THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No. 2012-CP-26-8652

Appellate Case No. 2013-CP-26-08652

TriStar Investors, Inc., Minerva Realty, LLC, and Angeline Johnson, ... Appellants,

v.

The Horry County Council and American Towers, LLC, ... Respondents.

Initial Reply Brief of Appellants

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Introduction

Appellants TriStar Investors, Inc. ("TriStar"), Minerva Realty, LLC ("Minerva"), and Angeline Johnson (collectively "Appellants") submit this Reply in support of their appeal of the Horry County Council's decision ("Resolution R-73-12"), jointly addressing the Respondents' Briefs filed by Respondent American Towers, LLC ("American Tower") and Respondent Horry County Council (the "Council") (collectively "Respondents").

This appeal is about the right to rely on the mandatory terms of the law as written. American Tower attempts to dodge competition, by arguing that the plain language of a mandatory ordinance does not apply to it.

TriStar paid Ms. Johnson for a property right that would, at the termination of American Tower's lease, allow TriStar to control cell tower activities on Ms. Johnson's property.[1] TriStar paid Ms. Johnson $100,000 for this right, relying on the mandatory language of Section 1605 of the Horry County Zoning Ordinances, which, if properly applied, would prevent American Tower from moving its existing tower off Ms. Johnson's land before its lease expired (the "American Tower Lease").[2] But in order to

[1] This property right is distinct from the right to control the cell tower itself. Appellants do not dispute that this tower is the property of American Tower. Once American Tower's lease of Ms. Johnson's property expires, TriStar's perpetual easement will allow it either to continue acting as landlord to American Tower (if the parties agree to an extension of the lease), to negotiate with American Tower to lease or purchase its tower to be operated by TriStar, or to build its own tower on Ms. Johnson's property. It is the loss of this property right that is the foundation of this appeal – not the loss of American Tower's tower.

[2] The American Tower Lease was originally scheduled to expire in 2015, but American Tower represented to the Council that the Lease was scheduled to expire in 2013. {American Tower's Application dated August 31, 2012, p. 1; American Tower's Mem. in Opp'n to Pls.' Appl. for TRO and Prelim. Inj., p. 3; R. ___}. The Council then represented to this Court that the Lease was set to expire in 2013. {The Council's Initial Resp. Br. at p. 21}. American Tower claims that it executed an amendment with Ms. Johnson that purportedly extended the Lease through 2030. {American Tower's Mem. in Opp'n to Pls.' Appl. for TRO and Prelim. Inj., p. 4; R. ___}. The parties have disputed the

avoid having to bargain with its competitor TriStar, and to avoid having to pay a greater share to the local landowner, American Tower convinced the Council to ignore the mandatory requirements of Section 1605 and invent something that does not exist and is not authorized under the statutes—a new fiction known as a "relocation permit." When a council ignores the specific requirements of an ordinance and employs a novel construction to expand its scope, such action constitutes an abuse of discretion. See, e.g., Tilley v. Pacesetter Corp., 355 S.C. 361, 373, 585 S.E.2d 292, 298 (2003); Peterson Outdoor Adver. v. City of Myrtle Beach, 327 S.C. 230, 235-37, 489 S.E.2d 630, 633-34 (1997).

Respondents' waiver arguments fail under a plain review of the record, which establishes that these same issues have been litigated from day one of these proceedings. Appellants have been deprived of their right to rely on proper enforcement and application of the law, and Ms. Johnson has been deprived of her right to rely on income from having a tower on her property.

Argument

This Court's standard of review is the same standard that applied to the circuit court. "In reviewing questions presented by the appeal, the court shall determine only whether the decision of the [Council] is correct as a matter of law . . . ." Wyndham Enterprises, LLC v. City of North Augusta, 401 S.C. 144, 147, 735 S.E.2d 659, 661 (Ct. App. 2012). The circuit court's ruling is not entitled to any deference. Rather, this Court should directly determine whether the Council's approval of Resolution R-

validity of this amendment, but under no circumstance was the Lease scheduled to expire in 2013. As a result, the Council's argument that "American Towers' ground lease was expiring in 2013 . . ., thereby making it impossible to continue the operation of the tower" carries no weight. { The Council's Initial Resp. Br. at p. 21}.

