zoning Waiver, subject to verification by Lexington County Zoning Staff.

PROTECTED PROPERTY OWNER(S) INFORMATION:

OWNER OF RECORD: Margie Kay Black

PROPERTY LOCATION: Hyler Rd. TMS#: 005000-02-032

MAILING ADDRESS (if different from property location) 1707 Ray Price Rd., Leesville

(See reverse side)

## LEXINGTON COUNTY ZONING WAIVER

The undersigned owner(s) of the protected property described above hereby waive(s) all or part of the protection afforded by the above listed buffering restrictions and/or performance standards, as stated in the Lexington County Zoning Ordinance, relative to the above described principal activity. The portions of the above listed buffering restrictions and/or performance standards that are to remain in effect (if any) are as follows:

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PROPERTY OWNER(S) SIGNATURE(S)

DATE

PRINTED PROPERTY OWNER(S) NAME(S)

PHONE #

This Zoning Waiver shall become valid only when verified and attached to an applicable Zoning Permit within 90 calendar days of the circulation date as designated on page 1 of this form. A fee for each waiver obtained, relative to this activity, is due at the time the Zoning Waiver is issued by the Zoning Office.

Questions or concerns by the protected property owner may be directed to:

Community Development – Zoning Office  
 Lexington County Administration Building – 4<sup>th</sup> Floor  
 212 South Lake Drive, Suite 401  
 Lexington, SC 29072  
 Phone: (803) 785-8121

WAIVER BECOMES VOID IF APPROPRIATE ZONING PERMIT NOT ISSUED WITHIN 90 DAYS

Is the tract or parcel of land restricted by any recorded covenant that is contrary to, conflicts with, or prohibits the proposed activity? ☐ Yes ☒ No (Applicant's Signature) [Signature] Date 6/11/09

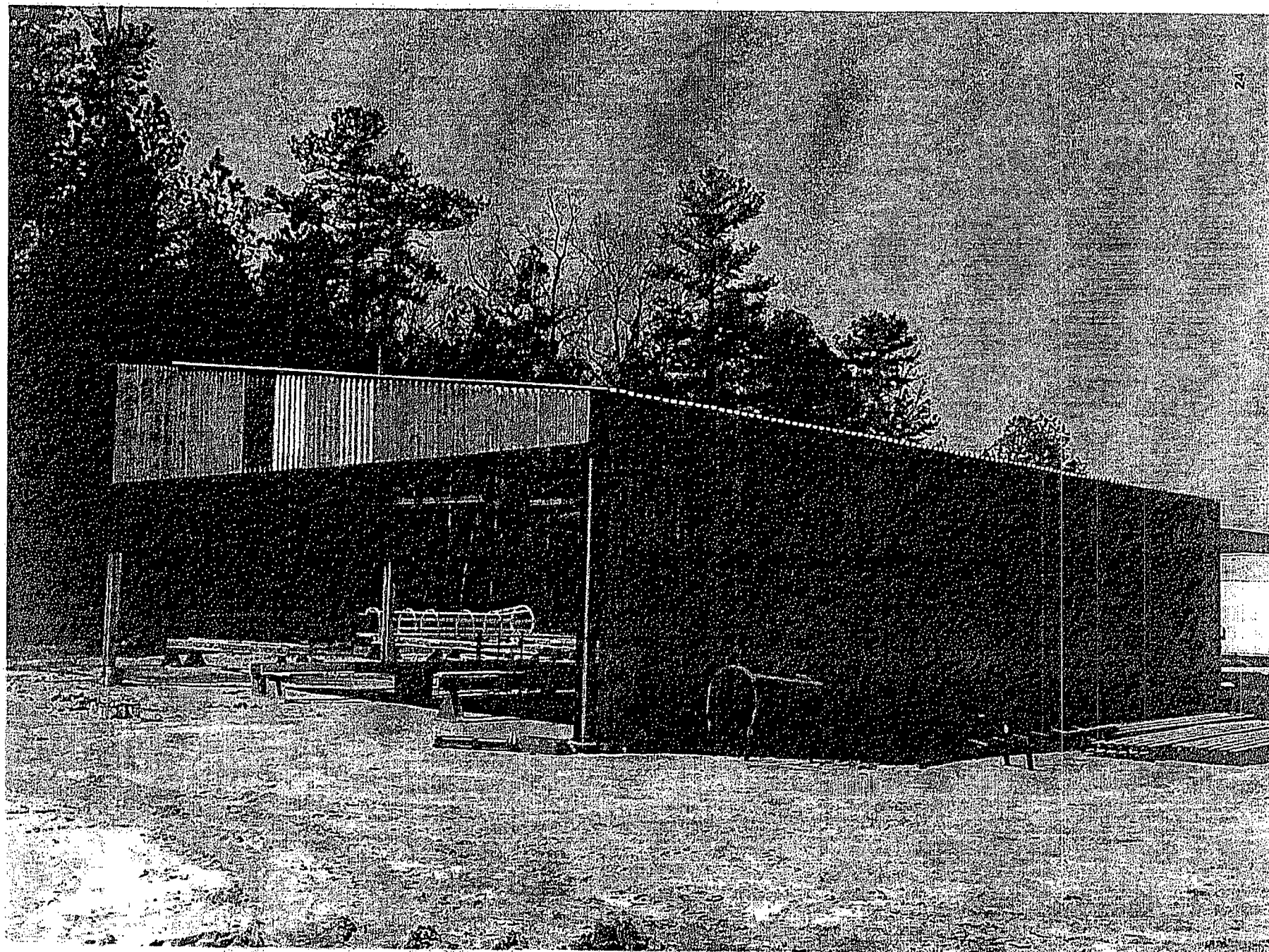
For Zoning Office Use Only

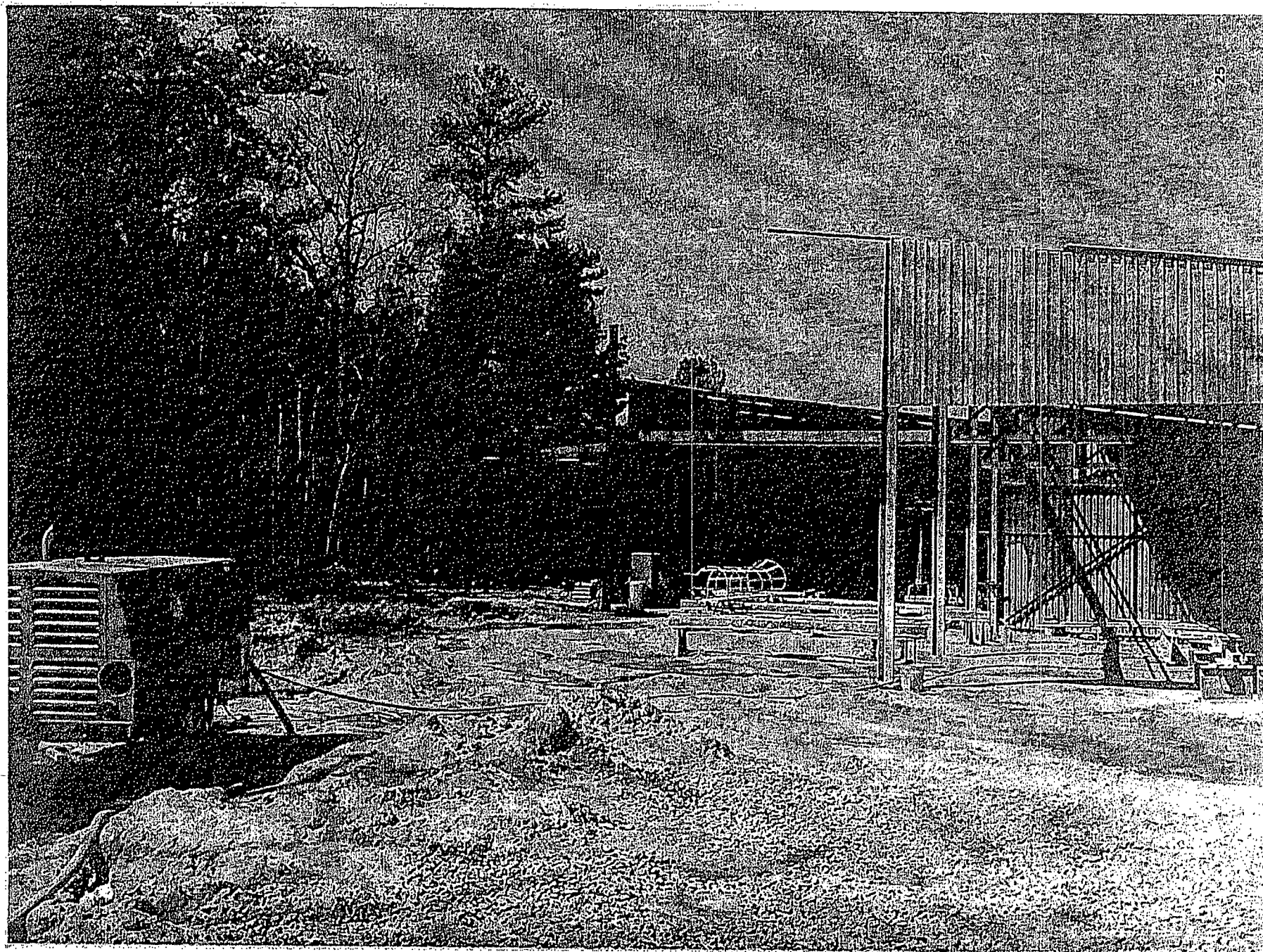
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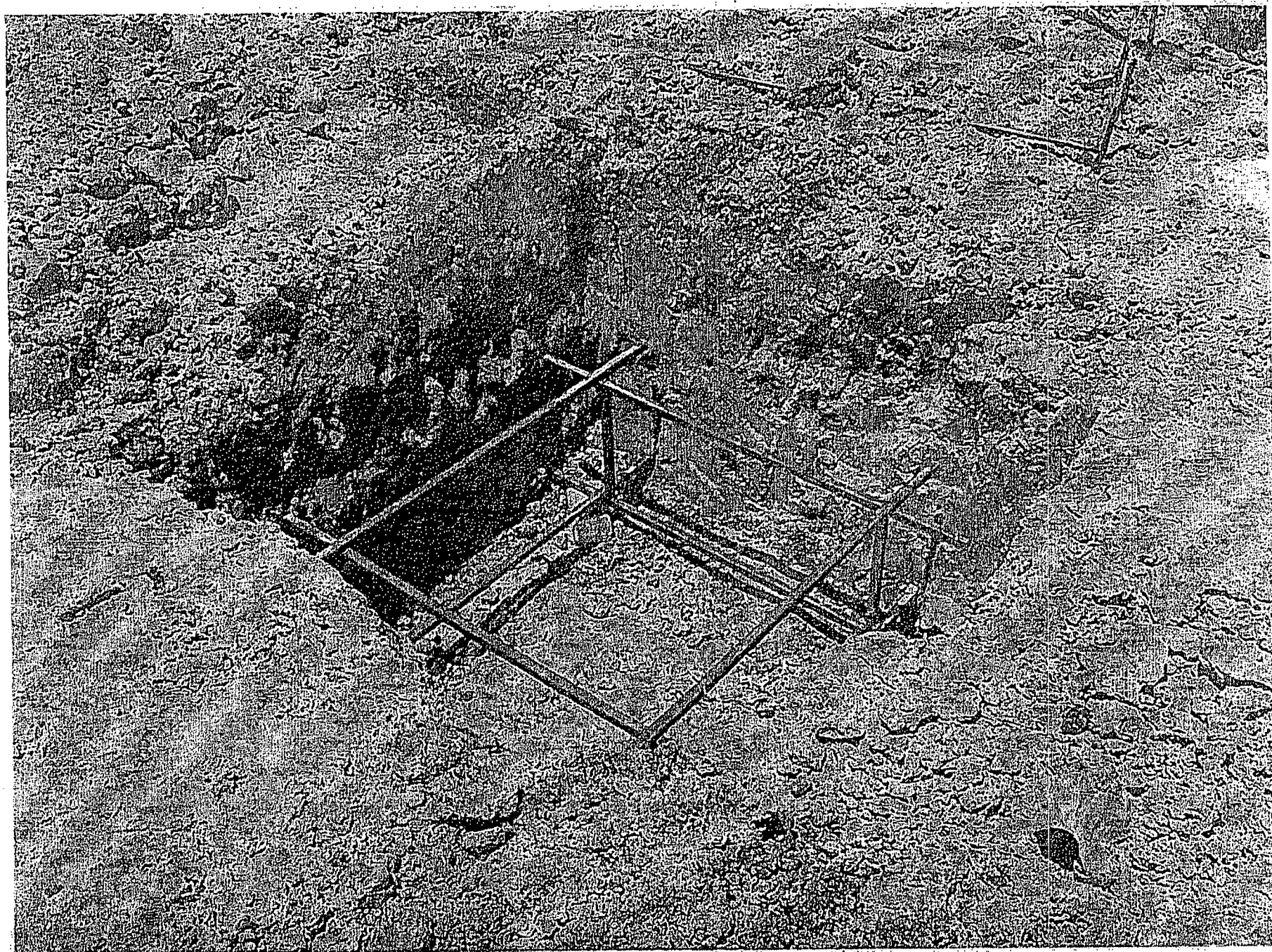
Zoning Staff: Robbie Derrick Signature: \_\_\_\_\_

Zoning Permit Date: - Zoning Permit #:

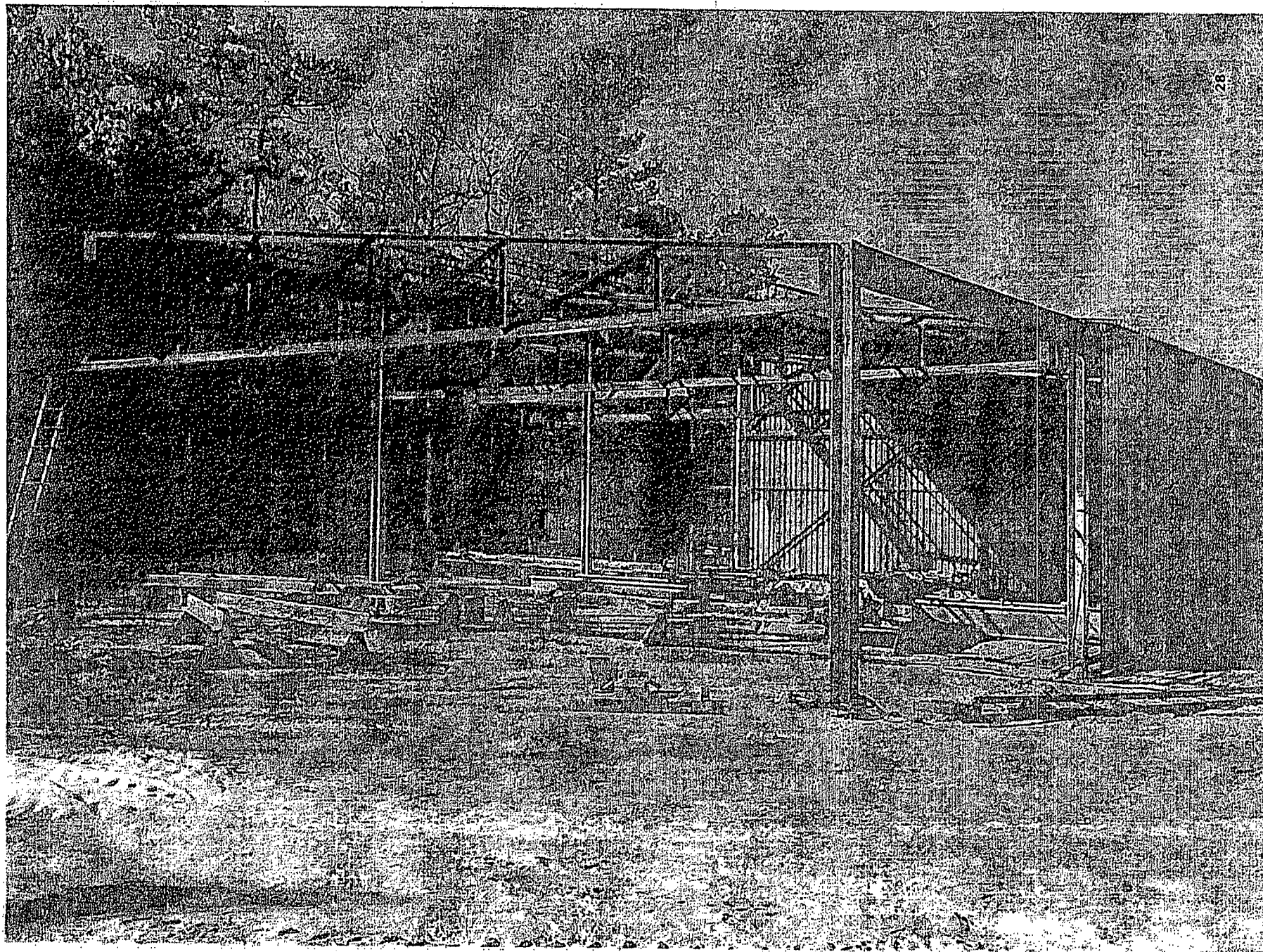
Zoning Staff: Robbie Derrick Signature: \_\_\_\_\_