73-12 was unauthorized by the Horry County Ordinances. See id.; Charleston Cnty. Parks & Recreation Comm'n v. Somers, 319 S.C. 65, 67, 459 S.E.2d 841, 843 (1995).

"Although great deference is accorded the decisions of those charged with interpreting and applying local zoning ordinances, 'a broader and more independent review is permitted when the issue concerns the construction of an ordinance.'" Eagle Container Co., LLC v. Cnty. of Newberry, 379 S.C. 564, 568, 666 S.E.2d 892, 894 (2008) (quoting Somers, 319 S.C. at 67, 459 S.E.2d at 843). The construction of an ordinance is at issue here. The Council approved American Tower's application on a basis that does not exist in the ordinances and after American Tower expressly declined to make the showing required under the applicable sections of the code.

The Horry County Ordinances required the Council to find that either American Tower met the requirements of Section 1605, that American Tower qualified for an exclusion to Section 1605, or that American Tower provided the mandatory evidence listed in Section 13-73(c) such that the Council was authorized to grant a waiver of the requirements in Section 1605. American Tower did not provide the evidence that any of these provisions require.

As a result, the Council did not make **any** of these required findings. Accordingly, the Council acted in an arbitrary and capricious manner in issuing Resolution R-73-12, and this Court should reverse. See, e.g., Peterson Outdoor, 327 S.C. at 235-37, 489 S.E.2d at 633-34 (declaring the decision of a zoning board to be arbitrary and an abuse of discretion because it failed to apply the specific criteria of the ordinance).

I. Section 1605 applies to American Tower's application, and American Tower failed to meet is burden of establishing the requirements of Section 1605.

Respondents do not even suggest to this Court that American Tower met the standards set forth in Section 1605 of the Horry County Zoning Ordinance, contending instead that Section 1605 does not apply at all. {The Council's Initial Resp. Br. at p. 14 ("Section 13-73(b) and (c) contain provisions relating to waiver of co-location requirements of § 1605 of the Horry County Zoning Ordinance. Planning and Zoning staff concluded that the co-location provisions are inapplicable to TriStar's application . . . .")}; {American Tower's Initial Resp. Br. at p. 16 (claiming that "[t]he co-location requirements of § 1605(a) only apply to adding a tower, not moving a tower.")}. Respondents' positions lack merit. The standards established in Sections 1600 – 1614 of the Horry County Zoning Ordinance apply to all towers: "The standards established herein shall apply to **any freestanding telecommunication tower** and associated equipment . . ." HORRY COUNTY, S.C., ZONING ORDINANCE art. XVI, § 1601 (emphasis added). It is undisputed that American Tower's newly built tower is a freestanding telecommunication tower.

Section 1605 states, "**[N]o** new freestanding telecommunication tower shall be permitted unless the applicant demonstrates that no existing telecommunication facility can accommodate the applicant's proposed use . . . ." HORRY COUNTY, S.C., ZONING ORDINANCE art. XVI, § 1605 (emphasis added). American Tower provided no such evidence.

The Council's application requested proof that would enable it to determine whether no existing tower could accommodate American Tower's proposed use, as

Section 1605 requires. In response to the application's mandate that applicants provide "[d]etailed information as to why the existing towers within two and one-half (2 ½) miles of the proposed tower . . . cannot reasonably be utilized for the proposed antenna installation," American Tower provided no evidence, stating instead:

> **This section is not applicable**, as we are proposing to relocate an existing tower with existing leases. The only towers shown by ASR [Antenna Structure Registration] are the existing American Towers, LLC tower, which will be removed, and a tower owned by SBA, which is over a mile from the Huggins property and will not accommodate the needs of T-Mobile, Horry Telephone, and Verizon wireless for their relocation.

{American Tower's Application dated August 31, 2012, p. 8; R. ___ (emphasis added). This is not the "detailed information" that Section 1605 requires; in fact, it was a refusal to provide **any** responsive information.