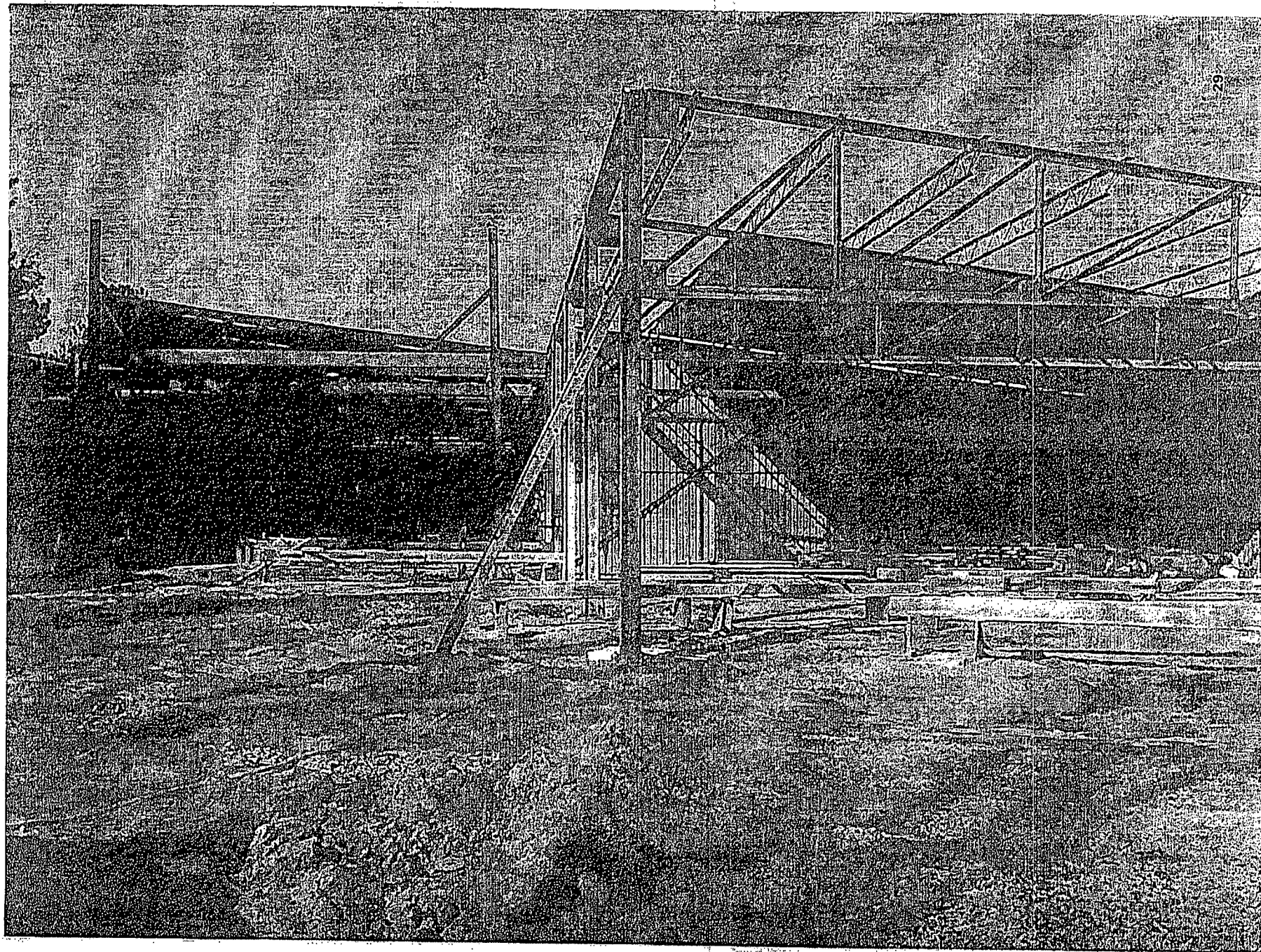


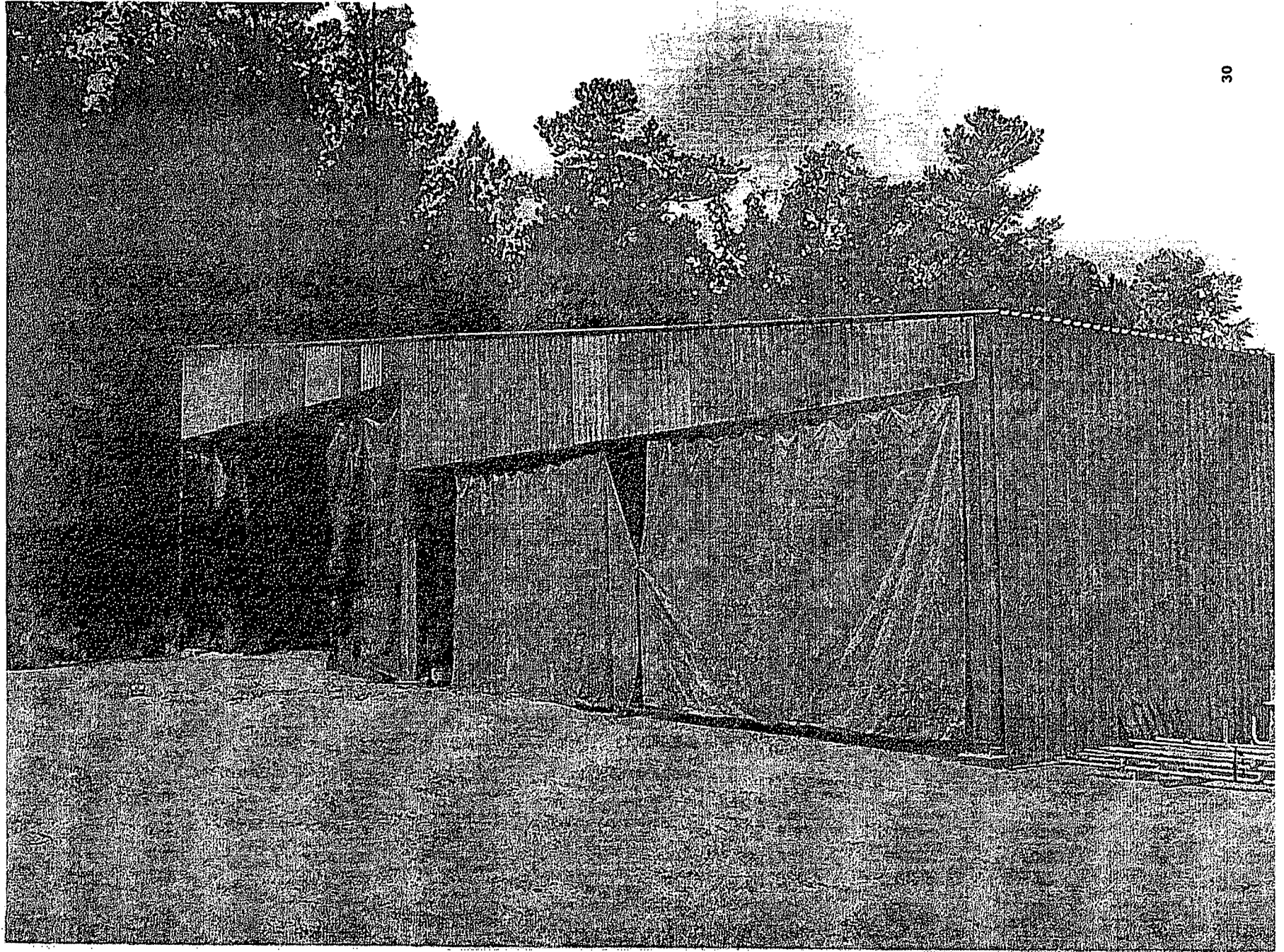


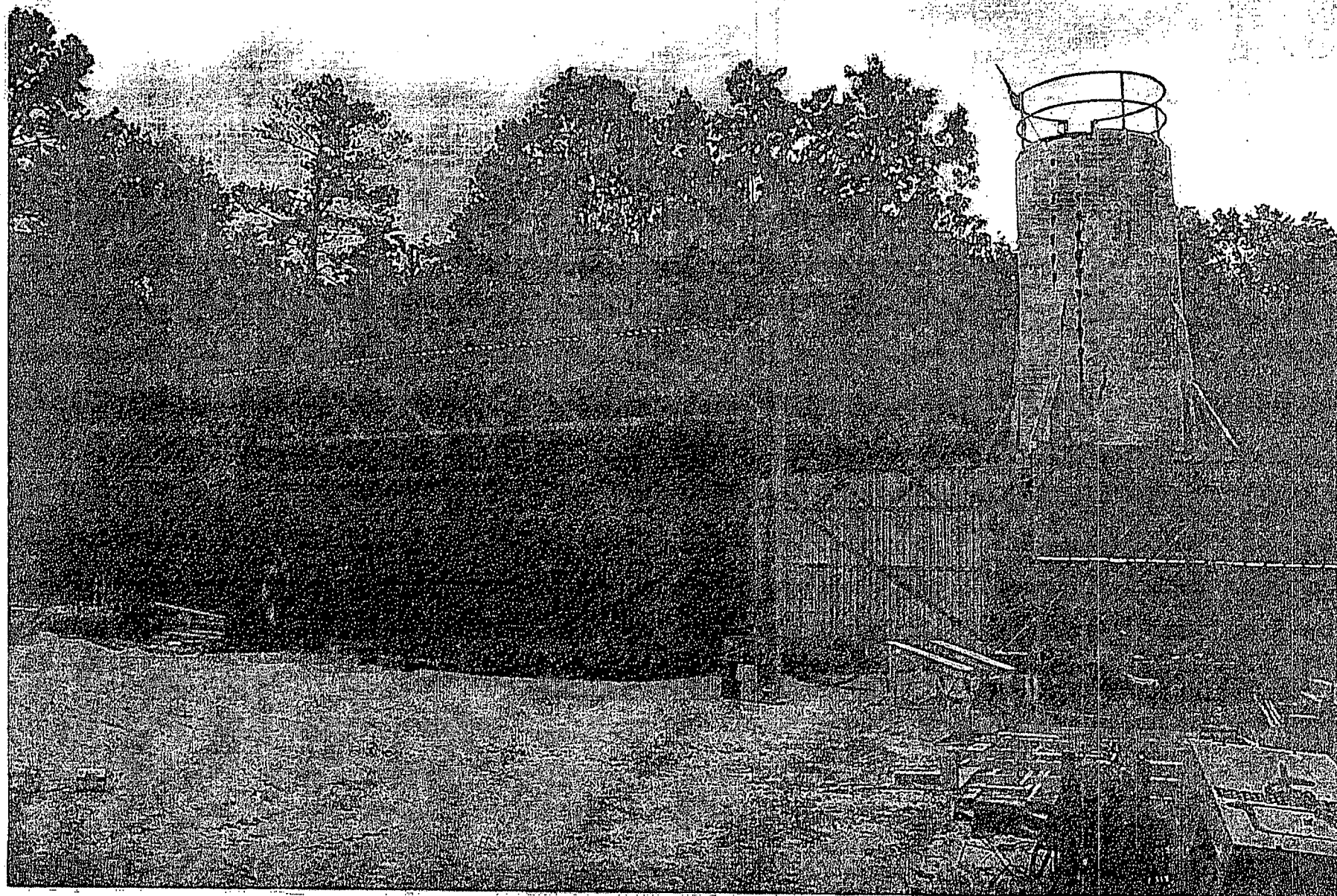


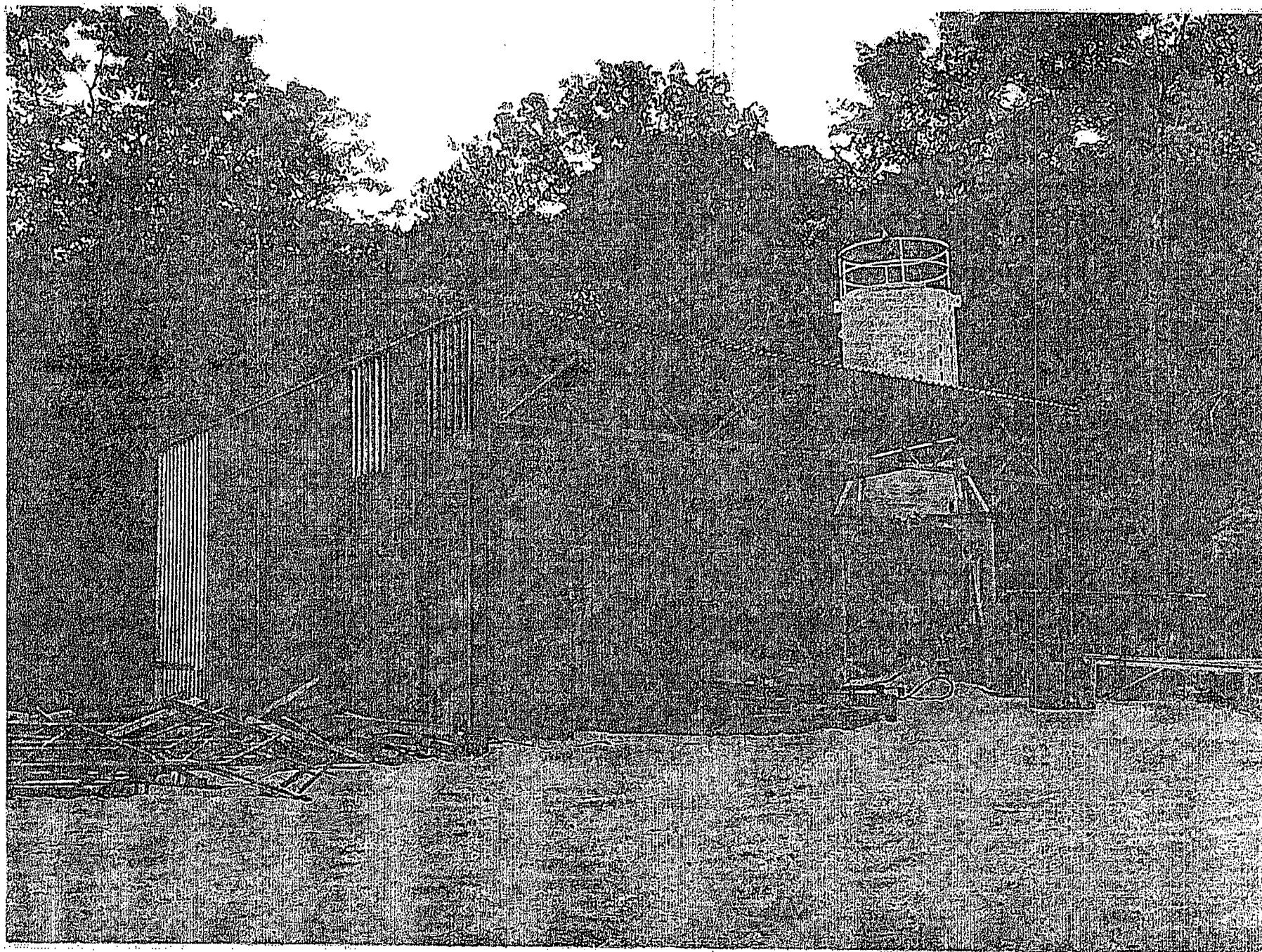


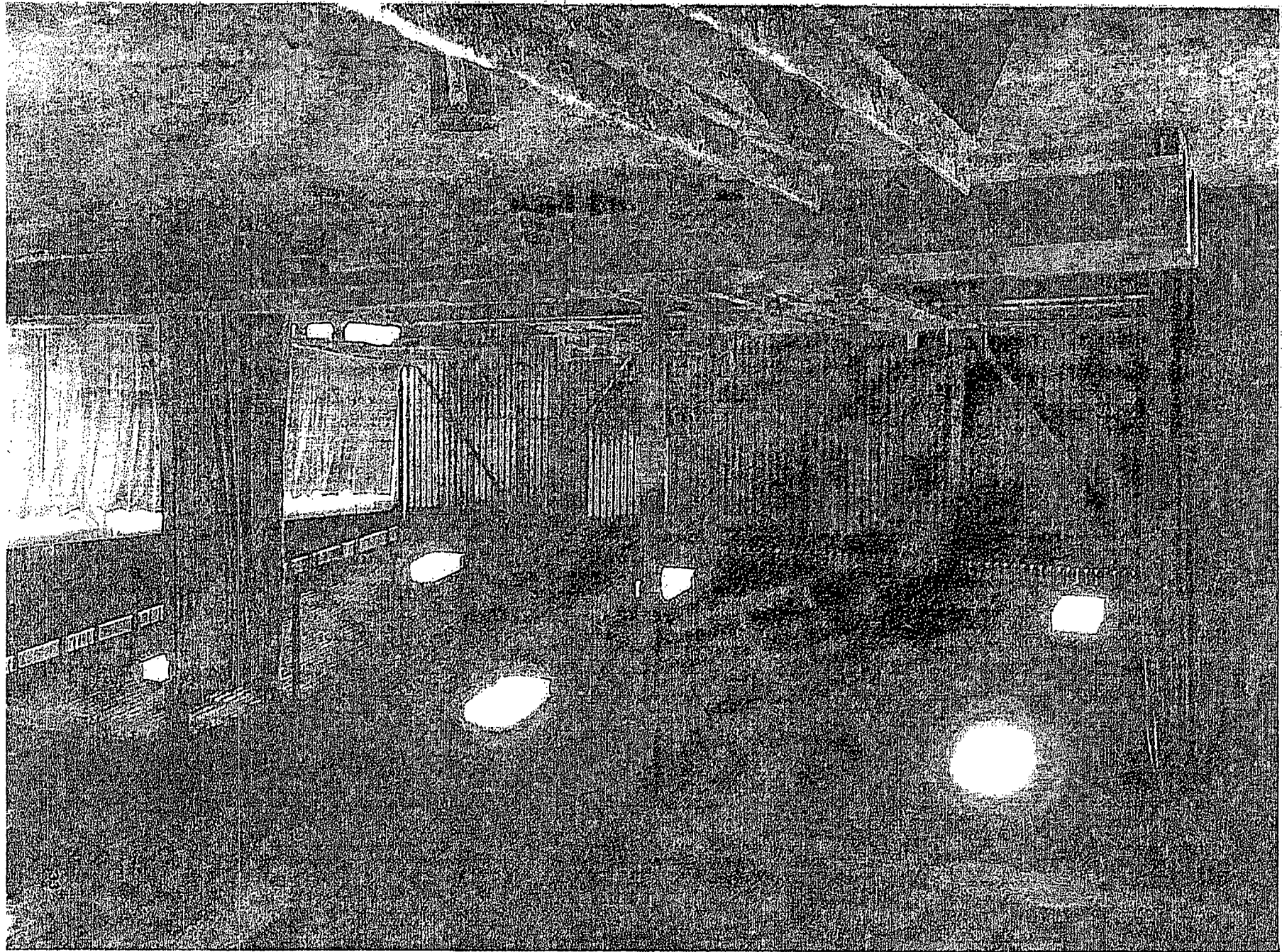


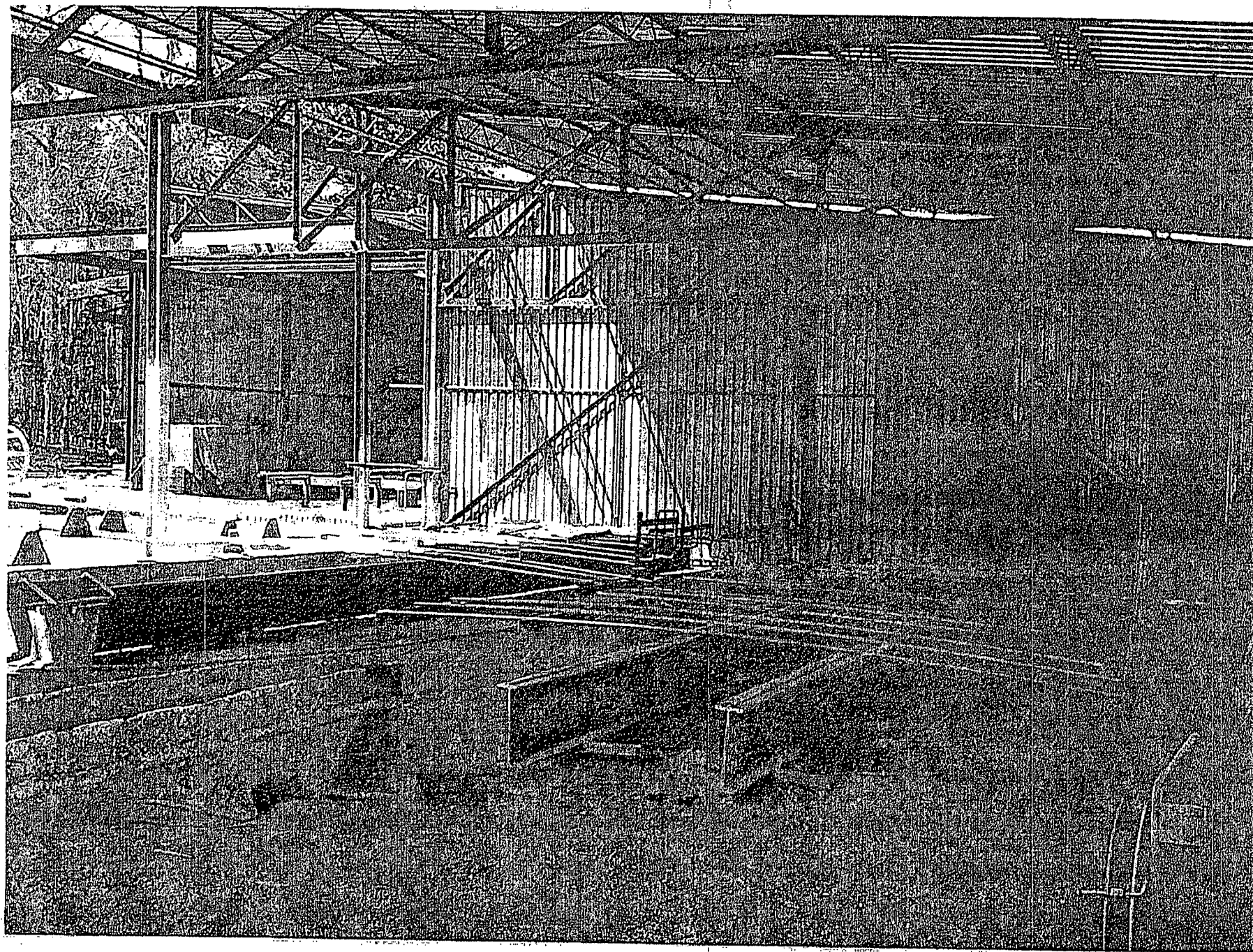


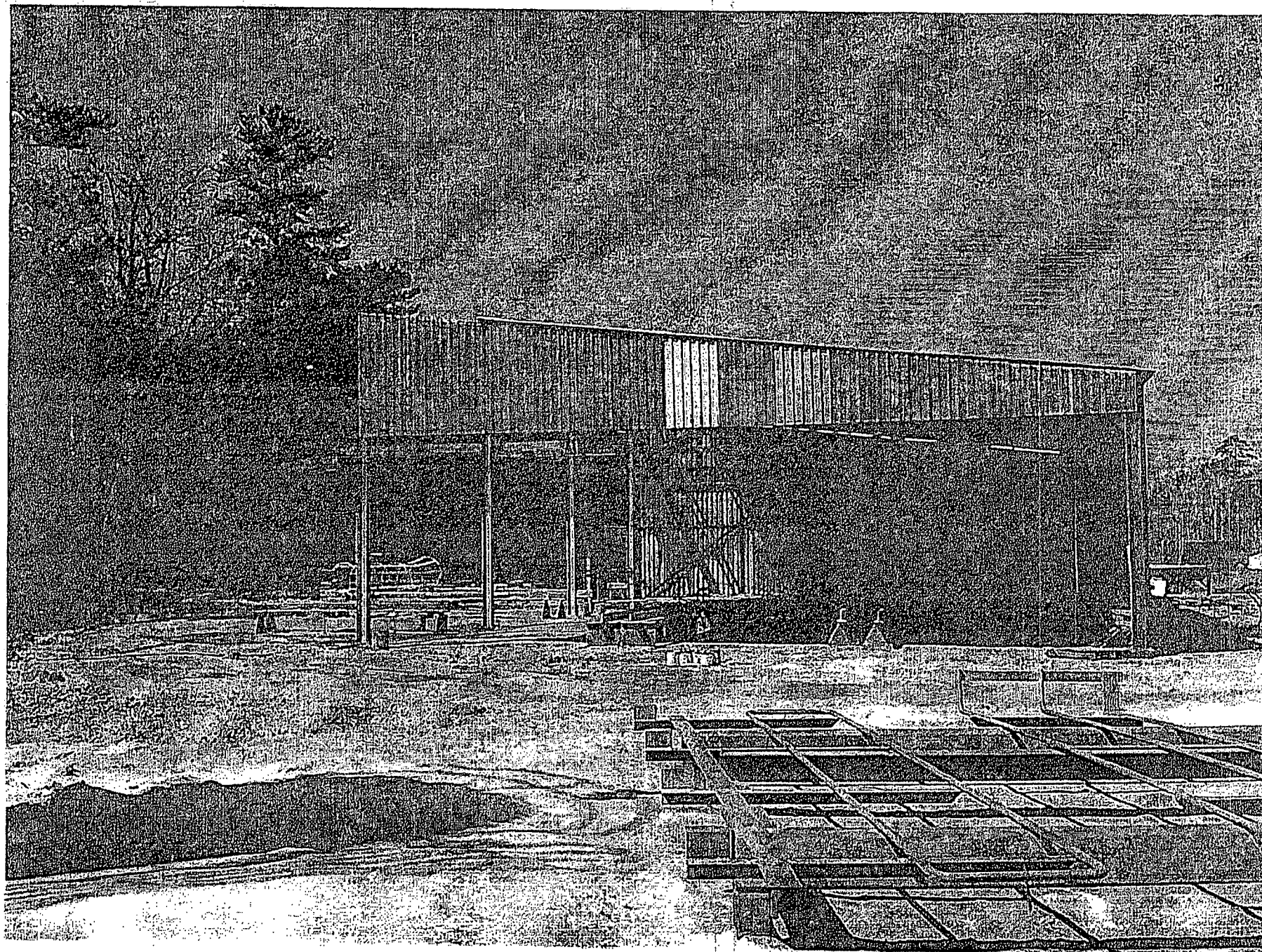


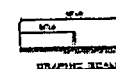












ZONING SITE  
PLAN

RETECH LLC  
152 MYLER RD.  
LEESVILLE, SC 2

NETRonline.com Real Estate | CAMA Properties | http://maps.lex-co.com/we... x | Community

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## Engineering & Surveying

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COUNTY OF LEXINGTON, SOUTH CAROLINA  
Department of Community Development  
County Administration Building (803) 785-8121  
212 South Lake Drive, Ste. 401 Lexington, South Carolina 29072

August 26, 2009

Mr. Bill Reilly  
137 Sharon Lake CT.  
Lexington SC 29072

RE: Zoning Variance Application #14-09  
152 Hyler Road  
TMS# 005000-02-003

Dear Mr. Reilly:

The previous approval letter I mailed to you on August 20, 2009 had an incorrect salutation (Dear Mr. Wade). I apologize for this error.

The Lexington County Board of Zoning Appeals conducted a public hearing at their regularly scheduled meeting on August 18, 2009 during which **Zoning Variance Application #14-09** was considered. May this letter serve as official notification that the Board voted to **approve** the request as submitted by you on July 7, 2009.

Respectfully,

A handwritten signature in cursive script, appearing to read "Walt McPherson".

Walt McPherson  
Zoning Administrator

Cc: Zoning Variance Application File #14-09



3. The Applicant filed the application (#14-09 attached as Exhibit B) for the zoning variance after constructing a new paint shop and sandblasting shed on the property without obtaining a building permit and in violation of the setback requirements, buffer requirements and screening requirements to the Petitioner's property to the south. Therefore, the Petitioner has a substantial interest in the decision of the Board.

4. The Applicant is seeking a reduction in buffer from 125 feet to 31 feet, a reduction in setback from 250 feet to 31 feet, a reduction in total screening from 200 feet to 31 feet, and a reduction in partial screening from 300 feet to 31 feet so he can "expand" his business.

#### **GROUND'S FOR APPEAL**

**I. THE BOARD'S DECISION IS CONTRARY TO LAW BECAUSE THE BOARD FAILED TO MAKE WRITTEN FINDINGS IN VIOLATION OF S.C. CODE ANN. 6-29-800 AND SECTION 122.60 OF THE LEXINGTON COUNTY ZONING ORDINANCE.**

S.C. Code Ann. §6-29-800(A)(2)(which is part of the Enabling Act of 1994 that allows Local Planning) provides, in part, as follows:

A variance may be granted in an individual case of unnecessary hardship if the board makes and explains in writing the following findings:

Emphasis added.

S.C. Code Ann. §6-29-800(F) mandates:

(F) All final decisions and orders of the board must be in writing and be permanently filed in the office of the board as a public record. All findings of fact and conclusions of law must be separately stated in final decisions or orders of the board which must be delivered to parties of interest by certified mail.

Also Section 122.60 of the Lexington County Zoning Ordinance provides, in part, that "The Board shall not grant a variance unless it makes findings as follows:"

In this case, the Board made no findings at all, but merely notified the Applicant the Board voted to "approve the request as submitted by you on July 7, 2009."

In Austin vs. Board of Zoning Appeals, 362 S.C. 29, 606 S.E.2d 209 (Ct. App. 2004), the Court of Appeals, discussed this requirement and noted that although the format of the decision was not material, it must be "sufficiently detailed so as to allow a reviewing court to determine if the decision is supported by the facts of the case." Id. at 212, quoting Vulcan Materials Co. v. Greenville County Board of Zoning Appeals, 342 S.C. 480, 536 S.E.2d 892 (Ct.App.2000). The court also cautioned Boards,

Our decision today, however, should not be interpreted as an indication that state and municipal agencies need not follow the mandate of section 6-29-800 and other statutory provisions requiring fully formed written final decisions....

While an exhaustive written decision may not be warranted when a narrow issue may be addressed succinctly by the Board, further detail will surely be required in more complicated cases. Indeed, thorough written findings and determinations eliminate potential confusion and ensure the will of the Board is accurately transmitted to the affected parties and reviewing courts.

Austin at 212.

In this case, the Lexington County Zoning Ordinance requires that the Board make four specific findings as set forth in Section 122.60 (a-d) which copies the requirements in S.C. Code Ann. §6-29-800(2)(a-d.) This court cannot review the Board's findings on each of these requirements because they were never made. This court should reverse the decision of the Board and remand to require specific findings on each of the four requirements set forth S.C. Code Ann. §6-29-800(2)(a-d.) and Section 122.60 (a-d). As set forth below; however, the Petitioner does not believe the Board can make these findings.

**II. THE BOARD'S DECISION IS CONTRARY TO LAW BECAUSE THE APPLICANT CANNOT CLAIM AN UNNECESSARY HARDSHIP BASED ON CONDITIONS IT CREATED OR ZONING RESTRICTIONS ENACTED BEFORE IT BOUGHT THE PROPERTY.**

As quoted above, S.C. Code Ann. §6-29-800(A)(2) empowers a local Zoning Board to grant a variance in cases of "unnecessary hardship" if specific findings are made by the Board. In Rush v. City of Greenville, 246 S.C. 268, 143 S.E.2d 527 (1965), our Supreme Court recognized that a claim of unnecessary hardship cannot be based upon conditions created by the owner nor, can one who purchases property after the enactment of a zoning ordinance complain that ordinance would work an unnecessary hardship upon him. See Also Witherspoon vs. City of Columbia, 291 S.C. 44, 351 S.E.2d 903 (Ct. App. 1986); La Quina Motor Inns, Inc. vs. Greenville County Board of Zoning Appeals, 279 S.C. 598, 310 S.E.2d 438 (Ct. App. 1983).

In this case this area was zoned with these restrictions in November 2001. The Applicant purchased this property on March 13, 2007, several years after the restrictions were already in place; therefore it cannot claim an "unnecessary hardship." The Applicant was on notice that it would not be able to "expand" the business at the time of purchase.

Moreover, as noted in the Statement of the Case, the Applicant created the conditions and hardship for which he is seeking a variance by building a paint shop and sandblasting shed without a building permit and in violation of existing zoning. Had the Applicant properly applied for a building permit he would have been advised of these restrictions prior to building. The Applicant cannot now claim a hardship based on conditions it created.

This court should reverse the decision of the Board as being contrary to law because the Applicant cannot claim an unnecessary hardship as a matter of law.

**III. THE BOARD'S DECISION IS CONTRARY TO LAW BECAUSE A ZONING VARIANCE SHOULD NOT BE GRANTED FOR AN "EXPANSION" OF AN EXISTING BUSINESS.**

In Zoning Variance Application #14-09, the Applicant states that the reason for the request is that the layout of the property will not allow any "new expansion." This is not a proper ground for granting a variance request. In South Carolina Code Ann. §6-29-800(A)(2)(d)(i), it states in part, "The fact that property may be utilized more profitably, if a variance is granted, may not be considered grounds for a variance." "The financial situation or pecuniary hardship of a single owner affords no adequate grounds for putting forth this extraordinary power affecting other property owners as well as the public." Groves vs. Board of Adj. of City of Charleston, 226 S.C. 459, 85 S.E.2d 708, 710 (1955)(quoting Lee v. Board of Adjustment, 226 N.C. 107, 37 S.E.2d 128,131, 168 A.L.R. 1.) This court should reverse the decision of the Board as being contrary to law since a variance cannot be granted for an "expansion."

**IV. THE BOARD'S DECISION IS CONTRARY TO LAW BECAUSE THE APPLICATION OF THE ORDINANCE DOES NOT EFFECTIVELY PROHIBIT OR UNREASONABLY RESTRICT THE USE OF THE PROPERTY.**

One of the findings the Board must make under Section 122.60 (c) which copies the requirements in S.C. Code Ann. §6-29-800(2)(c.) is that the application of the ordinance not effectively prohibit or unreasonably restrict the use of the property. Obviously if the Applicant is seeking to "expand" an existing business by adding a paint shop and sandblasting shed, then the ordinance is not prohibiting the use of the

property or unreasonably restricting its use. Indeed, the testimony at the hearing established that this property was being used for steel fabrication under the 2001 zoning restrictions for years at the time the Applicant purchased the property. This court should reverse the Board since it cannot find as a matter of law that the application of the ordinance effectively prohibits or unreasonably restricts the use of the property.

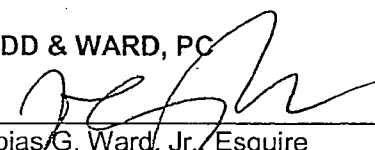
**V. THE BOARD'S DECISION IS CONTRARY TO LAW BECAUSE THE APPLICANT'S PROPERTY DIMENSIONS ARE NOT EXCEPTIONAL OR EXTRAORDINARY AND THESE SAME CONDITIONS GENERALLY APPLY TO OTHER PROPERTY IN THE SURROUNDING AREA.**

The Board must find under Section 122.60 (a and b) which copies the requirements in S.C. Code Ann. §6-29-800(2)(a and b) is that the "exceptional" and "extraordinary conditions pertain to the Applicant's property which do not generally apply to other property in the vicinity. There are no exceptional or extraordinary conditions which pertain to the Applicant's property. The Applicant has a rectangular-shaped lot which is less than 300 feet wide (see attached Exhibit C) at its widest point. However, this is hardly unique or peculiar as there are a number of lots that meet these same conditions. A cursory view of the tax map (see attached Exhibit D) for this area shows a number of lots which could meet this same criteria. This court should reverse the Board since it cannot find as a matter of law that the application of the ordinance effectively prohibits or unreasonably restricts the use of the property "exceptional" and "extraordinary conditions pertain to the Applicant's property which do not generally apply to other property in the vicinity.

### CONCLUSION

Granting a variance is an exceptional power which should be sparingly exercised and can be validly used only where a situation falls fully within the specified conditions. Hodge v. Pollock, 223 S.C. 342, 75 S.E.2d 752 (1953). A strong presumption exists in favor of the validity and application of zoning ordinances. Peterson Outdoor Advertising v. City of Myrtle Beach, 327 S.C. 230, 235, 489 S.E.2d 630, 632 (1997). In this case, the Board's decision is clearly contrary to law. The Board failed to make any written findings as required by law for review. Moreover, even if this case were remanded, the Board could not find as a matter of law any unnecessary hardship because the Applicant bought the property after the zoning was enacted and created his own hardship when it built a paint shop and sandblasting shed without a permit. Furthermore, a variance is not appropriate for an "expansion" of a business and the ordinance does not restrict or prohibit the Applicant's use of the property. Finally, there are not exceptional or extraordinary conditions which affect the Applicant's property which do not affect other property in the same vicinity. This court should reverse the decision of the Board and hold that the application for a Zoning Variance must be denied.

TODD & WARD, PC



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Tobias G. Ward, Jr., Esquire  
J. Derrick Jackson, Esquire  
Attorneys for the Petitioner  
P.O. Box, 1549  
Columbia, SC 29202  
803-779-4383

September 18, 2009.

|                                        |   |                                                    |
|----------------------------------------|---|----------------------------------------------------|
| STATE OF SOUTH CAROLINA                | ) | IN THE COURT OF COMMON PLEAS                       |
|                                        | ) |                                                    |
| COUNTY OF LEXINGTON                    | ) |                                                    |
| Margie Kay Black,                      | ) | <b>Respondents Bill Reilly and Reitech, LLC's,</b> |
| Petitioner,                            | ) | <b>Answer to Petition</b>                          |
|                                        | ) |                                                    |
| vs.                                    | ) |                                                    |
|                                        | ) |                                                    |
| Lexington County Board of Zoning       | ) |                                                    |
| Appeals, Bill Reilly and Reitech, LLC, | ) |                                                    |
|                                        | ) | Case No. 2009-CP-32-04260                          |
| Respondents.                           | ) |                                                    |

Respondents Bill Reilly and Reitech, LLC, answer Petitioner Margie Kay Black's  
Petition as follows:

FOR A FIRST DEFENSE

1. Unless specifically admitted in this Answer, Respondents deny each and every allegation, claim and ground set forth in Margie Kay Black's Petition.

FOR A SECOND DEFENSE

2. Respondents deny the first untitled paragraph of the Petition.
3. Respondents deny paragraphs 1, 2, 3 and 4 of Petitioner's Statement of the Case.
4. Respondents deny the Petitioner's Grounds for Appeal including individual grounds I, II, III, IV, and V.
5. Respondents deny the Petitioner's Conclusion.

FOR A THIRD DEFENSE

6. Respondents deny the Petitioner has standing to appeal the Lexington County Board of Zoning Appeal's final decision pursuant to Lexington County Ordinance § 1222.90 and South Carolina Code § 6-29-820

### FOR A FOURTH DEFENSE

7. On July 7, 2009, Respondents submitted Zoning Variance Application #14-09 to request a reduction of the setback, screening and buffering requirements applicable to Respondents' property at 152 Hyler Road in Lexington County, South Carolina.

8. Respondents application was based on the exceptional conditions regarding Respondents' property and the unnecessary hardship the current zoning requirements impose on the property pursuant to South Carolina Code § 6-29-800.

9. A public hearing was held by the Lexington County Board of Zoning Appeals on August 18, 2009 to discuss Respondents variance application. Prior to this hearing, all notices required by Lexington County Ordinances and South Carolina Law were properly published and mailed to interested parties.

10. At the hearing, all interested parties were given an opportunity to be heard in support or in opposition to the granting of the requested variance.

11. The Board granted the requested variance after due consideration of the evidence presented and arguments provided at the hearing.

12. The Board is vested by Lexington County Ordinance § 122.60 and South Carolina Code § 6-29-800 with the discretion to determine whether a variance from the zoning ordinances should be granted.

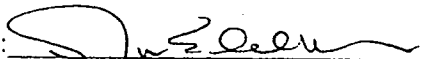
13. The Board exercised its authority and discretion reasonably and in good-faith, in conformity with Lexington County Zoning Ordinance § 122.60, South Carolina Code § 6-29-800, and all other applicable facts and law.

14. The Board's findings are in accordance with South Carolina Code § 6-29-800.

15. The Board's decision was proper and should be upheld.

WHEREFORE, the Respondents, having responded to Margie Kay Black's  
Petition for Appeal, ask that the Court dismiss the Petition for Appeal and award such  
other relief as the Court deems fair and equitable.

MOORE, TAYLOR & THOMAS, P.A.