American Tower does not argue how it provided the required information to this Court, nor could it. In fact, even on appeal, American Tower does not suggest that it provided this evidence. Neither does American Tower direct the Court to where such information exists in the record. That is because the former tower on Ms. Johnson's property is perfectly able to accommodate the proposed use—**as it has for the past 15 years without interruption**.

As to the **other** tower within 2.5 miles (the "SBA Tower"), American Tower does not even acknowledge its existence in its Respondent's Brief. The Council claims that it did not consider the SBA Tower because it "did not currently serve cellular antennas." {The Council's Resp. Br. at p. 8}. However, that has no bearing under the ordinance. The law requires evidence that the SBA Tower **cannot** serve antennas, not

that it is or is not currently doing so. HORRY COUNTY, S.C., ZONING ORDINANCE art. XVI, § 1605. There is no evidence, anywhere, that the SBA Tower could not reasonably be used for the proposed antenna installation.

The Council further claims, "the SBA tower was not considered by staff to violate the 2½ mile radius provision because . . . the SBA tower had previously been granted a co-location waiver from the existing American Tower site in 2003 . . . ." {The Council's Resp. Br. at p. 8}. There is nothing in the record to establish the purported 2003 waiver of the SBA Tower. The Council cites the Affidavit of David Schwerd (the "Schwerd Affidavit") to support this idea. {Id.}. The Schwerd Affidavit makes this same assertion, citing to its Attachment C for support. {Schwerd Affidavit, ¶ 7; R. ___}. Attachment C to the Schwerd Affidavit is the County Council Decision Memorandum dated October 5, 2012, which makes **no mention** of a previous waiver for the SBA Tower. {Schwerd Affidavit, Ex. C; R. ___}. Regardless, the ordinances do not authorize the Council to ignore an existing freestanding telecommunication tower simply because the Council (or its predecessor) purportedly granted a waiver of the co-location requirements for that tower's surrounding area ten years earlier. *See* HORRY COUNTY, SOUTH CAROLINA, CODE OF ORDINANCES, Appendix B, Article XVI, Section 1605; HORRY COUNTY, S.C., CODE OF ORDINANCES ch. 13, art. VII, §§ 13-73(b), (c).

Thus, these are two separate, independent reasons American Tower utterly failed to make the required showing. As a result of American Tower's failure to comply with Section 1605, the Council's approval of its application was unauthorized unless American Tower established an exclusion to Section 1605 or provided evidence

that authorized the Council to grant a waiver of Section 1605. As shown in Section II, infra, American Tower failed to do so.

II. American Tower did not meet an exclusion to Section 1605 or establish the criteria required to obtain a waiver of Section 1605.

Section 1605 lists several exclusions that are exempt from the ordinance. None of these enumerated exclusions apply to the facts here (nor has American Tower raised them). Sections 13-73(b)(1), 13-73(b)(2), and 13-73(b)(3) list criteria that allow the Council to waive the requirements of Section 1605, which American Tower also does not argue. *See* HORRY COUNTY, S.C., CODE OF ORDINANCES ch. 13, art. VII, §§ 13-73(a), (b). Section 13-73(c), discussed below, lists the only additional criteria that allow the Council to grant a waiver of Section 1605.

a. Respondents' arguments fail because sections 13-73(a) and 1607 are not exclusions to Section 1605.

Respondents try to justify the permit by suggesting that American Tower satisfied the terms of Section 13-73(a). Section 13-73(a) merely lists factors that the Council is required to consider before issuing a permit for a telecommunication tower. Section 13-73(a) does not set forth an exclusion to the limitations on cell tower construction mandated by Section 1605. Nor do the factors in Section 13-73(a) give the Council authority to grant a waiver of Section 1605. Under the plain language of the Code, Section 1605 and Section 13-73(a) are **conjunctive** requirements not **disjunctive** requirements. *See* HORRY COUNTY, S.C., ZONING ORDINANCE art. XVI, § 1605 ("No new freestanding telecommunication tower shall be permitted unless . . ."); HORRY COUNTY, S.C., CODE OF ORDINANCES ch. 13, art. VII, § 13-73(a) ("County Council

shall consider the following in determining whether the request should be approved or disapproved.").