By:   
James Edward Bradley  
1700 Sunset Boulevard  
P.O. Box 5709  
West Columbia, SC 29171  
(803) 796-9160  
Attorney for Defendants

West Columbia, South Carolina

October 2, 2009

PLEASE  
L CIRCUIT

Civil Action No.: 2009-CP-32-04260

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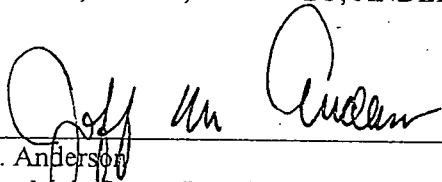
5. The County would allege that the provisions of South Carolina Code Section 6-29-800(2) provides for the proper standard of review by the County Board of Zoning Appeals.

FOR A THIRD DEFENSE:

6. The allegations of Paragraphs 1 through 5 of the First and Second Defenses are reasserted and re-alleged as fully as if set forth verbatim herein insofar as they are not inconsistent with this Third and Affirmative Defense.
7. The County would allege that S.C. Code Section 6-29-840 provides for the standard review by the Circuit Court.

WHEREFORE, having fully answered the Appeal of the Appellant, the Respondent asks the Court to affirm the decision of the Lexington County Board of Zoning Appeals.

NICHOLSON, DAVIS, FRAWLEY, ANDERSON, & AYER,  
LLC.

By: 

Jeff M. Anderson

140 East Main Street, Post Office Box 489

Lexington, South Carolina 29072

Phone No. (803) 359-2512

ATTORNEYS FOR THE RESPONDENT LEXINGTON  
COUNTY BOARD OF ZONING APPEALS

Lexington, South Carolina

October 27, 2009

STATE OF SOUTH CAROLINA

LEXINGTON COUNTY

MARGIE KAY BLACK,

Petitioner(s),

-vs-

Lexington County Board of Zoning  
Appeals, Bill Reilly and Reitech,  
LLC,

Respondent(s).

)  
) IN THE COURT OF COMMON PLEAS  
)

CA No.: 09-CP-32-04260

)  
)  
)  
)  
) MOTION TO ALTER OR AMEND/  
) PETITION FOR REHEARING  
)  
)  
)  
)

The Petitioner, Margie Kay Black, hereby moves this court for an order pursuant to Rules 52(b) and 59(e) SCRCP and Rule 221 SCACR to alter or amend and reconsider its order affirming the Lexington County Zoning Board of Appeals filed February 16, 2010 and received by Petitioner on February 17, 2010 or later. The grounds for this motion are as follows:

1. S.C. Code Ann. §14-8-250<sup>1</sup> provides,

In every decision rendered by the Court, every point distinctly stated in the case which is necessary to the decision of the appeal and fairly arising upon the record of the Court must be stated in writing and must, with the reason for the Court's decision, be preserved in the record of the case; provided, that the Court need not address a point which is manifestly without merit.

In this case, Ms. Black raised five distinctly stated grounds for appeal, each of which had merit and none of which were addressed by the court in the opinion. This court should alter or amend its order to comply with S.C. Code Ann. §14-8-250 and Rule 220 SCACR to address each of the grounds on appeal. Appellant is aware of the language in S.C. Code Ann. §6-29-840 that states "the court must only determine

<sup>1</sup> Rule 220(b) SCACR has similar language.

whether the decision of the board is correct as a matter of law;" however, this language only addresses the deference the court must give to findings of fact and does not permit the court to issue, in effect, a memorandum opinion.

2. The court misapprehended or overlooked that the Applicant Reitech, LLC acquired the property after the zoning restrictions were already in place.
3. The court misapprehended or overlooked that the Applicant Reitech, LLC created the problems for which he requested a variance and did so without first seeking a building permit.
4. The court overlooked or misapprehended that a variance cannot be granted for the expansion of a business.
5. The court overlooked or misapprehended that the same restrictions apply generally to other property in the surrounding area.

#### CONCLUSION

This court should alter or amend its opinion to address the reasons for its decision as it applies to each distinct point raised on appeal. Also, this court should amend its order to find that Reitech, LLC is not entitled to a variance because it bought the property subject to the existing zoning and created any problem for which it seeks a variance. Moreover, variances are not allowed for expansion of a business and the restrictions affecting the property apply generally to other property in the area. This court should amend its order and remand to the Lexington County Zoning Board with instructions to deny the permit as a matter of law.

TODD & WARD, PC

  
Tobias G. Ward, Jr., Esquire  
J. Derrick Jackson, Esquire  
Attorneys for the Petitioner  
P.O. Box, 1549  
Columbia, SC 29202  
803-779-4383

February 24, 2010.

**COPY** **FILED**  
2009 OCT 26 P 3: 58

BETH A. CARRIGS  
CLERK OF COURT  
LEXINGTON SC

**VERBATIM TRANSCRIPT**

**LEXINGTON COUNTY BOARD OF  
ZONING APPEALS**

**ZONING VARIANCE #14-09**

**Civil Action No.: 2009-CP-32-04260**

COPY  
FILED

LEXINGTON COUNTY BOARD OF ZONING APPEALS  
August 18, 2009

2009 OCT 26 P 3: 58

Zoning Variance #14-09 Verbatim

BETH A. CARRIGS  
CLERK OF COURT  
LEXINGTON SC

**MEMBERS PRESENT**  
Morris Phillips, Chairman  
Stan Smith, Vice Chairman  
Mark Bostic  
J. R. Caughman  
Jane Cook  
Albert Summers  
Anthony Watts  
Ed Yates

**STAFF PRESENT**  
Ronald Scott, Director, Community  
Development  
Bruce Hiller, Development  
Administrator  
Rhett Bickley, Landscape Administrator  
Walt McPherson, Zoning Administrator  
Robbie Derrick, Zoning Assistant  
Ronda Porth, Zoning Assistant  
Gayle Packard, Zoning Assistant  
Susan Neil, Zoning Assistant

Robbie Derrick: Robbie Derrick, Zoning Staff, presenting Zoning Variance #14-09. Before I get started, I just want to confirm ah—with everyone here tonight that this ah—request is not a rezoning of the property. Ah—this is actually for a buffering restriction, setback from a—or buffering restriction issue from a single property. The activity meets all the other requirements from Zoning from all the other surrounding properties in this area with the exception of one for what we are here tonight to ah—to address. I am also going to pass to the Chair, this is just a letter we received from some neighboring property owners ah—their opinion on tonight's hearing.

Albert Summers: These are different ones?

Robbie Derrick: They are the same letter with different signatures on them, Mr. Chair.

Morris Phillips: Okay.

Robbie Derrick: Again, Zoning Variance #14-09: The property is located at 152 Hyler Road, Leesville. The category is Manufacturing (Intermediate). Tax Map is 5000-02-003. Property owner is Reitech, LLC, and the business name is same as property owner. Once again, this slide shows the ah—location of the property; ah—it's located north ah—east/northeast of intersection of Ray Price and Paul Hite Road. Just a zoomed in location of the property. This is within the Western Planning Area of Lexington County which was zoned in November of 2001. Slide here illustrate—illustrates the zoning classification of the property: property is zoned RD (Restrictive Development), Hyler Road is classified as a local road. This is a 2009

aerial of the property. Ah—this is a copy of the site plan that's provided by the applicant.

The explanation of the variance request, the "Applicant is requesting a reduction in buffer from 125 feet to 31 feet, a reduction in setback from 250 feet to 31 feet, a reduction in total screening from 200 feet to 31 feet, and a reduction in partial screening from 300 feet to 31 feet." The reason for the request is, "The layout of the property will allow me to only expand to the rear and the required buffers will physically not allow any new expansion to meet current code from the side properties. The proposed shed in the rear will be used to lower the sound produced by the sandblaster at my operation."

The current, or the original activity, was at this location here. Here is the location of the expansion to the back of the building, and this is the ah—sandblasting shed that the applicant is referring to. We have received two waivers from two adjoining property owners. Ah—property owner to the north and property owner who owns a large portion of property here [west] have signed waivers reducing buffer, setback, screening and performance standards which covers noise and glare. Ah—property to the rear, activity is far enough from the property to the rear that it will meet our buffering restrictions requirements. Again, the property we are here to discuss tonight regarding the buffer, setback, and screening requirements is the property to the south. This is a ah—2—again, 2009 aerial photo of the property. This is the ah—part of the expansion in question. Ah—this was a Code related issue, originally with a noise concern, noise complaint, then ah—we had issues with a—a expansion beginning without any type of permits, and this is a portion of that expansion here. The sandblasting shed has not been started being constructed yet; it is roughly going to be in this location here.

The first photograph is a posting for this evening's zoning hearing. Another photograph from across Hyler Road ah—looking at the front of the existing facility there. Another photograph from across Hyler, I believe it's looking down the ah—property ah—line from ah—Ms. Black's property who is the affected property owner. This is looking down Hyler Road ah—back to the ah—I guess to the northeast. Again, you can see the front of the existing activity and all driveways are existing. Ah—this is looking from across Hyler Road down the main driveway of the facility. All this is existing and back in here you can see where the ah—the new addition's taking place. Another view from across Hyler looking at the main entrance to the facility. Again, all this is existing. This is a new office that was actually replacing an older office that we did issue a permit for back in 2008. Another view down Hyler Road looking

back towards ah—the ah—to the southeast. Again, this is existing facilities here.

The application was received on July 7, 2009. The applicant was Mr. Bill Reilly, 137 Sharon Lake Court, Lexington 29072.

Zoning facts: "Article 2 – Application of Regulations, Chapter 3. Buffering Restrictions, Section 23.10 Buffer—A buffer is an area in which no activity is permitted other than the necessary utility functions such as transmission lines, underground conduits, etc. A single driveway may encroach upon this buffer when that driveway location is the only possible point of access for that parcel. This area is described by a linear measurement from the property line inward and will vary depending on the nature of an activity and its location. Section 23.20 Setbacks—Setbacks delineate certain open spaces on lots. These spaces are linear distances measured from property lines inward. Buildings or other principal structures comprising the activity of the lot may not encroach this space. A setback may accept an accessory activity such as parking, unless superseded by a buffer. However, accessory buildings to residential activities must maintain a minimum 3-foot setback from adjoining property lines. The chart in Section 23.50 lists two types of setbacks based on the type of activity and location. They are measured either from a road right-of-way or an adjoining property line. Setbacks abutting existing roads shall be measured from the proposed right-of-way as shown in the Right-of-Way Plan if that width is greater than the existing road right-of-way. However, for Residential Detached or Mobile Home activities being established on an existing dead-end road, which has limited potential for future widening, the existing road right-of-way shall be used. Section 23.30 Screening—Screening consists of natural vegetation, landscaped vegetation (including planted berms), walls or fences designed to lessen the visual interaction between adjacent activities or accessories thereto. Vegetation used for screening must be evergreen, drought-tolerant, and disease resistant. Screening may be required with no buffer involved, or in combination with a buffer. The two types of screening listed in the chart in Section 23.50 are total and partial, and are measured in linear feet. If the activity occurs within the designated distance of the property line, then that type screening is required. Total screening is defined as being visually opaque. Partial screening is defined as being approximately 50 percent visually opaque." [23.50. Chart of Buffering Restrictions—]Manufacturing (Intermediate) activities in Restrictive Development zoning districts—they require a buffer of 125 feet—again, no part of the activity can be within 125 feet; the activity must setback 250 feet from adjoining properties and 150 feet from the road right-of-way; any part of the activity within 200 feet of surrounding

properties requires total screening, any part of the activity within 300 feet from surrounding properties requires partial screening.

The existing activity is a nonconforming activity ah—which meets—means it only has to meet the current code for screening and parking and performance standards. The current code for the buffer, setback, and screening only pertains to the new additions to the activity.

Just a little background—again, this is not a rezoning hearing; this is just an issue with buffering restrictions from the neighboring property to the south. Ah—it is a code related issue; it did begin with a noise concern with a neighboring property owner. Ah—that property owner has agreed and has signed a zoning waiver to reduce the buffering restrictions. Ah—his stipulation was that this new building for the sandblasting was going to be used to help lower the decibel levels from the sandblaster.

A little history—it was a storage building on this site and it was converted to a shop back in 1982, there are permits on file from 1982. In 1992 there was a 40 x 60 addition to the facility, which was also permitted. In 2008, of course the office trailer was ah—was changed out to a newer model. Ah—current building is existing. Ah—based on the site plan, it's roughly 9.6 feet from the property line and ah—the activity is approximately about the same distance from the property line. And of course, the ah—request for the variance is 31 feet.

Are there any other questions for staff?

Stan Smith: Can you go back to the aerial photograph?

Mark Bostic: With the trees, yeah.

Stan Smith: Yeah. Is—is there any dwelling located to the south of the—the facility?

Robbie Derrick: This piece of property, ah—from the records I found with the County, is a—is a vacant piece of property so, therefore—

Stan Smith: So, that's the—that's the affected piece, is that correct?

Robbie Derrick: That's correct.

Mark Bostic: Now, is that piece attached to the letter we got?

Robbie Derrick: I'm not sure if that ah—I think the—the person who owns this property is the—the lady who circulated those letters.

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Morris Phillips: It's the one that's to the south.

J. R. Caughman: To the south?

Robbie Derrick: To the south, yes.

Anthony Watts: How many letters did you get? I only saw one.

Stan Smith: [counts letters] One, two, three, four, that's five...

Robbie Derrick: The letters are identical letters with different signatures on there. Ah the majority of those letters, again the activity is going to meet all the buffering restrictions from those—pro—properties there in those letters. Again, the only property we are here to discuss is the one to the south.

Mark Bostic: So you don't see a letter from that particular piece of property.

Robbie Derrick: I—

Stan Smith: There are roughly fifteen letters in here and ah—I don't know how many, not many, have a Hyler—Hyler Road. Is that where the property's listed?

Robbie Derrick: That's correct, yes sir.

Stan Smith: I don't have a Hyler Road address, they're somewhere else. They—they may be in the vicinity but they are not on Hyler Road, maybe—maybe one or two in here. So anyway, for what it's worth.

Robbie Derrick: Are there any other further questions?

J. R. Caughman: I do.

Robbie Derrick: Yes, sir.

J. R. Caughman: You said a Ms. Black?

Robbie Derrick: Yes, sir.

J. R. Caughman: Where's her property?

Robbie Derrick: Ms. Black's property's here.

J. R. Caughman: I can't see it.

Robbie Derrick: I'm sorry. It's—it's the property to the south—

J. R. Caughman: Okay.

Robbie Derrick: it's the wooded area—

J. R. Caughman: So, I thought the—the ah—Peeles were to the south also.

Robbie Derrick: There's a—any other property to the south, the activity is far enough away from.

J. R. Caughman: Okay, and it's been there for a while also.

Robbie Derrick: It was originally permitted in '82.

J. R. Caughman: Yeah. The noise issue, do we have a decibel count?

Robbie Derrick: We did do a noise reading. There were approximately three readings that exceeded. The location we took the noise readings was roughly by this mobile home to the north. Ah—that gentleman actually signed a waiver to ah—to reduce the noise provided they constructed that sandblasting facility to contain the sandblaster in.

Morris Phillips: Thank you, Robbie.

Stan Smith: That is noted on his waiver?

Robbie Derrick: That is noted on his waiver. Yes, sir.

Morris Phillips: Thank you. Will with first proponent come—come and speak.

Jake Moore: Hello, Mr. Chairman.

Morris Phillips: Good to see you, sir.

Jake Moore: Pleasure to be here.

My name is Jake Moore. I practice law over in West Columbia with Moore, Taylor and Thomas, and I've had the honor to appear before this group on numerous occasions and it's always a pleasure to be back in front of you. Ah—the property in question, is—is basically owned by a corporation which is a steel fabrication company. The ah—building when it was originally purchased ah—was bought with the idea that it would eventually be expanded. The lot in question is long but it's very narrow—it's only 300 feet wide—and with a zoning requirement for a buffer on either side of 250 feet—if you take 250 on one side and 250 on the other,

that's 500 feet—so when they changed the zoning, it basically created a situation where you could never build anything else on the property if you apply the technical requirements of the Zoning Ordinance; and as I understand, the concept of a variance, it is when the applicability of the Zoning Ordinance adversely affects the piece of property to render it basically non-buildable—that's basically when we ought to be basically looking at the concept of a variance. The ah—what we had here was a situation when my client was doing sandblasting outside and the neighbors basically came and complained and said that the sandblasting activity—which is a lawful activity ah—was creating a problem and asked us if we would correct it. And Mr. Reilly who runs the company said we certainly don't want to be a bad neighbor, so he went out and he built a shed. And to refer to what has actual been put up as a building is somewhat of a misnomer—I guess it technically qualifies as a building, but it's got a dirt floor, it's just got ah—a—it's a metal pole top with a metal pole side and a canvas front. And he built the facility just to be a good neighbor and to try to cut down on some of the noise and the fumes and so forth that are lawfully there but were bothering a neighbor. Ah—and it is after he basically did what he was asked to do by DHEC—DHEC came out and said, "Look, we're not telling you you gotta put up this shed, but we're asking you to"—so he basically did what DHEC asked him to do and low and behold, that got him trouble with—with Zoning. So, ah—we basically—once we got the shed up, we have had no one complaining any further about noise and nobody complaining about fumes and like it's been stated, two of the neighbors—one across the street and one directly next door—have signed off. Somehow another it's gotten out in the community that this is some sort of a rezoning of the property, and we don't know how to stop rumors. We heard one rumor that this has to do with working on Sunday, and people are against it because they are going to be working on Sunday out there. And of course, there's no way to stop the rumor mill once it starts. Ah—so if anyone is under the impression that this is a rezoning of the property, or anything other than trying to make the situation better ah—I mean I guess if the variance is not granted we can take the building down and start sandblasting outside again, but the noise and the fumes are going to be aggravating to the people who are there and it's going to make the matters worse instead of better. We really believe that what we have put up there is something that should make the property basically better for everyone. Ah—again, the property is—is—is only 300 feet wide and with the type of zoning we have, if it's applied, nothing can ever been built and it can never be expanded. Ah—the new building is somewhere around 40 feet from the property line, whereas the original building that's there and complies is only 9 feet from the property line. Ah—as you can look at the property, it's pretty much screened all the way around by trees. Ah—the neighbor who is complaining to the south, there's nothing there but woods; the—the folks to the north, there—

there're trees over there and they consented; the building is far enough to the east to where we comply; and the gentlemen across the street, ah—he's the one who us the property originally and he sold it to us with the idea we could eventually expand it, and he—he has consented.

Yes, sir?

Stan Smith: Mr. Moore, do you know why the property owner to the south has refused to sign the waiver?

Jake Moore: We really don't.

Stan Smith: Okay.

Jake Moore: Ah—we are under the impression that there may have been some mis—misinformation—

Stan Smith: Understood.

Jake Moore: and we certainly want to try to be a good neighbor. We think this thing is certainly beneficial to the property owner to the south instead of harmful.

Stan Smith: Well, what are the hours of operation? Are they strictly Monday through Friday, no Saturday, no work on Sunday?

Jake Moore: I think they work on Saturdays and Sundays, too, but they work—they work primarily ah—during business hours.

Stan Smith: On—on a Sunday?

Jake Moore: I think they work, Bill do we—do we work on Sunday?

Bill Reilly: [from audience] Very occasionally, not very often.

Jake Moore: Occasionally.

Morris Phillips: Apparently, you don't.

Jake Moore: Sir?

Morris Phillips: Apparently, you don't. [laughing]

Jake Moore: I don't. [laughing]

Stan Smith: Ah—one second. Staff, was this ah—ah—was this an enforcement issue for the noise?

Robbie Derrick: Yes, sir. The original complaint was noise, but the—

Stan Smith: Did they—did they indicate when they were disturbed by the noise, what day of the week, what time of day?

Robbie Derrick: They said it varied—they said it varied. Generally, it was during the working hours—

Stan Smith: Okay.

Robbie Derrick: ah—but it did vary. The ah—times—two times we did noise readings, all but four of the ah—decibels we read exceeded, but the gentlemen who made the original complaint did consent and sign a waiver regarding the noise complaint.

Stan Smith: With that stipulation?

Robbie Derrick: With the stipulation that that—that shed in the rear—the second shed which has not been constructed yet—contain the sandblaster to help reduce the noise levels.

Jake Moore: And with that—with that shed, the—the noise would n—, if—if the variance is granted, we can put up that shed; the noise is going to be no problem for anybody.

Stan Smith: So you are waiting on us to approve the request, then the shed will be constructed and the sandblasting will take place inside this—

Jake Moore: That's the idea.

Stan Smith: confined area?

Jake Moore: Yes, sir.

Morris Phillips: Question.

Jake Moore: Sure.

Morris Phillips: Who is there—I'm looking at this layout here and I don't see where anybody would be close enough to really smell the fumes or—ah—, can ya? Well, we'll probably find out. Somebody will come and advise us of that.

Jake Moore: I can—I'm sure somebody will say they've smelled it, but there's nobo—there's really nobody there. Again, to the south of us is woods, to the east of us is woods, to the north of us there's a—there's a building way back there in the back, but it's a—everything is a good deal away from the occupant[?].

Stan Smith: Mr. Moore, ah—Mr. Derrick reported that this was permitted back in 1982. To your knowledge has steel fabrication and sandblasting been taking place there for the last almost thirty years?

Jake Moore: My understanding—and I—correct me if I'm—Bill will correct me if I'm wrong—but my understanding is that it—it—it—it—it was. Ah—when the property was originally zoned, ah—it was the—the—they—the gentlemen was told you need to go ahead and get it zoned industrial so that—so that ah—when you expand your operation it will be there. He said I paid the extra \$10 so I could have it zoned industrial. But it—it has been some form of industrial use and I believe this type of the use for a long, long time.

Stan Smith: Okay.

Anthony Watts: Mr. Moore, the activity in question, the sandblasting, it's already taking place in the location in which y'all are wanting to build this shed or building?

Jake Moore: Yes, sir.

Anthony Watts: So it's already happening in this location?

Jake Moore: Yeah, and the idea is we want to be able to build a shed so that we can cut down on the noise and put it inside instead of outside.

Morris Phillips: And this ah—Mr. Derrick—

Robbie Derrick: Yes, sir.

Morris Phillips: When you took your readings, was the shed there or the buffer or—?

Robbie Derrick: Neither of the ah—the sheds were not there when I took the—

Morris Phillips: Okay.

Robbie Derrick: the last—well, I take that back ah—Mr. Chair. The first reading I took back ah—in 2008, there were no additional sheds in the back. The second

reading I took, the—the one shed that is shown on there partially constructed was there, but ah—the shed that he is wanting to contain the sandblaster in is actually a separate building from what is there now.

Morris Phillips: Okay.

Jake Moore: And if we can put that up, sound is going to be ah—if we can put that up, there'll never be a problem with sound again. It will be completely contained inside and we'll be within all decibels at all conceivable points. There's no way we can basically bother anybody sound wise with it up.

Anthony Watts: I got two questions. One is for you and one is for staff. Well, yours is have y'all talked to the people from the south?

Jake Moore: Yes, sir. Ah—and ah—I can—I'm going to ask Bill Reilly who basically runs it, he can answer that question better than you. Ah—

Anthony Watts: As long as you've had conversation that is all of it.

Jake Moore: Yes, sir.

Anthony Watts: I get a little disappointed when people don't talk to each other.

Jake Moore: We—we have had some conversation.

Anthony Watts: And that is good enough. Second, when you were measuring, was you measuring the air compressor or sandblasting itself, because that is two different things?

Robbie Derrick: Most of the noise re—

Anthony Watts: My—my question would be is the sandbla—the air compressor being shielded?

Robbie Derrick: It was actually the sandblasting that recorded the higher readings.

Anthony Watts: The sandblaster?

Robbie Derrick: Yes, sir.

Anthony Watts: Okay.

Jake Moore: The sandblast—the sandblasting does carry a noise and if—if you simply put the shed up, contain it, the noise problem is gone. And again, you—you're in a situation where you want to build a shed but you couldn't even

build a shed 2 inches in width according to the present Zoning Ordinance because it has got to be 250 feet on either side, and more with that kind of buffer. That's where we are.

Phillips Morris: Any other questions. Thank you, sir.

Jake Moore: Bill, you want to come next? Thank y'all very much for listening to me.

Bill Reilly: Good evening. I'm Bill Reilly, 137 Sharon Lake Court, Lexington, the owner. The situation we have here—ah, I need to correct Mr. Moore just a little bit—since ah—the gentleman to the north agreed to sign the waiver if I put the building up, I have put the building up. So I am in the rears of getting a ah—building permit for that's ah—

Stan Smith: You—you've constructed a building. Are you actually doing your operation in that building now?

Bill Reilly: The building is actually up over the sandblaster, that is true.

Stan Smith: You are doing sandblasting in there now?

Bill Reilly: Yes, sir.

Stan Smith: Okay.

Bill Reilly: Ah—so I'm kind of in a rock and a hard place. If the ah—zoning permit is denied then I have to take the building down and we start sandingblast—sandblasting—

Stan Smith: How long have you been sandblasting on this site?

Bill Reilly: Ah—four years.

Stan Smith: Four years?

Bill Reilly: Yes, sir.

Anthony Watts: So you put the building up without a permit?

Bill Reilly: Yes, sir, I did. And that's an issue that ah—I have with the—

Anthony Watts: I can agree.

Bill Reilly: Well, I knew it going in. I knew I was going to get ah—in trouble for that, but I was eager to get the ah—issue solved.

Mark Bostic: Has the noise gone down?

Bill Reilly: In my opinion, it has. I have walked around that side, the north side, of the building a few times while the sanding is going on—in my opinion, it is. I don't know if Mr. Derrick has gone out since to take a reading, but I've had no complaints from my neighbor to the north.

Stan Smith: Mr. Reilly, can you confirm that there is work occurring on Saturdays and Sundays?

Bill Reilly: Well, we're fortunate that we are people who are sold in the steel fabrication business—

Stan Smith: Sure.

Bill Reilly: right now, so I don't turn any work down.

Stan Smith: I understand.

Bill Reilly: So right now, we're working regularly six days a week—

Stan Smith: Okay.

Bill Reilly: every now and then, seven.

Stan Smith: Okay. Alright.

Morris Phillips: How about Sunday?

Stan Smith: Every now and then.

Bill Reilly: Every now and then—one in ten—but we do and we do need to be able to go in there on a Sunday if we need to get caught up.

Stan Smith: But this is on a Sunday, but it'll be not before 8:00 or 9:00—

Bill Reilly: No, sir.

Stan Smith: and not after say 5:00 or 6:00 in the afternoon?

Bill Reilly: Well, we don't sand before sunup—

Stan Smith: Okay.

Bill Reilly: and we can't sand after sundown.

Stan Smith: Okay. Alright.

Morris Phillips: Any other questions?

Stan Smith: I'm good.

Morris Phillips: Thank you, sir.

We will now listen to an opponent if—ah—someone would like to speak. And, before we get started, I'd like—ah—Mr. Derrick to explain that we're not talking about other properties—we're strictly addressing this piece of property here as to any variances. Am I correct?

Robbie Derrick: That's correct, Mr. Chair. Just the one property to the south, that's correct.

Morris Phillips: If you're worried about something and some other general zoning, that's not what's happening here—

Robbie Derrick: Agreed.

Morris Phillips: what we're talking about here.

Dave Almeida: My name is Dave Almeida. I reside at 101 East Circle Drive, Lexington, South Carolina. And I'm here to speak on behalf of my in-laws, Margie K. Black and Harold Black, who are the property owners ah—with property adjacent to 152 ah—Hyler Road. So, ah—we are here because we do not—we question whether or not the criteria for granting a variance ah—has been met ah—as established by ah—the Standards of Variance, Article 12, Chapter 2, Section 122.60, as y'all all know very well. Specifically, ah—section (a), relating to extraordinary and exceptional conditions, we ah—do not believe that the applicant has established the extraordinary-and-exceptional conditions ah—around pertaining-to-this section. But more than that, we are also very convinced that had the applicant applied for a building permit prior to building, that these issues could have been resolved prior to building. Had the applicant ah—applied for a building permit, he would have had to have submitted his plans to the County and the County would have ah—would have informed him that ah—hi—his plans did not conform to current ordinance. Ah—secondly, regarding that these conditions do not apply to other property in the vicinity, that criteria, ah—in fact we believe that these conditions do apply—all properties, 152 Hyler Road and properties in the vicinity have buffer, setback, and screening retirements—ah—requirements specified

under the Lexington County Zoning Ordinance. Ah—third, section (c) relating to conditions that would unreasonably restrict the utilization of the property, ah—the property has been in use ah—as staff mentioned for a number of years right now, so we see no reason why ah—the ah—current conditions would unreasonably restrict the utilization of the property if the property's been used for that purpose since 1982. And fourth and finally, ah—I think this goes to the heart of the matter relating to substantial detriment to the adjacent property or to the public good, it's our position that given the nonindustrial, rural nature of this community and the industrial nature of this facility that the granting of a variance will in fact be of substantial detriment to the adjacent property. I think it is a fair assumption that that structure ah—surrounded by homes, surrounded by residences, ah—has the effect of decreasing the market value of the adjacent property. So if the property owner, Ms. Black wants to make improvements upon the property, I think it is a fair assumption to assume that what she may get if she decides to sell—either unimproved or improved property—would be less than fair market value, and that's the reason we believe that she is harmed in that regard. Thus to diminish ah—the effect of the financial impact of the adjacent property, we believe that the existing structure's buffer, setback, and screening should conform to the requirements covered under Manufactured (Intermediate) as specified on page 31 of the Lexington County Ordinance. And again, we believe most of these issues, or all of these issues, would have been or could have been resolved had the applicant, had the ah—requestor applied for a building permit ah—prior to building. So, on behalf of Ms. Black and ah—the family, we would ah—respectfully request that you ah—deny the request before you this evening.

Morris Phillips: Where is this piece of property you're referring to? We have a pointer there—there should be a laser pointer there.

Bruce Hiller: Yeah. The red button.

Dave Almeida: This piece of property right here. This is the property in question.  
Correct?

Morris Phillips: Do they reside there?

Dave Almeida: Ah—no, sir. They reside over here, *but* this is their property and clearly they may want to do something with it.

Morris Phillips: Now I was understood that—I thought we'd said that they had signed off on that?

Dave Almeida: No, not them.

Mark Bostic: No, the other people on the top.

Morris Phillips: Oh, okay.

Dave Almeida: Ah—right here, sir, and right here signed off. Ms. Black owns this piece of property and she has not signed off on it.

Stan Smith: Question for staff. If Mr. Reilly tears down his structures, ah—he could continue to sandblast on the site because he's been doing that for four years—now he does have a noise issue, is that correct?

Robbie Derrick: From my—the—the complaints we received for the noise, at this time the noise issue has been resolved. We have received no more complaints with noise. The complaints we have received for the noise, they've signed off and agreed—except for the sandblasting at the building, the additional building with stipulation. The activity—the existing activity as established before zoning can continue as established.

Stan Smith: Do you understand that?

Dave Almeida: Yes, sir, Mr. Smith. And—and I think our point is essentially that ah—we question whether or not this structure that has been built could have been built *differently* in a way that complies to current zoning without a variance.

Stan Smith: Ah—no. I think Mr. Moore explained that, I mean the lot's too narrow to set something back 250 feet from a lot that's barely much wider than that would—it's—it's impossible. Like I said it's going to be a 2-inch wide building. Ah—the other thing is if we make Mr. Reilly tear this down, I don't see that we have improved the situation at all. We've probably worsened it because he's not able to confine the noise.

Dave Almeida: So is Mr. Reilly not—would not be able to build here?

Stan Smith: Is there 250 feet distance from the side of the ....

Dave Almeida: I—I don't know.

Stan Smith: I don't think so.

Dave Almeida: ~~I—I'm only asking would he have been able to building further up here~~ and then been in compliance with the zoning requirements.

Stan Smith: Well, that is a question we can certainly ask him when he returns, but um—

Morris Phillips: Well, we'll—let's go ahead. What we're saying—what he just said—the way I interpret—I want to make sure—

Stan Smith: Sure.

Morris Phillips: is that ah—he can sandblast. If he wants to, he can get out there and they can sandblast all day. To me, I am under the impression that you have less pollution, less noise—I am talking about noise pollution to my knowledge—if you have a building versus not putting it in a building. Obviously, it would be cheaper to anybody. And I don't know any of these people, okay—I don't know you—but we're trying to be fair here. But if you have a business and you want to sandblast, you can stand out there and sandblast all you want to. It's zoned for that. Is that not correct, Mr. Derrick?

Robbie Derrick: That's correct. It's an allowed activity.

Chairman Phillips: Just want to be fair.

Dave Almeida: I understand that, sir, and—and—

Morris Phillips: Now we're talking about a long piece of land and you've got a building sitting somewhat out in it. There's no way it's got 500 feet on ah—200 or 500 feet on each side.

Dave Almeida: And not—not even in here?

Stan Smith: According to the site plan—can we bring the site plan up please?

Morris Phillips: Yes, please.

Anthony Watts: How long have the Blacks' owned this property?

Dave Almeida: Margie, how long have you owned the property?

Margie Black: *[spoke from the audience]* Since 1950.

Dave Almeida: Since 1950, sir.

Margie Black: *[spoke from the audience]* My dad owned it, it's been in my family.

Mark Bostic: And what for zo—for staff, when was zoning incorporated into this area?

Stan Smith: 2001.

Robbie Derrick: November 2001. Just for clarification, Mr. Chair, the property at its widest point is 297 feet and the rear of the property is 200 feet in width.

Stan Smith: It's hard to see, but—yeah—I was going to bring that out. It's 200 feet long the back, so, as Mr. Moore brought out, it's a—it's a long and narrow piece of property so it—it's very limited in what you can do to the left and right, so you're essentially forced to go back.

Dave Almeida: And was Mr. Reilly forced to build a she—a building of that size?

Stan Smith: Ah—I don't know. Obviously, we can certainly ask him when he returns if that's ah—you know how much square footage did he need in order to—to secure or confine his sandblasting operation ah—and how big—how big a thing is he—you know—is he fabricating. Obviously, it needs to be put somewhere so that he can ah—continue the manufacturing process.

J. R. Caughman: Mr. Chairman, I have a question. And I—I understand where he's coming from. I don't like people building buildings outside of permitting and that kind of stuff anyway. So, my question really is to staff. Where do we go from here with the approval, or not the approval, far as the violation of building—putting the building in without a permit?

Mark Bostic: Well, we're a little early for that yet.

Robbie Derrick: I'll get you—I'll get—

J. R. Caughman: I don't know, so—somebody's got to address it one way or another. I'd like to know the answer.

Mark Bostic: [inaudible]

Robbie Derrick: Mr. Caughman, Mr.—Mr. Reilly has been issued three citations. He has been taken to court. The judge has continued the court case pending this evening's outcome. Actually we have a rescheduled court hearing Friday.

J. R. Caughman: Okay.

Robbie Derrick: If he is not in compliance with Zoning then that's something we'll have to address with ah—Judge Morgan at the Batesburg-Leesville Magistrate's office Friday morning. He has also met with ah—Mr. Reilly has also met with Mark Hendrix with our Building Inspections Department. Mr.

Hendrix has advised him on—that he requires engineering plans, stamped plans for building review. After we spoke with a code enforcement officer and she's relayed it to the judge, it was not any reason for Mr. Reilly to proceed with the engineering plans for the buildings until we see if we could resolve the zoning issue.

J. R. Caughman: Okay.

Robbie Derrick: So he has been issued citations—

J. R. Caughman: Well based on that, how does that a—effected by what we decide tonight?

Robbie Derrick: If you were to grant the variance tonight, he'd be issued a zoning permit tomorrow. We would go to court on Friday, let the judge know he's in compliance with zoning, and it'd be up to the ah—the judge to decide if he's given any leeway to ah—get the building plans into him.

J. R. Caughman: I don't like that.

Stan Smith: Well, we're looking at the site plan, you've got—you've got building closer to the property line now than the constructed shed. Was it what, 9 feet away—is that you said earlier?

Robbie Derrick: Just a little over 9 feet.

Stan Smith: Yeah. So—

Dave Almeida: I would—I would think—

Mark Bostic: I think—I think—

Stan Smith: in a nutshell, it's been you know—

Mark Bostic: I think we're getting ahead of ourselves. I think we need to see what else we hear and who else speaks.

Stan Smith: Okay. Sure. Go ahead.

Dave Almeida: And I would just like to ah—close by saying that our concern is that if you grant this variance, you are in fact ah—sending a message ah—to Mr. Reilly and to other property owners that it's okay ah—to build first if they think that they can justify building later. And I think that that's a bad precedent to set. So, ah—thank you very much for your time.

Morris Phillips: We appreciate your input. Thank you. Someone else like ah—to oppose, ah—opponent? Would you like to speak ah—address this?

Stan Smith: Hang on.

Morris Phillips: Oh. We are going to change the tape, it's a good time.

Windol Gillian: I'm Windol Gillian. I reside at ah—135 Hyler Road which is directly across in front of the property. I sold the property to ah—Mr. Reilly and as a matter of *fact*, what's going on *right now* in this business has been going on since 1990. I originally started part-time in 1989 when I left my other job and I kept continuing to add on to the building. And we'd been doing the *very* same type of work for all these years with *no* complaints from *anyone*. And ah—I don't have a problem with it and I stay the closest as anyone to it where it's at right now—I'm down—I'm probably—ah—7, 800 feet maybe from it, across the road. And I have no problem with anything the gentleman does. And not just because I sold him the property, but ah—there—there's not a—there's not a—thing wrong with what is going on and the way he is running it—in *my opinion* from where I *am* located. Thank you.

Morris Phillips: Thank you, sir.

Jake Moore: [inaudible from audience]

Morris Phillips: Sir, I'd like to see if we have any ah—one else ah—opposing opinion or ah.... I don't see anyone moving. Yes, sir, you may.

Jake Moore: [from audience] Mr. Caughman, ...if I could just try to answer your questions the best I know how. There's an old saying—

Morris Phillips: Come back up.

Jake Moore: I'm sorry. There is an old saying in the building business with people who are sophisticated builders, "It's better to ask for forgiveness than it is permission." I don't like that either. Ah—I mean I'm city attorney for Irmo. Ah—we're county attorneys for the County of Saluda. Ah—I helped draft the first zoning ordinance for the Town of Irmo ever passed and we deal with this in Irmo all the time. The man I represent's not a lawyer and he's not a zoning expert. He's trying to fabricate steel in a very bad economy. He winds up with DHEC coming out there saying, "Do something." He says, "What?" They say, "Put up a shed." He puts up a shed. The next thing we know, here come the County officials. And I would like to say that—that ah—ah—Mr. Reilly has told me, and my law partner whose case this is has told me, that the County zoning officials

have been as nice and helpful and cooperative as you could ask for. You know, I've worked with this staff for years and sometimes we butt heads and sometimes we're great, but these people are tremendous professionals and they do a great job. They wind up doing what they should do. When they find a building that is out of compliance, they issue the citation. Mr. Bradley gets involved and we've talked to him, "What do you need for us to do?" And they set out a road map for us which is perfect, they are exactly right. The first thing you do is let's put off the case in the magistrate's court. And then, let's come before the ZBA and see if we can't work out a variance so that we can, obviously if the property—if—if setbacks got to be 500 feet and the property is only 300 feet wide, zoning has basically meant—made the whole back part of that—property worthless. And Zoning is not suppose to make property worthless as—

Morris Phillips: I got a question for you, sir. What made your—I guess you'd say your client—

Jake Moore: Yes, sir.