The Council further claims that American Tower met the requirements of Section 1607 which justified the issuance of the permit. This argument lacks merit. Section 1607(d) requires the applicant to provide a map showing "the locations of . . . any existing communications towers within two and one-half (2.5) miles of the proposed location . . . ." See HORRY COUNTY, S.C., ZONING ORDINANCE art. XVI, § 1607. American Tower failed to provide the required map. {American Tower's Application dated August 31, 2012; R. ___}. Thus, Section 1607 cannot justify the Council's action in this matter. Even if American Tower had provided the information that Section 1607 requires, Section 1607—similar to Section 13-73(a)—merely lists information that American Tower must submit. Section 1607 does not set forth an exclusion to the limitations on cell tower construction set forth in Section 1605.

Thus, even if the Council properly considered each factor listed in Section 13-73(a), and even if American Tower had submitted all the information required by Section 1607 (it did not), the Council was not authorized to approve American Tower's application on that basis. Rather, the Council was required to separately find that either: (a) American Tower met the requirements of Section 1605 (which it did not), (b) that American Tower qualified for an exclusion to Section 1605 (which it did not), or (c) that American Tower provided the mandatory evidence listed in Section 13-73(c) such that the Council was authorized to grant a waiver of the requirements in Section 1605 (which it did not). Accordingly, Respondents' arguments regarding Section 13-73(a) and Section 1607 fail because neither Section 13-73(a) nor Section 1607, alone, is

sufficient to authorize the Council's approval of its application. Respondents still were required to comply with the mandatory requirements of Section 1605.

b. Relocation is not an exclusion to Section 1605 or grounds for a waiver of Section 1605 and cannot be used to allow issuance of the permit.

American Tower's classification of its new tower as a "relocation" does not have any bearing on the proper application of the ordinance. Similarly, Respondents' arguments that the new tower is in an allegedly superior location has no effect on the ordinance's mandatory language. The ordinances list numerous exclusions to Section 1605 and grounds for a waiver of Section 1605. See HORRY COUNTY, S.C., ZONING ORDINANCE art. XVI, § 1605; HORRY COUNTY, S.C., CODE OF ORDINANCES ch. 13, art. VII, §§ 13-73(a), (b), (c). Notably, the ordinances never identify a tower **relocation**. American Tower appears to argue that a relocation is an implied exclusion to Section 1605. Such an interpretation does not comport with the rules of statutory interpretation.

The same rules governing statutory interpretation that apply to acts of the legislature are applicable to county ordinances. Eagle Container Co., LLC v. Cnty. of Newberry, 379 S.C. 564, 666 S.E.2d 892 (2008) (applying rules of statutory construction to determine the meaning of an ordinance). And when the language of a statute or ordinance is clear, then councils, like courts, may not depart from that plain meaning:

> When the language of a statute is plain, unambiguous, and conveys a clear and definite meaning, the application of standard rules of statutory interpretation is unwarranted. The statutory terms, therefore, must be applied according to their literal meaning. In such circumstances, this Court

> simply lacks the authority to look for or impose another meaning and **may not resort to subtle or forced construction in an attempt to limit or expand a statute's scope**.

Tilley v. Pacesetter Corp., 355 S.C. 361, 373, 585 S.E.2d 292, 298 (2003) (internal quotations and citations omitted) (emphasis added); *see also* Lukich v. Lukich, 379 S.C. 589, 666 S.E.2d 906 (2008) (holding that none of the express statutory exceptions applied and therefore enforcing the statute's plain language).

The petitioner in Lukich sought the application of a statutory exception. The statute expressly provided three exceptions, none of which included the petitioner's circumstances. The court determined that none of the three statutory exceptions applied and held that the petitioner was therefore not exempt from the statute. Lukich, 379 S.C. at 592, 666 S.E.2d at 907. The court found that "[a]ny other construction of [the statute] would lead to uncertainty and chaos." Id.. at 593, 666 S.E.2d at 907.

Here, the ordinances identify exclusions to the prohibition of new towers in Section 1605 and list grounds for a waiver of the prohibition in Section 13-73(b) and (c). None of these criteria include a tower relocation exclusion or exception. Thus, the Council lacked authority to create this implied exclusion and limit the scope of Section 1605. See Tilley, 355 S.C. at 373, 585 S.E.2d at 298.