Morris Phillips think that they could just go build a building when they want to and don't have to get it approved through—

Jake Moore: Oh—look—

Morris Phillips: channels?

Jake Moore: Ah—let me—let me answer the question this way.

Morris Phillips: I want it explained[?].

Jake Moore: First of all, because they had DHEC—DHEC out there telling them to do it.

Morris Phillips: They told them to build the building?

Jake Moore: They told them that would—they told them that. I mean, *however—however*, let me make this *perfectly clear*, and being *totally honest*—

Morris Phillips: I hope so.

Jake Moore: Bill knew that even though DHEC—DHEC was telling him to do it, he knew he should've gotten the building permit, but he was trying to get DHEC—then again he's in the business of fabrication and—he's trying to get DHEC off his behind and try to build steel and trying to keep twenty

something people employed in Lexington County ah—ah—in a very bad economic time. Should he have gone and applied for a building permit and gone through the channels? Yes. *And*, what will basically happen here, assuming we can—assuming y'all are kind enough to grant the variance tonight—and we think it is going to make the property better, not worse, for everybody including Ms. Black—the point, once we get the zoning variance, assuming we're fortunate enough to have it granted, then we basically have to get our—as—as it's been explained to us—then we have to go get our engineer and pay him to do an as-built drawing of the shed which it's—it is a shed, it's not really—it's a shed. Ah—then when we get the as-built drawings of the shed, then we make the application for the building permit. We basically pay the money, get the permit, we go back to the magistrate and say, "We're sorry. We know we did wrong." The magistrate then fines us. We pay our fine. And hopefully we've brought the matter into compliance. I mean, did we do something that we should not have done? Yes. And there will be a price to be paid for that. That's for another day, hopefully another day and another court. If—if they make us tear it down, we're back to sandblasting—but doing it outside—and then we got—then we got DHEC back in our backyard screaming at us. What DHEC basically said is, "Look—you got the zoning, you can do the sandblasting." And when I say that DHEC *told* us to put up a building, they *asked* us to put up the building. What DHEC basically said was, "Look—we can't tell you you have to stop, but you got neighbors over here who are complaining. Could you put up a building and make it work?" And we said, "Yes." So, when I said that we were told by DHEC that we had to do it—we weren't. They *asked* us to put up the building.

Anthony Watts: How large of a building are we talking about?

Jake Moore: I'm going to have to ask Bill. Bill, how big is the building?

Morris Phillips: We need Bill to come up here, if he's—

Stan Smith: If it's the shed that's on this illustration, it's a 40 by 30.

Jake Moore: That sounds about right.

Stan Smith: 40 by 30.

Mark Bostic: I—I don't think that's it.

Stan Smith: "Sandblast" is written on top of them. The sand hopper right beside it.

Mark Bostic: Yeah, but the other one says, "New paint shop and sandblast shed."

Jake Moore: Let's—Bill—

Mark Bostic: He'll be here. We'll see.

Morris Phillips: For the recording, make sure we keep—always identify ourselves as we come back.

Bill Reilly: Bill Reilly, ...137 Sharon Lake Court. The building that we've been talking about is indeed the sandblast building which is farthest to the east. Ah—we're also requesting a ah—permit on the paint shop. Ah—it's my fault for ah—causing confusion but DHEC has been out to us twice. Ah—their main complaint was paint fumes. So, ah—the—the two buildings that were pointed to by the box in the ah—site plan is actually what we're discussing. What we've been talking about this evening is the sandblast shed which is—

Morris Phillips: 30 by 40.

Bill Reilly: Yes, sir. And that's the one that was stipulated to put together ah—by the gentleman who complained about the noise to the north, Mr. Gerald Gillian. The paint shop ah—was there to cover the thick paint fumes that one of the neighbors to the north complained about which caused DHEC to come out twice. Ah—their suggestion was to put up something over this to cover the paint fumes. Their response was, after checking the paint I used—the quantity of paint I used and the viscosity of the paint I used—it—to quote them, it could smell like chicken manure but it's not harmful. So they said if you put a cover over the paint area then the neighbors will be satisfied in the fact that the paint fumes aren't floating.

Morris Phillips: Thank you, sir.

Mark Bostic: Can you give me a—a cost outlay for each one of these buildings.

Bill Reilly: Ah—I probably spent on the paint shop ah—50,000 [\$50,000], on the sandblast shop about 6 or 7 [\$6,000 or \$7,000].

Anthony Watts: You started work on the paint shop.

Bill Reilly: Ah—we started work on the paint shop early of this year after DHEC came by the later part of last year.

Anthony Watts: And the blast shed was put up when?

Bill Reilly: The blast shed was put up right after Mr. Derrick came by and said that we're still in noise compliance, noise problems ... probably.

Anthony Watts: This year?

Bill Reilly: Yes, sir. That was proba—

Anthony Watts: So it was put up after he came by?

Bill Reilly: Ah—Mr. Derrick's come by twice—

Anthony Watts: So DHEC told you—

Bill Reilly: after DHEC.

Anthony Watts: I'm trying to get a time line of when this building was put up.

Bill Reilly: The paint shop went up—started going up ah—February of this year.

Anthony Watts: And that was after Mr. Derrick came by?

Bill Reilly: Mr.—it was up when Mr. Derrick came by.

Anthony Watts: So you never went by before the building was up?

Morris Phillips: The shed...

Anthony Watts: Shed.

Bill Reilly: The blast shed. The blast shed was not up.

Robbie Derrick: I have not been by there since the sandblasting shed has been put up.

Bill Reilly: Blast shed—

Anthony Watts: Okay. I will try to give you the benefit of doubt whether he could have talked to you about a permit is what I was after. Okay.

Bill Reilly: Ah—blast shed was probably put up three months ago.

Morris Phillips: Are there any other—any other questions? Thank you, sir.

Discussion.

Stan Smith: I can understand Mr. Almeida's position but I just feel like what the—Mr. Reilly has done is—in this is improving ah—ah—you know—I just think he's improving the situation. He's fulfilled, I guess, a DHEC requirement for paint fumes and sound ah—which should generally make the neighborhood a little better place. Ah—he's—he's got existing structure which is closer to the property line than what he has constructed. So, for me, it may not be a win/win situation but I don't see it as entirely a win/lose situation here.

Mark Bostic: Do you think that if he moved the shed to the other side of the property it would be any better than it is now?

Stan Smith: He's still going to be here in front of us because he cannot construct that shed anywhere on his property and fulfill the Ordinance that was adopted in 2001, not when he est—you know—established this operation in 1982.

Morris Phillips: Because of the 200 foot.

Stan Smith: That's right. He's only got 297 feet at the widest point and he's never going to be able to get something far enough away from a property line to fulfill the variance. So as far as I am concerned, I would approve it.

J. R. Caughman: Stan, I am going to disagree with you but I am going to be against it, just for the fact that we got to start sending a message somewhere that people got to get permits.

Stan Smith: Well I agree. We send messages every day.

J. R. Caughman: Ah—and I know it is a hardship for both, but I'm going to be a descending against. I—I support it but I'm also—

Morris Phillips: We are going to have to get a—get a—some motions here.

Stan Smith: I'll make one. I move that Zoning Variance Application 14-09 be approved as requested.

Mark Bostic: I'll second.

Morris Phillips: All in favor signify by raising their right hand. [Bostic, Cook, Phillips, Smith, Summers, Watts] The motion carries. [pause] Does it not?

Stan Smith: How many oppositions did you have?

Morris Phillips: How many oppositions? [Caughman, Yates]

Zoning Variance #10-09 Verbatim  
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J. R. Caughman: I had—I was ah—

Mark Bostic: Just two.

J. R. Caughman: you had two.

Morris Phillips: Just two, the motion carries.

Stan Smith: Right.

Mark Bostic: You got to count them.

Stan Smith: Yeah, you do.

Chairman Phillips: Thank you.

Bill Reilly: Thank y'all.

FILED

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LEXINGTON, SC

THE STATE OF SOUTH CAROLINA  
In The Court Of Appeals

APPEAL FROM LEXINGTON COUNTY  
Court Of Common Pleas

The Honorable William P. Keesley

Civil Action No.: 2009-CP-32-04260

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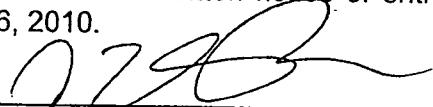
Margie Kay Black.....Appellant

vs.

Lexington Co. Board of Zoning Appeals,  
Bill Reilly and Reitech, LLC .....Respondents

NOTICE OF INTENT TO APPEAL

Margie Kay Black appeals the order of the Honorable William P. Keesley dated July 9, 2010 and entered July 12, 2010. Appellant received written notice of entry of this order from the Clerk of Court on or after July 16, 2010.

  
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THE STATE OF SOUTH CAROLINA  
In The Court Of Appeals

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APPEAL FROM LEXINGTON COUNTY  
Court Of Common Pleas

---

The Honorable William P. Keesley

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Civil Action No.: 2009-CP-32-04260

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Margie Kay Black.....Appellant

vs.

Lexington Co. Board of Zoning Appeals,  
Bill Reilly and Reitech, LLC .....Respondents

---

**APPELLANT'S FINAL BRIEF**

---

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### **STATEMENT OF ISSUES ON APPEAL**

1. DID THE CIRCUIT COURT ERR BY NOT CONCLUDING THE BOARD'S DECISION IS CONTRARY TO LAW BECAUSE THE APPLICANT CANNOT CLAIM AN UNNECESSARY HARDSHIP BASED ON CONDITIONS IT CREATED OR ZONING RESTRICTIONS ENACTED BEFORE IT BOUGHT THE PROPERTY?
2. DID THE CIRCUIT COURT ERR BY NOT CONCLUDING THE BOARD'S DECISION IS CONTRARY TO LAW BECAUSE A ZONING VARIANCE SHOULD NOT BE GRANTED FOR THE "EXPANSION" OF AN EXISTING BUSINESS?
3. DID THE CIRCUIT COURT ERR BY NOT CONCLUDING THE BOARD'S DECISION IS CONTRARY TO LAW BECAUSE THE APPLICATION OF THE ORDINANCE DOES NOT EFFECTIVELY PROHIBIT OR UNREASONABLY RESTRICT THE USE OF THE PROPERTY?
4. DID THE CIRCUIT COURT ERR BY NOT CONCLUDING THE BOARD'S DECISION IS CONTRARY TO LAW BECAUSE THE APPLICANT'S PROPERTY DIMENSIONS ARE NOT EXCEPTIONAL OR EXTRAORDINARY AND THESE SAME CONDITIONS GENERALLY APPLY TO OTHER PROPERTY IN THE SURROUNDING AREA

### **STATEMENT OF THE CASE**

On July 7, 2009, Bill Reilly ("Reilly") on behalf of his company, Reitech, LLC ("Reitech" or "Applicant") applied for a zoning variance (Application No. 14-09) for property owned by Reitech and used for metal fabrication which includes a sandblasting operation (R. 20). A hearing was held before the Lexington County Zoning Board (the "Board") on August 18, 2009. Margie Black ("Black") owns property adjacent to Reitech's land and opposed the application. At the hearing, by a 6-2 vote, the Board approved the application for a variance and by letter dated August 20, 2010 informed Reitech of its decision (R. 38).

Black timely filed a Petition for Appeal of the Board's decision to the Circuit Court on September 18, 2009 (R. 39). Reitech and Reilly filed an answer to this Petition on October 3, 2009 (R. 46). On October 21, 2009, the Board served its "Findings of Fact

and Conclusions of Law (R. 17). On October 22, 2009, the Board filed its answer (R. 49). On February 12, 2009, the Honorable William P. Keesley entered an order affirming the Board which was filed on February 16, 2010 and mailed February 17, 2010 (R. 14). Black timely filed a motion to alter or amend this order on February 26, 2010 (R. 51). By Order on Reconsideration dated July 9, 2010 and filed July 12, 2010, Judge Keesley denied the motion to alter or amend (R. 2). Black received written notice of entry of this order on or after July 16, 2010 and timely filed Notice of Appeal on August 4, 2010.

### **STATEMENT OF FACTS**

Black is a resident of Lexington County who owns property adjacent to the southern boundary of property owned by Reitech. Black's family has owned this property since the 1950's (R. 39).

Reitech purchased the property for which it is seeking a variance on March 13, 2007 to continue and expand a steel fabrication business on the site. (R. 17) This area was zoned with the restrictions for which Reitech is seeking a variance in November 2001 (R. 17). Reitech filed the application for the zoning variance after constructing a new paint shop and sandblasting shed on the property without obtaining a building permit and in violation of the setback requirements, buffer requirements and screening requirements to the Petitioner's property to the south (R. 40). Therefore, Black has a substantial interest in the decision of the Board.

Reitech is seeking a reduction in buffer from 125 feet to 31 feet, a reduction in setback from 250 feet to 31 feet, a reduction in total screening from 200 feet to 31 feet, and a reduction in partial screening from 300 feet to 31 feet so he can "expand" his business (R. 20).

## ARGUMENTS

**I. THE CIRCUIT COURT ERRED IN FAILING TO FIND THE BOARD'S DECISION IS CONTRARY TO LAW BECAUSE THE APPLICANT CANNOT CLAIM AN UNNECESSARY HARDSHIP BASED ON CONDITIONS IT CREATED OR ZONING RESTRICTIONS ENACTED BEFORE IT BOUGHT THE PROPERTY.**

S.C. Code Ann. §6-29-800(A)(2) empowers a local Zoning Board to grant a variance in cases of "unnecessary hardship" if specific findings are made by the Board. In *Rush v. City of Greenville*, 246 S.C. 268, 143 S.E.2d 527 (1965), our Supreme Court recognized that ordinarily a claim of unnecessary hardship cannot be based upon conditions created by the owner nor, can one who purchases property after the enactment of a zoning ordinance complain that ordinance would work an unnecessary hardship upon him. See Also *Witherspoon vs. City of Columbia*, 291 S.C. 44, 351 S.E.2d 903 (Ct. App. 1986); *La Quina Motor Inns, Inc. vs. Greenville County Board of Zoning Appeals*, 279 S.C. 598, 310 S.E.2d 438 (Ct. App. 1983).

In this case, this area was zoned with these restrictions in November 2001 (R.17). Reitech purchased this property on March 13, 2007, several years after the restrictions were already in place (R. 17); therefore it cannot claim an "unnecessary hardship." Reitech was on notice that it would not be able to "expand" the business at the time of purchase.

Moreover, Reitech created the conditions and hardship for which he is seeking a variance by building a paint shop and sandblasting shed without a building permit and in violation of existing zoning. Had Reitech properly applied for a building permit he would have been advised of these restrictions prior to building. Reitech cannot now claim a hardship based on conditions it created.

The circuit court would temper this rule by empowering the word "ordinarily" as cited in *Rush* to allow zoning boards discretion to grant variances despite the "unnecessary hardship" requirements the legislature placed in S.C. Code Ann. §6-29-800(A)(2); however, as noted by this court in *Witherspoon vs. City of Columbia*, 291 S.C. 44, 351 S.E.2d 903 (Ct. App. 1986):

However, *Rush*, in less restrictive language, states unequivocally "...nor can one who purchases property after the enactment of a zoning regulation complain that a nonconforming use would work an unnecessary hardship upon him. 143 S.E.2d at 532.

*Witherspoon* 351 S.E.2d at 904.

The circuit court states "the court does not believe that the phrase from *Witherspoon* is to be given absolute application, regardless of the facts." Order on Reconsideration, pg. 9 (R. 10). Black contends that this court's interpretation in *Witherspoon* is compelled by the legislature's requirement of a finding of "unnecessary hardship." To hold otherwise is to render the word "unnecessary" meaningless and to give the Board more discretion than intended by our legislature as used in the statute.

This court should reverse the decision of circuit judge and hold the decision of the Board as being contrary to law because Reitech cannot claim an unnecessary hardship as a matter of law.

**II. DID THE CIRCUIT JUDGE ERR BY NOT CONCLUDING THE BOARD'S DECISION IS CONTRARY TO LAW BECAUSE A ZONING VARIANCE SHOULD NOT BE GRANTED FOR AN "EXPANSION" OF AN EXISTING BUSINESS.**

In Zoning Variance Application #14-09, the Applicant states that the reason for the request is that the layout of the property will not allow any "new expansion." (R. 20). This is not a proper ground for granting a variance request. In South Carolina Code Ann. §6-29-800(A)(2)(d)(i), it states in part, "The fact that property may be utilized more profitably, if a variance is granted, may not be considered grounds for a variance."

"The financial situation or pecuniary hardship of a single owner affords no adequate grounds for putting forth this extraordinary power affecting other property owners as well as the public." Groves vs. Board of Adj. of City of Charleston, 226 S.C. 459, 85 S.E.2d 708, 710 (1955)(quoting Lee v. Board of Adjustment, 226 N.C. 107, 37 S.E.2d 128,131, 168 A.L.R. 1.) This court should reverse the decision of circuit judge affirming the Board because the decision is contrary to law since a variance cannot be granted for an "expansion."

**III. THE CIRCUIT COURT ERRED BY NOT CONCLUDING THE BOARD'S DECISION IS CONTRARY TO LAW BECAUSE THE APPLICATION OF THE ORDINANCE DOES NOT EFFECTIVELY PROHIBIT OR UNREASONABLY RESTRICT THE USE OF THE PROPERTY.**

One of the findings the Board must make under Section 122.60 (c) which copies the requirements in S.C. Code Ann. §6-29-800(2)(c.) is that the application of the ordinance not effectively prohibit or unreasonably restrict the use of the property. Obviously if the Applicant is seeking to "expand" an existing business by adding a paint shop and sandblasting shed, then the ordinance is not prohibiting the use of the property or unreasonably restricting its use. Indeed, the testimony at the hearing established that this property was being used for steel fabrication under the 2001 zoning restrictions for years at the time the Applicant purchased the property. (R. 57).

This court should reverse the Circuit Court and the Board since it cannot find as a matter of law that the application of the ordinance effectively prohibits or unreasonably restricts the use of the property.

**IV. THE CIRCUIT COURT ERRED BY NOT CONCLUDING THE BOARD'S DECISION IS CONTRARY TO LAW BECAUSE THE APPLICANT'S PROPERTY DIMENSIONS ARE NOT EXCEPTIONAL OR EXTRAORDINARY AND THESE SAME CONDITIONS GENERALLY APPLY TO OTHER PROPERTY IN THE SURROUNDING AREA.**

The Board must find under Section 122.60 (a and b) which copies the requirements in S.C. Code Ann. §6-29-800(2)(a and b) is that the "exceptional" and "extraordinary conditions pertain to the Applicant's property which do not generally apply to other property in the vicinity. There are no exceptional or extraordinary conditions which pertain to the Applicant's property. The Applicant has a rectangular-shaped lot which is less than 300 feet wide (R. 36) at its widest point. However, this is hardly unique or peculiar as there are a number of lots that meet these same conditions. A cursory view of the tax map (R. 37) for this area shows a number of lots which could meet this same criteria.