American Tower's new tower falls within the ambit of Section 1605 regardless of whether American Tower or the Council characterizes it as a "relocation."[3] Therefore, American Tower was not excused from making the required showing under Section 1605. American Tower failed to do so. In fact, American Tower refused to

[3] The Decision Memorandum approving the application does not say that it is a "relocation permit." It simply says the requirements of Section 13-73 are met. {Horry County Council Decision Memorandum; R. ___}.

meet the mandatory requirements of Section 1605. Accordingly, the Court should hold that the Council abused its discretion by applying an unauthorized exclusion to the ordinance.[4]

c. American Tower did not meet the requirements set forth in Section 13-73(c) for a waiver of Section 1605.

The Council's decision memorandum states that council staff recommended approving the tower "based on the applicant meeting the required criteria set forth in . . . Section 13-73." The Council's decision did not state which subsection of Section 13-73 purportedly authorized the permit. Respondents now argue that this general statement in the decision memorandum included a specific finding that American Tower met the criteria in Section 13-73(c).[5] Yet, Respondents do not and cannot point to anywhere in the record that supports such a finding. That is because American Tower refused to provide any evidence on the points that Section 13-73(c) requires.

To permit the Council to grant a waiver of Section 1605, Section 13-73(c) **required** American Tower to submit specific evidence to the Council. Section 13-73(c) provides:

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[4] American Tower tells this Court that it has incurred "significant costs" to build its new tower. {American Tower's Resp. Br. at p. 11}. This argument lacks merit and contradicts American Tower's prior position to this Court. When TriStar requested a stay of construction pending appeal via its petition for supersedeas, American Tower told the Court: "American Towers can deconstruct a tower within 5-15 days and American Towers accepts and assumes the risk of constructing and potentially deconstructing this relocated tower." {American Towers, LLC's Verified Return to Appellants' Pet. for Supersedeas Relief and Request for Immediate Hearing at p. 3; R. ___}. American Tower was fully aware of the risks imposed by acting on the baseless approval of its application. Its decision to proceed despite these risks does not excuse its failure to provide the requisite evidence to obtain that approval in the first place.

[5] In fact, the Council tries to **retroactively** implement a waiver of the requirements in Section 1605 based on Section 13-73(c), which the ordinance does not permit. {The Council Resp. Br. at p. 21}.

> The following information shall be provided justifying that co-location is not practical or warranted.
>
> (1) A list of all existing telecommunication towers within two and one-half (2½) miles of the proposed tower (or within one and one-half (1½) miles for a monopole).
> (2) Maps showing broadcast coverage from the proposed site together with the coverage from applicant's (or the wireless licensee's) existing sites that would connect with and are adjacent to the proposed site.
> (3) Detailed information as to why the existing towers within two and one-half (2½) miles of the proposed tower (or within one and one-half (1½) miles for a monopole) cannot reasonably be utilized for the proposed antenna installation.
> (4) Applicant shall provide any other relevant information related to the proposed site as may be requested; however, applicant shall not be required to provide complete coverage maps of its wireless system or other proprietary information.

HORRY COUNTY, S.C., CODE OF ORDINANCES ch. 13, art. VII, § 13-73(c). American Tower wholly failed to meet these requirements. Therefore, American Tower's argument that it met the criteria in Section 13-73(c) is manifestly without merit.

Section 13-73(c) required American Tower to provide, among other things, the information required in subsection (2). In response, American Tower submitted the following:

> (2) **Maps showing broadcast coverage from the proposed site together with the coverage from applicant's (or the wireless licensee's) existing sites that would connect with and are adjacent to the proposed site.**
>
> **The coverage by T-Mobile, Horry Telephone, and Verizon Wireless will remain the same, as we are proposing to relocate an existing tower.**

{American Tower's Application dated August 31, 2012; R. ___}. No maps were attached. Thus, there was a total failure of proof. American Tower could not have complied with Section 13-73(c) as they now allege.