The Board concluded that the "extraordinary and exceptional" condition was that the zoning restrictions, "would make it impossible for any feasible expansion or improvements to the facilities.." (Conclusions of Law, p. 2(a), R. 18); however, as argued in Argument II, supra, "expansion" and "improvements" are not valid grounds for a variance.

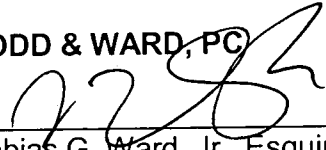
This court should reverse the Circuit Court's decision to affirm the Board since it cannot find as a matter of law that "exceptional" and "extraordinary conditions pertain to the Applicant's property which do not generally apply to other property in the vicinity.

### **CONCLUSION**

Granting a variance is an exceptional power which should be sparingly exercised and can be validly used only where a situation falls fully within the specified conditions. Hodge v. Pollock, 223 S.C. 342, 75 S.E.2d 752 (1953). A strong presumption exists in favor of the validity and application of zoning ordinances. Peterson Outdoor Advertising v. City of Myrtle Beach, 327 S.C. 230, 235, 489 S.E.2d 630, 632 (1997). In this case, the Board's decision is clearly contrary to law and it was error for the Circuit

Court to affirm that decision. The Board could not find as a matter of law any unnecessary hardship because the Applicant bought the property after the zoning was enacted and created his own hardship when it built a paint shop and sandblasting shed without a permit. Furthermore, a variance is not appropriate for an "expansion" of a business and the ordinance does not restrict or prohibit the Applicant's use of the property. Finally, there are not exceptional or extraordinary conditions which affect the Applicant's property which do not affect other property in the same vicinity. This court should reverse the decision of the Circuit Court and hold that the application for a Zoning Variance must be denied.

**TODD & WARD, PC**



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December 3, 2010.

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## **STATEMENT OF ISSUES ON APPEAL**

- I. Did Judge Keesley properly affirm the decision of the Lexington County Zoning Board because the Zoning Board's decision was reasonable, correct as a matter of law and not arbitrary, capricious or an abuse of discretion?
- II. Did Judge Keesley properly affirm the decision of the Lexington County Zoning Board because the variance meets the requirements of South Carolina Code Section 6-29-800(a)(2) and Lexington County Ordinance Section 112.60?

## **STATEMENT OF CASE**

The Lexington County Zoning Board of Appeals granted a zoning variance to Bill Reilly on behalf of Reitech, LLC. (R. pp. 78-79). Mr. Reilly applied for the variance to build structures to contain the sandblasting and painting that was being done on the property subject to this action. (R. pp. 59-61). The sandblasting and painting operations pre-existed the current zoning and qualify as a legal non-conforming activity. (R. p. 17). Mr. Reilly's application sought only to reduce the buffer, screening and setback requirements. (R. p. 20). The structures are simply to contain the noise and paint fumes. (R. pp. 59-61).

Margie Kay Black owns unimproved, wooded property to the south of Mr. Reilly's property. (R. pp. 67-68). The Lexington County Zoning Board of Appeals held an open hearing to address the variance on August 18, 2009. (R. pp. 54-79). Mrs. Black opposed the variance. (R. pp. 67-68). The remainder of Mr. Reilly's neighbors supported the variance and signed waivers. (R. p. 58). The Zoning Board granted the variance. (R. pp. 78-79). The Zoning Board properly issued its Findings of Fact and Conclusions of Law, which included specific findings on each of the statutory factors to be considered in granting a variance. (R. pp. 17-19).

Mrs. Black filed a petition to appeal the Zoning Board's decision to the Circuit Court on September 18, 2009. (R. pp. 39-45). Mr. Reilly and Reitech, LLC, answered on October 3, 2009. (R. pp. 46-48). The Zoning Board answered on October 22, 2009. (R. pp. 49-51). The Honorable William P. Keesley heard the appeal in the Circuit Court.

Judge Keesley ruled against Mrs. Black finding the Zoning Board's decision to be proper under South Carolina Code Section 6-29-800(A)(2) and Lexington County Ordinance Section 112.60. (R. pp. 14-16). Mrs. Black filed her motion to alter or amend Judge Keesley's order on February 26, 2010. (R. pp. 51-52). Judge Keesley denied Mrs. Black's motion in a detailed order filed on July 12, 2010. (R. pp. 2-13). Mrs. Black filed her notice of appeal on August 4, 2010. (R. p. 80).

#### **STATEMENT OF FACTS**

The property subject to this action is located at 152 Hyler Road in Leesville, South Carolina. (R. p. 17). In 1982, a large storage building on the property was converted to a machine shop. (R. p. 57). Around 1989, the former owner of the property began to use the shop to fabricate steel. (R. p. 63). The area was zoned in 2001 and the property was categorized Manufacturing (Intermediate). (R. p. 17). The pre-existing activities and buildings qualify as a legal non-conformity. (R. p. 17).

Bill Reilly, on behalf of Reitech, LLC, purchased the property and business on March 13, 2007. (R. p. 17). Mr. Reilly continued to use the property to fabricate steel. (R. p. 63). Sandblasting and painting are normal parts of the steel fabrication process. (R. p. 18). Mr. Reilly legally sandblasted and painted his steel; however, one of his neighbors complained about the noise and paint fumes. (R. pp. 59-61; 69). The county came out to take decibel readings on the property. (R. pp. 63-64). The Department of

Health and Environmental Control came out to investigate the paint fumes. (R. pp. 76-78). It was suggested that Mr. Reilly put up buildings to house the fumes and cut the noise. (R. pp. 76-78). Mr. Reilly built the paint shed first and then planned a sandblasting shed. (R. pp. 59-61; 76-78). Mr. Reilly built the paint shed within the foot print of an original building on the property. (R. pp. 57; 59-61). As such, he did not first obtain a building permit. (R. pp. 73-74). He has accounted for his error. (R. pp. 73-74).

The property is laid out in a rectangular shape. (R. pp. 59-61). It is 297 feet wide at its widest point. (R. pp. 59-61). The current zoning requires a setback of 250 feet, total screening at 200 feet, partial screening at 300 feet and a buffer of 125 feet. (R. p. 17). The shape of the property makes it impossible to comply with the zoning requirements as it is impossible to fit anything within a 297 foot piece of property with two 250 foot setback requirements. (R. pp. 17-19). Mr. Reilly sought a variance for the paint shed and proposed sandblasting shed to bring the setback requirements to 31 feet. (R. p. 17). There is a building currently on the property which is only 9 feet from the property line, legally non-conforming to the requirements. (R. p. 57).

In the interest of abating the noise and fumes, fifteen of Mr. Reilly's neighbors signed waivers agreeing to the variance. (R. pp. 59-61). There are three parcels of property that share a property line with Mr. Reilly's property. (R. pp. 59-61). Of these, the property owners to the north and west signed waivers, with one specifically stipulating a sandblasting shed must be built to reduce the noise. (R. pp. 59-61). The property owner to the south, Margie K. Black, refused to sign a waiver. (R. pp. 59-61; 67). Mrs. Black spoke against the variance request at the hearing on August 18, 2009. (R. pp. 67-68). She still actively opposes Mr. Reilly's variance request.

Mrs. Black has owned her property since 1950. (R. p. 70). It is completely unimproved and filled with trees and brush. (R. pp. 60-61). At the hearing, Mrs. Black indicated she opposes the variance because it may reduce the fair market value of her property in the event she ever decides to sell the property. (R. pp. 67-68). In addition, she did not like that Mr. Reilly did not obtain a permit before building. (R. pp. 67-68). Also, there is a rumor Mr. Reilly's company occasionally works on Sunday. (R. p. 60).

## ARGUMENTS

**I. JUDGE KEESLEY PROPERLY AFFIRMED THE DECISION OF THE LEXINGTON COUNTY ZONING BOARD BECAUSE THE ZONING BOARD'S DECISION WAS REASONABLE, CORRECT AS A MATTER OF LAW AND NOT ARBITRARY, CAPRICIOUS OR AN ABUSE OF DISCRETION.**

South Carolina Code Section 62-29-840 sets forth the standard of review the Circuit Court must use when analyzing an appeal of a local zoning board decision. The statute states in pertinent part as follows:

The findings of fact by the board of appeals must be treated in the same manner as a finding of fact by a jury, and the court may not take additional evidence.... In determining the questions presented by the appeal, the court must determine only whether the decision of the board is correct as a matter of law.

S.C. Code Ann. § 62-29-840(A) (Supp. 2003). Judge Keesley properly affirmed the decision of the Lexington County Zoning Board of Appeals because the Zoning Board clearly made the required findings of fact to justify granting Mr. Reilly's variance. (R. pp. 17-19). This Court should interpret the standard of review as stated and affirm the Circuit Court's decision.

A circuit court charged with review of a local zoning board decision is specifically required by South Carolina Code Section 62-29-840 to treat the board's findings "in the same manner as finding of fact by a jury...." S.C. Code Ann. § 62-29-840. The Court of Appeals has held that "the findings of the jury will not be disturbed unless a review of the record discloses that there is no evidence which reasonably supports the jury's findings." *Austin v. Board of Zoning Appeals*, 362 S.C. 29, 35, 606 S.E.2d 209, 212 (Ct. App. 2004) (internal quotations omitted)(citing *Sterling Dev. Co. v. Collins*, 309 S.C. 237, 240, 421 S.E.2d 402, 404 (1992)). The Supreme Court came to

the same conclusion, holding a municipal zoning board decision will be overturned if it is “arbitrary, capricious, has no reasonable relation to lawful purpose, or if the board has abused its discretion.” *Restaurant Row Assocs. v. Horry County*, 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999). Furthermore, the Supreme Court held that a “court will refrain from substituting its judgment for that of the reviewing body, even if it disagrees with the decision.” *Id.*

In this case, the Zoning Board published its findings of fact and conclusions of law justifying the variance in a document entitled, “Lexington County Board of Zoning Appeals Findings of Fact and Conclusions of Law.” (R. pp. 17-19). The Zoning Board is clear and specific, documenting the circumstances that led Mr. Reilly to apply for a variance and the reasoning applied by the Zoning Board to grant the variance. (R. pp. 17-19). Judge Keesley reviewed the Zoning Board’s findings and the transcript of the hearing. (R. pp. 2-13). He noted the Zoning Board applied the correct law, Lexington County Zoning Ordinance Section 122.60 and South Carolina Code Section 6-29-800(A)(2). (R. pp. 2-13). He found the Zoning Board’s findings were supported by the record. (R. pp. 2-13). He found the Zoning Board’s reasoning to be logical, rational and “quite well-stated.” (R. pp. 2-13). Thus, he found the decision of the Zoning Board was reasonable, correct as a matter of law and not arbitrary, capricious or an abuse of discretion. Therefore, this Court should affirm Judge Keesley’s finding.

**II. JUDGE KEESELY PROPERLY AFFIRMED THE DECISION OF THE LEXINGTON COUNTY ZONING BOARD BECAUSE THE VARIANCE MEETS THE REQUIREMENTS OF SOUTH CAROLINA CODE SECTION 6-29-800(A)(2) AND LEXINGTON COUNTY ORDINANCE SECTION 112.60.**

Lexington County Ordinance § 112.60 and South Carolina Code § 6-29-800(A)

(2) set forth the requirements for granting a zoning variance. The statute and ordinance are nearly identical. They state in pertinent part as follows:

A variance may be granted in an individual case of unnecessary hardship if the board makes and explains in writing the following factors:

- a) There are extraordinary and exceptional conditions pertaining to the particular piece of property;
- b) These conditions do not generally apply to other property in the vicinity;
- c) Because of these conditions, the application of the ordinance to the particular piece of property would effectively prohibit or unreasonably restrict the utilization of the property; and
- d) The authorization of a variance will not be of substantial detriment to adjacent property or to the public good, and the character of the district will not be harmed by the granting of the variance.

S.C. Code Ann. § 6-29-800(A)(2) (Supp. 2003).

At the hearing on August 18, 2009, the Lexington County Zoning Board of Appeals heard facts from all of the interested parties. (R. pp. 17). The Zoning Board then applied those facts to the specific factors set forth above to grant a variance. (R. pp. 18-19).

Contrary to Mrs. Black's assertions, the Zoning Board cited facts to logically support each and every factor. (R. pp. 18-19). Further, the Zoning Board's reasoning is legally sound and there is no basis to allege Mr. Reilly created "an unnecessary

hardship,” tried to “expand an existing business,” or purchased the property with the intent to obtain a variance to change the zoning of the property.

**A. There are Extraordinary and Exceptional Conditions Pertaining to Mr. Reilly’s Property.**

Mrs. Black contends that Mr. Reilly’s property is not subject to any exceptional or extraordinary conditions. This contention is false. Mr. Reilly’s property is set out in a rectangular shape. (R. pp. 59-61). The property is 297 feet wide at its widest point. (R. pp. 59-61). The current zoning requires a setback of 250 feet, total screening at 200 feet, partial screening at 300 feet and a buffer of 125 feet. (R. pp. 17). The shape of Mr. Reilly’s property renders compliance with the present zoning ordinance impossible. The Zoning Board came to the same conclusion, recognizing that the “property is only slightly wider than the setbacks imposed.” (R. pp. 18-19). It further concluded that Mr. Reilly’s property was subject to an “extraordinary and exceptional condition since the activity existed prior to the zoning of the area.” (R. pp. 18-19).

**B. The Conditions on Mr. Reilly’s Property Do Not Generally Apply to Other Property in the Vicinity.**

Mrs. Black argues that Mr. Reilly’s property is not subjected to any extraordinary or exceptional conditions because there are other lots in the area that are subjected to the same restrictions. This argument is without merit. Mr. Reilly’s property was categorized Manufacturing (Intermediate) in 2001. (R. p. 17). Mr. Reilly’s rectangular lot is 297 feet wide, at its widest point, and subject to setback requirements of 250 feet and partial screening requirements of 300 feet. (R. pp. 17). If the zoning requirements were literally construed, it would be impossible for Mr. Reilly to operate his steel

fabrication business on his property. It would be impossible to have anything on the property at all.

Mrs. Black contends, however, that Mr. Reilly's property is "hardly unique or peculiar" because there are several other lots "that meet these same conditions." This contention is factually inaccurate. The Zoning Board found that Mr. Reilly's property contained the only steel fabrication business zoned as Manufacturing (Intermediate) in the "entire general area . . . ." (R. pp. 18). Adjoining lots may be of similar size, but, as the Zoning Board concluded, immediate lots are largely not zoned for industrial activity. (R. pp. 18). Thus, the Zoning Board concluded that the "same intense buffering restrictions to not apply to other properties in the vicinity." (R. pp. 18).

**C. The Application of the Buffer, Setback, Screening and Partial Screening Ordinance Would Effectively Prohibit or Unreasonably Restrict the Utilization of Mr. Reilly's Property.**

Mr. Reilly would be unable to operate his steel fabrication business if the zoning ordinance was applied to his property. Variance applicants are not required to prove that without the variance there exists no feasible conforming use for the property in question in order to show unnecessary hardship. *Restaurant Row Associates v. Horry County*, 335 S.C. 209, 218, 516 S.E. 2d 442, 446 (1999). Thus, Mr. Reilly simply needed to show that without a variance his use would be "effectively prohibit[ed] or unreasonably restrict[ed]." S.C. Code Ann. § 62-29-800(A)(2)(c).

The Zoning Board found that Mr. Reilly's property was used to operate his fabrication business prior to zoning of the area. (R. p. 17). The Zoning Board recognized that Mr. Reilly's sandblasting operation is a "normal and necessary" component of his steel fabrication business. (R. p.18). It further concluded that the sandblasting operation

exceeded the maximum decibel level allowed by the performance standards of the zoning ordinance. (R. p. 18).

The Zoning Board found that the sandblasting shed would be constructed in order to reduce noise levels, thus, bringing the activity into compliance. (R. p. 18). Therefore, denying the variance would prohibit Mr. Reilly from continuing to operate the business on his property. (R. p. 18). The Zoning Board concluded that if Mr. Reilly continued to operate without the variance, he would be inviting further "prosecution" and "possible revocation of the zoning permit . . . ." (R. p. 18). Such a revocation, the Zoning Board found, would "restrict the utilization of the property as it was intended prior to zoning of the area." (R. p. 18).

Mrs. Black alleges that application of the ordinance would not effectively prohibit or unreasonably restrict Mr. Reilly's use of his property because it will only limit the "expansion" of an "existing business." Her contention seems to be that Mr. Reilly's current operation, without the addition of the sandblasting shed, is not in violation of the ordinance and that the variance is only requested to permit the proposed shed. This argument is off point. As previously stated, Mr. Reilly's proposed shed would be built in an effort to curb emitted noise levels, thus allowing his operation to comply with the current zoning restrictions. Without the variance, the business would not be in compliance and, therefore, subject to revocation. Again, as the Zoning Board concluded, revocation would "restrict the utilization of the property as it was intended prior to zoning of the area." (R. p. 18).

**D. The Variance Will Not be a Substantial Detriment to the Adjacent Property or to the Public Good and the Character of the District Will Not be Harmed by the Granting of the Variance.**

Mr. Reilly's sandblasting shed will not be physically intrusive or distress adjoining property. In order to build his sandblasting shed, Mr. Reilly applied for a variance to reduce the setback from 250 feet to 31 feet, total screening from 200 feet to 31 feet, and partial screening from 300 feet to 31 feet. (R. p. 17). There is an existing building on the property, built before the current zoning restrictions, located only 9 feet from the property line. (R. p. 57).

The Zoning Board recognized that Mr. Reilly's proposed shed would be further from the property line than the existing building. (R. p. 19). Approving the variance, therefore, would result in a "lesser degree of encroachment" than is already present. (R. p. 19). The Zoning Board further concluded that because the sandblasting shed would reduce emitted noise levels, granting the variance will actually allow for an "improvement for the adjacent properties, the public good, and the character of the district." (R. p. 19).

**E. The Variance Was Properly Granted Under the Unnecessary Hardship Standard as Mr. Reilly Did Not Create a Hardship or Expand His Business.**

Mrs. Black alleges Mr. Reilly "created the conditions and hardship" for the variance by "expanding" his business. This allegation is factually inaccurate. The property was used for steel fabrication prior to its zoning in 2001. (R. p. 63; 73). This pre-existing activity qualifies as a legal non-conformity. Painting and sandblasting are part of steel fabrication. Mr. Reilly was painting and sandblasting on the property prior to his application for a variance. (R. pp. 63).

The painting shed and proposed sandblasting shed are simply going to contain the activities already occurring on the property. (R. p. 60). There is no expansion. (R. p. 60). The variance will serve to contain noise and fumes, not expand Mr. Reilly's business. (R. p. 60). In fact, Mr. Reilly did not seek to build the sheds. (R. pp. 74-74). They were suggested to benefit his neighbors. (R. pp. 74-75).

Furthermore, the cases Mrs. Black cites to support her allegation "Mr. Reilly cannot have a variance because he purchased the property after the enactment of the zoning restrictions" may be factually distinguished.