Section 13-73(c) also required American Tower to provide the information listed in subsection (3). American Tower responded as follows:

> (3) Detailed information as to why the existing towers within two and one-half (2½) miles of the proposed tower (or within one and one-half (1½) miles for a monopole) cannot reasonably be utilized for the proposed antenna installation.
>
> **This section is not applicable, as we are proposing to relocate an existing tower with existing leases. The only towers shown by ASR are the existing American Towers, LLC tower, which will be removed, and a tower owned by SBA, which is over a mile from the Huggins property and will not accommodate the needs of T-Mobile, Horry Telephone, and Verizon Wireless for their relocation.**

While American Tower claims in its brief[6] that there is an "abundance of evidence" that it provided to support a waiver under subsection 3 of Section 13-73(c) , American Tower's only citations are to its application (as shown in the screenshots set forth above) and to the transcript of the hearing before the Council. American Tower did not present **any evidence** at the hearing and instead relied solely on its application. {American Tower's Application dated August 31, 2012; R. ___; Transcript dated October 16, 2012; R. ___}.

In short, American Tower failed and refused to provide the required evidence to establish that the other two towers within a 2.5 mile radius could not accommodate its proposed use whether through broadcast maps or any other "detailed information." As a result, the Council had no basis or authority to grant a waiver under Section 13-73(c), and any such finding would have been wholly unauthorized by the ordinances. Therefore, the grant of the permit constituted an abuse of discretion.

[6] See American Tower's Resp. Br. at p. 17.

Respondents further argue that because TriStar failed to provide evidence to the Council that American Tower did not meet Section 13-73(c), the Council did not err in finding the elements were satisfied.[7] This argument is manifestly without merit.

Appellants had no burden of proof before the Council. Instead, the ordinances impose the evidentiary burden squarely on American Tower, as the applicant, to meet the requirements imposed by the ordinances and obtain approval. See Section 1605 ("No new freestanding telecommunication tower **shall** be permitted unless **the applicant demonstrates**. . ."") (emphasis added); Section 13-73(c) ("The following information **shall** be provided justifying the co-location is not practical or warranted.") (emphasis added). The ordinances authorized the Council to approve American Tower's application only if **American Tower provided** the requisite evidence.[8]

It is this total lack of evidence provided by American Tower to the Council that forms the basis of this appeal. Because American Tower did not provide the evidence that Section 13-73(c) requires, the Council had no basis to find that American Tower met Section 13-73(c)'s requirements. Therefore, the Council had no authority to waive the restrictions on new towers mandated by Section 1605. The issuance of the permit constituted an abuse of discretion. This Court should reverse.

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[7] American Tower argues that "each of the criteria at issue here were expressly identified by American Tower and addressed. The Horry County Council made a finding that these elements were satisfied, and Appellants presented no evidence to the contrary." {American Tower's Resp. Br. at 14; the Council's Rep. Br. at p. 15 ("Appellants provided no evidence to the contrary.")}.

[8] This argument also fails because the Council did not find that the requirements of Section 13-73(c) were satisfied because waiver of Section 1605's requirements were inapplicable to American Tower's application. {The Council's Resp. Br. at p. 14 ("Section 13-73(b) and (c) contain provisions relating to waiver of co-location requirements of § 1605 of the Horry County Zoning Ordinance. Planning and Zoning staff concluded that the co-location provisions are inapplicable to TriStar's application . . . ."); American Tower's Resp. Br. at p. 16 ("The co-location requirements of § 1605(a) only apply to adding a tower, not moving a tower.").

III. Appellants properly preserved its arguments for review.

American Tower claims that Appellants have not previously argued that the Council was not authorized to issue the permit as a "relocation" because the ordinances do not create any exclusion for a "relocation."[9] This argument borders on frivolous. Appellants have, in fact, repeatedly argued this position from the inception of its challenge to the issuance of the permit. For example, Appellants argued:

- "There's no exception to the language of this ordinance to move a tower to another location . . . . It simply is not in the ordinance. The co-location restriction says that if you can be accommodated within two and a half miles, you have to use the existing tower and that's what we have here." {Transcript dated October 16, 2012, at p. 13, lines 12-19; R. ___}.

- "They want to call it a relocation and it may be in practical terms a relocation but in the law of Horry County, in the ordinance that is set forth it is a co-location. It has to be dealt with as a colocation." {Transcript dated April 26, 2013, at p. 37, lines 6-10; R. ___}.

- "[T]he ordinances deal with this and nowhere in there will you find the term relocation." {Id. at p. 37, lines 25-38:2; R. ___}.

- "[T]here are certain rules that you've got to comply with as prescribed by the county council to put up a new tower and if you will look at the resolution, it doesn't say a word about this is a relocation of an existing tower, it says this is a permit to build a new tower because that is the way it has to be done under the ordinances that are in place there in the county." {Id. at p. 41, lines 18-25; R. ___}.

- "They've got to deal with a co-location because that is all the ordinance allows." {Id. at p. 44, lines 19-20; R. ___}.

The Council's lack of authority to issue a "relocation" permit is not a new argument. It is the same position that Appellants have consistently taken throughout their challenge to Resolution R-73-12.

[9] The Council also raises this argument by incorporating American Tower's Brief. To the extent that the Council raises any of the same arguments as American Tower, Appellants are responding to the Council's arguments as well.

IV. Appellants have standing to challenge Resolution R-73-12.

In its brief, American Tower acknowledges that the circuit court did not rule on its standing argument but asks this Court to affirm on this ground. While, it is within the discretion[10] of this Court to address any additional sustaining grounds, our appellate courts have repeatedly demonstrated reluctance to exercise this discretion and frequently decline to do so. See, e.g., Alexander v. Houston, 403 S.C. 615, 621, n.4, 744 S.E.2d 517, 521 n.4 (2013) (reversing trial court and refusing to consider additional sustaining ground that was raised but not ruled on in the circuit court); Vaught v. A.O. Hardee & Sons, Inc., 366 S.C. 475, 623 S.E.2d 373 (2005) (holding that trial court erred and declining to address respondent's additional sustaining ground); Simmons v. Berkeley Elec. Co-op. Inc., 404 S.C. 172, 744 S.E.2d 580 (Ct. App. 2013) (declining to address possible additional sustaining ground based on exercise of court's discretion). Thus, this Court should decline to address this argument.

Regardless, American Tower's claim that Appellants lack standing to appeal the Council's ruling is a red herring and lacks merit. The Council approved American Tower's application to construct a new cell tower and mandated that the previously existing tower on Ms. Johnson's property be taken down. Section 13-75 of the ordinances provides:

> Any person having a substantial interest in the issuance, denial or revocation of a telecommunication tower permit may appeal the decision of a county council to the Circuit Court in and for the County of Horry by filing with the clerk of court a petition in writing setting forth plainly, fully and distinctly wherein such decision is contrary to

[10] I'On, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000).

> the law. Such appeal shall be filed within thirty (30) days of the county council meeting where the decision is rendered.

HORRY COUNTY, SOUTH CAROLINA, CODE OF ORDINANCES, Chapter 13, Article VII, Section 13-75. As the owner and easement holder of the property underlying the previous tower site, located across the street from American Tower's new tower site, Appellants have a substantial interest in the Council's wrongful issuance of American Tower's tower permit. *See* HORRY COUNTY, SOUTH CAROLINA, CODE OF ORDINANCES, Appendix B, Article XVI, Section 1605(a)(2) (prohibiting construction of new cell towers within 2.5 miles of an existing tower). TriStar will lose the value of the $100,000 property right acquired from Ms. Johnson. Ms. Johnson will suffer the loss of the substantial economic benefit of having a cell tower on her property.

Moreover, Appellants have a substantial interest in the Council's mandate that American Tower tear down the tower on the previous tower site, which is effectively a revocation of the tower permit that allowed a tower to sit on Ms. Johnson's property, by placing a competing tower across the street. TriStar bargained for and obtained the right to control telecommunication operations from Ms. Johnson's property. TriStar lost the right to either (a) renegotiate the Lease, or (b) operate its own tower from Ms. Johnson's property upon expiration of the Lease because American Tower evaded the law's requirements. Appellants have a vested property interest at stake sufficient to confer standing under the ordinance.