Mrs. Black's primary authority is *Rush v. City of Greenville*. In *Rush*, the Plaintiff purchased a residentially zoned lot with the intention of creating a driveway through it for commercial use. 246 S.C. 268, 278-80, 532 S.E.2d 527, 532-533 (1965). The Plaintiff intended to effectively rezone the property with a variance. *Id.* The zoning board denied the variance. *Id.* at 271, 528. The circuit court overturned the zoning board. *Id.* at 272, 529. The Supreme Court found this to be a "self-created or self inflicted hardship intentionally created...." *Id.* at 279, 280. The court stated "ordinarily" a landowner cannot purchase previously zoned property and then claim the zoning of the property causes a hardship. *Id.*

*Rush* is factually distinct from this case. Here, Mr. Reilly purchased an existing steel fabrication business that was in operation before the enactment of the zoning laws. (R. pp. 63; 73). Mr. Reilly is not seeking to effectively rezone the property to do something that would be otherwise restricted. (R. p. 17-19). He is simply attempting to alter the setback lines on a piece of property barely as big as the setback lines to make the pre-existing use of the property more tolerable for the neighbors. (R. pp. 59-60).

Mrs. Black also cites the Court of Appeals' opinions *Witherspoon v. City of Columbia*, 291 S.C. 44, 351 S.E.2d 903 (Ct. App. 1986) and *La Quinta Motor Inns, Inc., v. Greenville County Board of Zoning Appeals*, 279 S.C. 598, 310 S.E.2d 438 (Ct. App. 1983). Like *Rush*, these cases may be factually distinguished from this case. See *Id.* Further, while these cases cite the principle stated in *Rush*, they ultimately stand for the strong deference given to the decision of local zoning boards. See *Id.* The opinions support the authority of local zoning boards to either grant or deny variances when the circumstances are appropriate. See *Id.* Thus, the Court should give the Zoning Board in this case the same deference, as Judge Keesley did, and affirm his ruling.

### CONCLUSION

South Carolina Code Section 62-29-840 sets forth the standard of review the Circuit Court must use when analyzing an appeal of a local zoning board decision. A circuit court charged with review of a local zoning board decision is specifically required by South Carolina Code Section 62-29-840 to treat the board's findings "in the same manner as finding of fact by a jury...." S.C. Code Ann. § 62-29-840(A).

Mr. Reilly respectfully asks this Court to affirm Judge Keesley's decision in his favor for the following reasons:

- The court properly affirmed the Zoning Board's decision because it was reasonable, correct as a matter of law and not arbitrary, capricious or an abuse of discretion.
- There are extraordinary and exceptional conditions pertaining to Mr. Reilly's property.
- The conditions on Mr. Reilly's property do not generally apply to other property in the vicinity.

- The application of the buffer, setback, screening and partial screening ordinance would effectively prohibit or unreasonably restrict the utilization of Mr. Reilly's property.
- The variance will not be a substantial detriment to the adjacent property or to the public good and the character of the district will not be harmed by the granting of the variance.
- The variance was properly granted under the unnecessary hardship standard as Mr. Reilly did not create a hardship or expand his business.

Respectfully submitted,

November 30, 2010



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IN THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

---

APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas

The Honorable William P. Keesley

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Case No. 2009-CP-32-04260

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Margie Kay Black.....Appellant,

v.

Lexington Co. Board of Zoning Appeals,  
Bill Reilly and Reitech, LLC.....Respondents,

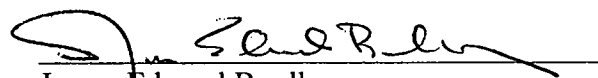
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**CERTIFICATE OF COUNSEL**

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I certify that this Final Brief of Respondents Bill Reilly and Reitech, LLC  
complies with Rule 211(b), SCACR.

November 30, 2010



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IN THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM LEXINGTON COUNTY  
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Case No. 2009-CP-32-04260

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Margie Kay Black.....Appellant,

v.

Lexington Co. Board of Zoning Appeals,  
Bill Reilly and Reitech, LLC.....Respondents,

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**PROOF OF SERVICE**

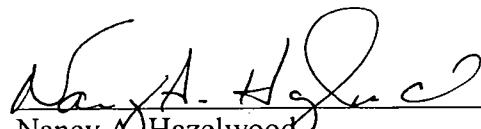
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I certify that I have served the Respondents Bill Reilly and Reitech, LLC's Final Brief on Margie Kay Black and the Lexington Co. Board of Zoning Appeals by depositing a copy of it in the United States Mail postage prepaid on December 2, 2010, addressed to their attorneys of record as follows:

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December 2, 2010

  
\_\_\_\_\_  
Nancy A. Hazelwood

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### STATUTES

S. C. Code Ann §6-29-800

S. C. Code Ann §6-29-840

## STATEMENT OF FACTS

Margie Kay Black (Black) owns property adjoining property of the Respondent Bill Reiley and Reitech (hereinafter Reitech). Reitech asked the Lexington County Zoning Board of Appeals to grant a variance for a reduction buffer from 125 feet to 31 feet and a reduction setback from 250 feet to 31 feet and a reduction of total screening from 300 feet to 31 feet. The subject property has been used for years as a fabrication facility. Reitech made recent additions to the facility by the addition of a paint shed and sand blasting shed to the facility which caused the property owner to seek a variance in order to be in compliance with the county zoning ordinance in regards to the buffer zone setbacks and screening. The fabrication facility was purchased by the Appellant on March 13, 2007. The fabrication facility was in operation before the enactment of zoning laws. The need for the variances was discovered after complaints of noise from adjoining property owners. Upon inspecting subject property, the Lexington County Zoning Office determined that variances would be required in order for the newly created paint shed and sand blasting shed to be properly permitted.

The parties that are directly affected by the outcome of this case are the Appellant Black and the Respondent Reitech, but since the Lexington County Board of Zoning Appeals was the initial deciding body, this brief is being filed to support the decision of the Lexington County Board of Zoning Appeals.

The Circuit Court's initial Order found that the decision of the Lexington County Board of Zoning Appeals should be affirmed and thereafter upon motion for reconsideration the Circuit Court issued a 12-page Order that gave great detail in his analysis of the case and his ultimate decision.

## SCOPE OF REVIEW

In the context of zoning, a decision of the reviewing body will not be disturbed if there is evidence in the records to support its decision. A court will refrain from substituting its judgment with that of the reviewing body, even if it disagrees with the decision. *Restaurant Row Associates v. Horry County*, 335 S.C. 209, 516 S.E. 2d 442 (1999).

A decision of the municipal zoning board will be overturned if it is arbitrary, capricious, has no reasonable relation to a lawful purpose, or if the board abused its discretion. *Restaurant Row Associates v. Horry County*, 335 S.C. 209, 516 S.E. 2d 442 (1999). The trial judge reviewed the transcript and all the evidence presented to the board and reviewed the specific findings of fact and conclusions of law found by the zoning board and determined that Reitech presents sufficient evidence to support a variance as required by S. C. Code § 6-29-800. The Zoning Board in its Findings of Fact and Conclusions of Law clearly understood the importance of the factors set forth in S. C. Code § 6-29-800, and made specific findings as to those four criteria. Pursuant to S. C. Code § 6-29-840, the trial court had to treat the findings of the Zoning Board of Appeals in the same manner as the findings of fact by a jury and the court must only determine whether a decision of the board is correct as a matter of law.

The decision of the Zoning Board must be given great weight by the circuit judge when reviewing any decision by the Zoning Board. The circuit judge reviewed the Findings of Fact and Conclusions and found that the board set forth reasoning that was logical, rational, and quite well stated. (R. 6)

## ARGUMENTS

### I. THE CIRCUIT COURT DID NOT ERR IN FAILING TO FIND THE BOARD'S DECISION AS CONTRARY TO THE LAW BECAUSE THE APPLICANT DID NOT CLAIM UNNECESSARY HARDSHIP BASED ON CONDITIONS IT CREATED ON ZONING RESTRICTIONS ENACTED BEFORE IT BOUGHT THE PROPERTY.

This issue was raised in the Motion to Alter or Amend pursuant to Rule 59 and was analyzed in detail in the Trial Court's Order denying motion for Reconsideration. (R. 7) The trial judge analyzed and contrasted the cases cited by Black in the Motion to Alter or Amend and, as hereafter cited in Black's brief to this court. The trial judge correctly distinguished *Rush v. City of Greenville*, 246 S.C., 143 S.E. 527 (1965) by the fact that in *Rush* the person seeking the variance knew that the property was zoned for residential when he purchased the property and then tried to convert residential property into commercial use. The property in the case before this court had an existing fabrication facility on the property in operation before the enactment of the zoning laws in Lexington County. (R. 7 & 8)

The Zoning Board has the unique responsibility to decide each case based on the specific facts of the case and the trial judge correctly reviewed the facts to make a determination as to whether the Zoning Board had made an error under the scope of review by the circuit court so as to warrant a reversal of the Zoning Board's decision. In the present case, the trial judge correctly stated that the landowner wanted a variance in setback lines on a piece of property barely bigger than the setback lines to make the pre-existing use of the property more tolerable for adjoining landowners. (R. 12) This was a very important factor in the decision of the Zoning Board since the noise is what brought this matter to the County's attention and the construction of the sandblasting shed would reduce the current noise. Of the overall factors considered by the Board and the trial judge, it should be noted that the fabrication facility existed prior to the adoption of the zoning ordinance, went further into the setback areas than the proposed new sandblasting

shed and the new sandblasting shed would be less of a visible intrusion and contain additional noise reduction elements. (R. 6) Therefore, although the additional facilities needed a variance in order to be in compliance with County zoning, these new facilities were less intrusive into the setback than the proposed new sandblasting facility.

The trial court went into great analysis in the Order of Reconsideration as to all the cases cited by the Appellant Black and in very much detail differentiated all three cases cited by the Appellant Black.

It would do no good to repeat the detailed analysis by the trial judge and this Respondent would rely on the detail discussion in the Order of Reconsideration in regards to the law as decided in those cases.

**II. THE CIRCUIT JUDGE DID NOT ERR BY CONCLUDING THAT THE BOARD'S DECISION IS NOT CONTRARY TO THE LAW BECAUSE A ZONING VARIANCE SHOULD NOT BE GRANTED FOR AN EXPANSION OF AN EXISTING BUSINESS.**

As discussed in the Finding of Facts and Conclusions of Law and in the trial judge's Order of Reconsideration, the Board considered many factors in making its determination to grant a variance. The expansion as referenced by the Appellant Black was not as intrusive into the setback as the existing facility. The consideration of property being utilized more profitably is not mentioned in any findings of fact by the Zoning Board or by the trial judge's Order. The facts of this particular case are once again that an existing fabrication facility existed on this subject property prior to any zoning of subject property and that the "additions" of the facility were approved because of the specific findings of fact and conclusions of law of the Zoning Board.

**III. THE CIRCUIT COURT DID NOT ERR BY CONCLUDING THAT THE BOARD'S DECISION IS NOT CONTRARY TO THE LAW BECAUSE THE APPLICATION OF THE ORDINANCE DOES NOT EFFECTIVELY PROHIBIT OR UNREASONABLE RESTRICT USE OF THE PROPERTY.**

As noted in the trial judge's Order of Reconsideration, the Zoning Board found that the property was being used as a fabrication facility prior to zoning, that the sandblasting is a normal and necessary part of the process, that allowing the variance on this small piece of property will allow the noise levels to come into compliance with the performing standards of the Zoning Ordinance. (R. 4)

Therefore, the Findings of Fact and the Conclusions of Law found that not allowing the variance would deprive the landowner of the ability of continuing operations on the property and restrict the utilization of the property as it was intended prior to the zoning of the area. The Zoning Board very clearly made its findings on this particular issue.

**IV. THE CIRCUIT COURT DID NOT ERR BY CONCLUDING THE BOARD'S DECISION IS NOT CONTRARY TO THE LAW BECAUSE THE APPLICANT'S PROPERTY DIMENSIONS ARE NOT EXCEPTIONAL OR EXTRAORDINARY AND THESE SAME CONDITIONS GENERALLY APPLY TO OTHER PROPERTY IN THE AREA.**

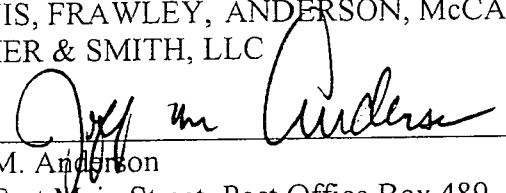
The Zoning Board found that the fabrication facility was the only such facility in the area and that the application of the setbacks to this use amounted to "intense buffering" that would not be applicable to other property in the area. Once again, the fabrication facility was in existence prior to zoning and is a very important factor in the outcome for this case.

The conclusions of the Zoning Board on this issue fully support its decision. The Board specifically found that the sandblasting facility would help reduce the noise level. Further, if the noise was not reduced, the existing facility would be restricted in its utilization of the property as it was intended prior to zoning.

## CONCLUSIONS

County zoning boards have very difficult decisions to make when applications for variances are requested. They must determine the particular facts of each case and make their decision based on those particular facts. The facts of this case are very unique in that the fabrication facility was already in existence at the time that the zoning was enacted in this area of Lexington County. The board detailed its findings of fact and conclusions of law as required by the statute and determined that, based on the particular facts of this case, the zoning variance request should be granted. The Circuit Court, upon reviewing the findings of fact and conclusions of law, the case law, and the statutes, upheld the decision of the Zoning Board in a very detailed Order of Reconsideration that could be used as the Zoning Board's brief for upholding the decision of the Zoning Board. Once the Zoning Board has made its decision by using proper statutory criteria, any reviewing court is limited in its scope of review as has been set forth herein. It is respectfully submitted that the decision of the circuit court to affirm the zoning variance should be affirmed.

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Lexington, South Carolina

December 14, 2010

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas

The Honorable William P. Keesley

Civil Action No.: 2009-CP-32-04260

Margie Kay Black .....Appellant

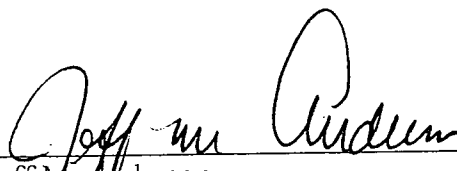
Vs.

Lexington County Board of Zoning Appeals,  
Bill Reilly and Reitech, LLC ..... Respondents

CERTIFICATE OF COUNSEL

I certify that this Final Brief of Respondent Lexington County Board of Zoning Appeals  
complies with Rule 211(b), SCACR.

December 14, 2010

  
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THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY  
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Margie Kay Black .....Appellant

Vs.

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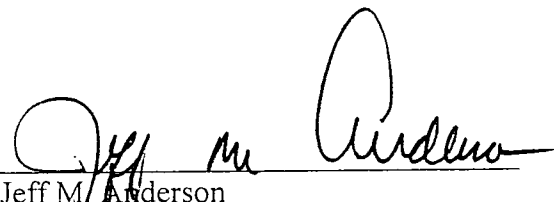
**PROOF OF SERVICE**

I certify that I have served the Respondent Lexington County Board of Zoning Appeals' Final Brief on Margie Kay Black and Bill Reilly and Reitech, LLC, by depositing a copy of it in the United States Mail postage prepaid on December 15, 2010, addressed to their attorneys of record as follows:

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THE STATE OF SOUTH CAROLINA  
In The Court Of Appeals

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APPEAL FROM LEXINGTON COUNTY  
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The Honorable William P. Keesley

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Margie Kay Black.....Appellant

vs.

Lexington Co. Board of Zoning Appeals,  
Bill Reilly and Reitech, LLC .....Respondents

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**APPELLANT'S FINAL CONSOLIDATED REPLY BRIEF**

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The Respondent, Margie K. Black ("Black") replying to the briefs of Lexington County Board of Zoning Appeals ("Zoning Board"), Billy Reilly("Reilly") and Reitech, LLC ("Retech") ("Reilly and Reitech collectively, ("Applicant"), replies as follows:

### **ARGUMENT**

#### **1. A zoning variance should not be used to preserve a non-conforming use.**

One of the principal arguments of both the Zoning Board and the Applicant is that the variance is necessary so that the Applicant can continue to operate the business on his property. (See Applicant Brief, pg. 10) Indeed, the Applicant argues that without the variance, he would invite further prosecution for violating maximum decibel levels allowed by the zoning ordinance and possible revocation of is zoning permit. *Id.*

However, a non-conforming use by definition is operating contrary to the planned zoning for the area. Indeed, the overall policy as reflected in limitations on repairs and polices on abandonment is to reduce or eliminate non-conforming uses when possible. The Board found that the Applicant's property contained the only steel fabrication business in the entire general area (R. 18). So, if the Applicant cannot continue to operate the business in conformity with the code requirements including decibel levels for noise, the non-conforming use should no longer be allowed and not be preserved by the Zoning Board granting a variance.

#### **2. The Applicant cannot demonstrate an "unnecessary hardship".**

Black reasserts the arguments made in her initial brief, including that the Applicant purchased the property several years after the current zoning was adopted so any alleged hardship was self-inflicted. Moreover, in response to Applicant's allegations that

"There is no expansion" (Applicant's Brief, pg. 12), Black cites the following from the Zoning Variance Application:

Reasons for Request: The layout of the property will allow me to only expand to the rear and the required buffers will physically not allow any new expansions...

(R. 20)(emphasis added.)

Regardless of the Applicant's motive, he was seeking an expansion of his business.

**3. The extraordinary and exceptional conditions required for variance should pertain to and be unique to the property and not its nonconforming use.**

The Applicant argues that the exceptional condition which affects its property and which is unique to his property is that it's being used as a steel fabrication plant. Black believes that the "exceptional conditions" which do not generally apply to other property in the area (See S.C. Code Ann. §6-29-800(2)(a) & (b) ) relates to the conditions of property itself and not its nonconforming use. If that were the proper standard, then every person with a nonconforming use could claim that exceptional and unique conditions affect their property so they are entitled to variances to avoid zoning requirements.

*Groves vs. Board of Adjustment City of Charleston*, 226 S.C. 459, 85 S.E.2d 708 (1955) provides an example of how this requirement is analyzed. In *Groves*, the applicant applied for a variance to construct a restaurant in an area zoned for a residential use. The Zoning Board granted the variance, and neighboring owners appealed. The court noted,

Another consideration of prime importance is the fact that it is not shown that this particular piece of property suffers a singular disadvantage through the operation of the zoning regulation involved. There is nothing to

indicate that this site is in anywise unique or different from all other waterfront property in this particular residential zone. The Special Referee and the learned Circuit Judge each found and held that there was a large area of land owned by the State Ports Authority located within this 'B' residential district similar to the lot in question.

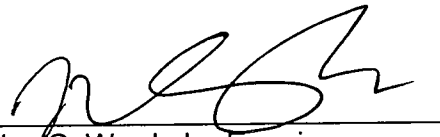
it affirmatively appears that any disadvantage to the same is suffered generally by the entire area of which this is but a small part. Quoting again from 62 C.J.S., Municipal Corporations, § 227(11), p. 536, 'It is necessary that the property suffer some unusual hardship from application of the regulation different from, and greater than, that suffered by other property in the district,

Groves, 85 S.E.2d at 711. In this case, as noted in Black's initial brief (an on appeal to the circuit court), there is nothing unique about this property and there are other lots at similar disadvantage throughout the area. The fact that the Applicant used the property for steel fabrication does not make the property unique or exceptional.

### CONCLUSION

For the reasons set forth herein and in Appellant's Brief, this court should reverse the circuit judge and hold that the variance granted by the zoning board was contrary to law.

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December 3, 2010.