Appellants have a clear and substantial interest in the property rights they negotiated and for which they paid substantial sums in reliance on the rule of law set forth in the county's ordinances. By securing a superior right to act as landlord to

American Tower, sharing a greater percentage of the proceeds with the local landowner in the process, Appellants secured a substantial interest in the land, its use, and the proper enforcement of the law as it relates to that property and its leases. Appellants further have a due process right to rely on the ordinance's mandate that American Tower make its case under Section 1605 before destroying a fully-functional tower that has satisfied the needs of the community under Section 1605 for over a decade before American Tower suddenly experienced its change of heart.[11]

American Tower cites ATC South, Inc. v. Charleston Cnty., 380 S.C. 191, 669 S.E.2d 337 (2008), in support of its argument that Appellants lack standing to challenge the Council's ruling. The ATC South court held the plaintiff's allegation that the rezoning of a competitor's property would cause an increase in competition did not establish standing to challenge the rezoning. Id. (stating "sole interest" of objecting to zoning board's decision was to prevent competition, the potential injury was "only an increase in business competition", and plaintiff's challenge of rezoning was "solely to protect its own economic interests").

Here, Appellants are not merely competitors of American Tower. Rather, Appellants have a **direct property interest** in the tower site, as the owner and easement holder of the property. Further, Ms. Johnson is not American Tower's competitor. She is a landowner seeking to preserve her right to obtain income from having a tower on her property. And, it is American Tower's position that decreases competition. By securing an easement, TriStar can use its market power to afford local landowners a

[11] Respectfully, this Court's supersedeas order mistakes the injury that Appellants claim. Appellants have never claimed an interest in the actual tower on Ms. Johnson's property.

greater share of revenues than American Tower did. By subverting that arrangement, American Tower maintains its monopolistic ability to pay local landowners far less.

Appellants filed their appeal within the time permitted by the ordinance that confers standing to challenge the Council's ruling. The Council approved Resolution R-73-12 at the Horry County Council meeting on October 16, 2012. Appellants filed their Original Complaint and Application for Temporary Restraining Order and Preliminary Injunction in the Court of Common Pleas in Horry County on November 8, 2012—within 30 days of the Council's meeting, as required by Chapter 13, Article VII, Section 13-75 of the Horry County, South Carolina, Code of Ordinances. Appellants have complied with the ordinance and have standing to bring this appeal.

Conclusion

Based on the foregoing, this Court should: (1) reverse the circuit court; (2) find the Horry County Council erred in granting the permit via approval of R-73-12; (3) order American Tower to remove the tower constructed pursuant to R-73-12 as American Tower said it would; (4) and order American Tower to reconstruct the old tower on Ms. Johnson's property, which the Council ordered to be removed pursuant to R-73-12.

{Signature Page Follows}

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Columbia, South Carolina

January 27, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No. 2012-CP-26-8652

TriStar Investors, Inc., Minerva Realty, LLC, and Angeline Johnson, ... Appellants,

v.

The Horry County Council and American Towers, LLC, ... Respondents.

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Tristar Investors, Inc., Minerva Realty, LLC and Angeline Johnson, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid and hand delivery, to the following address(es):

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Initial Reply Brief of Appellants

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January 27, 2014

Hand Delivered
The Honorable Jenny Abbott Kitchings
Clerk of Court
SC Court of Appeals
1015 Sumter Street - 5th Floor
Columbia, SC 29201

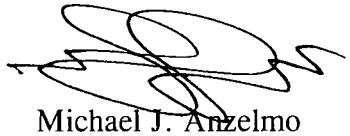
RE: TriStar Investors, Inc., Minerva Realty, LLC, and Angeline Johnson v. The Horry County Council, and American Tower Corporation
Civil Action No. 2012-CP-26-08652
Our File No. 39776/01501

Dear Ms. Kitching:

Enclosed please find an original and one copy of the Initial Reply Brief of Appellants in the above-referenced matter. Please file the original and return a clocked-in copy to me via our courier. Should you have any questions, please do not hesitate to contact me.

By copy of this letter, I am hereby serving opposing parties.

Very truly yours,



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Enclosures

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