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STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas
Honorable Larry B. Hyman, Circuit Court Judge

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SC Court of Appeals

Case No. 2012-CP-26-6987

Appellate Case No. 2013-000971

Helicopter Solutions, Inc.
d/b/a Helicopter Adventures ..... Respondent,

v.

Richard Hinde and Horry County Board of Zoning Appeals, ... Defendants,

of whom Richard Hinde is ..... Appellant.

RESPONDENT'S FINAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

1. Is the conclusion of law reached by the Zoning Board of Appeals that "a helicopter tour facility is not a sight-seeing depot and is not consistent with the uses allowed in the AC Zoning district" an interpretation of an ordinance that is subject to a broad scope of review by the Circuit Court?

2. Did the Circuit Court err in overturning the interpretation of the ordinance by the Zoning Board of Appeals and reinstating the administrative interpretation by the Zoning Administrator on the ground that the Board made an error of law in misconstruing the plain meaning of ordinance's language?

STATEMENT OF THE CASE

A. Summary of the Case

This appeal involves the construction of a zoning ordinance. The legal issue on appeal is whether a helicopter sight-seeing tour facility is a permitted use within the Amusement/Commercial district of Article VII, Section 712.1 of the Horry County Zoning Ordinance ("the Ordinance"). The Horry County Zoning Administrator made the initial administrative interpretation of the Ordinance and determined that it was a permitted use. The Horry County Board of Zoning Appeals ("the Board") interpreted the Ordinance and determined it was not a permitted use. The Circuit Court then reversed the Board in favor of the interpretation of the Zoning Administrator. This appeal followed.

The Ordinance specially allows "sight-seeing depots" within the AC zoning district. It is not disputed that Respondent operated a sight-seeing tour facility. Instead, Appellant seeks to add a new restrictive term to the Ordinance allowing only "land based sight-seeing depots." No such limitations appears in the Ordinance.

The Zoning Administrator properly interpreted the Ordinance and the Circuit Court correctly ruled that the Board made a reversible error of law by misinterpreting the plain language of the Ordinance.

B. Factual Background

Respondent Helicopter Solutions, Inc. d/b/a Helicopter Adventures ("Helicopter Adventures") owns and operates a helicopter sight-seeing tour business located off of Highway 17 Bypass near 21st Avenue North in Myrtle Beach ("the Property"). (R., pp. 289-290). The Property is across the street from Broadway at the Beach and surrounded by the NASCAR Speed Park, the former site of Phillips Seafood Buffet restaurant, Myrtle Waves, and the City of Myrtle Beach wastewater treatment plant. (R., pp. 285-290). The Property has been zoned Amusement/Commercial since at least 2000, when the developer of Broadway at the Beach, Myrtle Waves, and the NASCAR Speedpark entered into a development agreement with Horry County to develop these and other parcels of property for amusement and commercial use. (R., pp. 285-290). Appellant Richard Hinde is a resident of the nearby Plantation Pointe subdivision, having purchased his home on March 17, 2011. (R., pp. 102-103). Hinde testified before the Board that he knew the property behind his home was zoned Amusement/Commercial and read the Ordinance prior to buying the home. (R., p. 104).

Hinde also testified that, after reading the Ordinance, "I realized what could potentially be back there. **I even interpreted from that ordinance that it could be a helicopter business**." (R., p. 104) (emphasis added).

Freddie Rick, who owns Helicopter Adventures with his wife Mitzi Rick, began searching for property locations in the summer of 2010 suitable for operating a helicopter sight-seeing tour business. (R., pp. 316-319). Rick sough FAA approval and County zoning approval prior to making any financial commitments toward the proposed business. (R., pp. 316-319). Rick hired a consultant to obtain FAA approval and an engineering firm to obtain zoning approval. (R., pp. 316-319). After obtaining preliminary approval of site building plans from Horry County, Rick submitted a finalized Initial Site Plan on November 21, 2011. (R., pp. 316-319).

C. The Zoning Administrator's Determination

On November 22, 2011, Rennie Mincey, the Horry County Zoning Administrator of twenty-three (23) years, issued her determination that **"a helicopter tour facility is a permitted use in the AC Zoning district...."** (R., p. 322). On February 22, 2012, the FAA approved Rick's site for operating his business. (R., pp. 355-356). In reliance upon the foregoing approvals, the Ricks made the investments into the business, including signing several marketing and public relations contracts, commencing construction of the structure, building pads and parking lot, signing its land lease, purchasing four helicopters, leasing a fifth helicopter, and hiring and training pilots to operate the helicopters. (R., pp. 316-319).

On May 25, 2012, following various public notices and advertising, Helicopter Adventures opened for business. (R., pp. 316-319). It is undisputed that the business operates a helicopter sight-seeing tour facility upon the Property. (Return of Hine to Notice of Appeal). The business consists of a building, five landing pads, five helicopters, twenty-four (24) employees, and seven available tours for customers to purchase for the purpose of seeing various sites within Myrtle Beach. (R., pp. 316-319) (Appendix 1-14). In total, the Ricks have invested in excess of $3,000,000 into the business. (R., pp. 316-319).

D. Hinde's Appeal to the Board

On June 22, 2012, Hinde filed an appeal to the Horry County Board of Zoning Appeals challenging the Zoning Administrator's interpretation of the Ordinance from the previous November. Hinde contended the Ordinance's permitted land use of a "sight-seeing depot" could only be interpreted to include a sight-seeing tour business by way of ground transportation.

Following a hearing on the merits of Hinde's appeal, the Board entered an Order on September 10, 2012 reversing the Zoning Administrator's interpretation of the Ordinance by a 4-3 vote. (R., pp. 285-288).

What follows are the Board's **FINDINGS OF FACT**[1]:

1. The property in issue is owned by Burroughs & Chapin, Inc. (B&C) and is located between the NASCAR Speed Park and the City of Myrtle Beach Wastewater Treatment facility off of Highway 17 By-pass and 21st Avenue North, Myrtle Beach.

[1] The Board's Findings of Fact are misnumbered. The Circuit Court re-numbered the findings of fact in chronological order in its subsequent order.

2. The property is 46.17 acres and the business in issue, Helicopter Adventures, is located on approximately 5.47 acres of the parcel directly behind the NASCAR Speed Park parking lot.

3. The property is split zoned Amusement Commercial (AC) and Limited Industrial (LI). The business in issue is located within the AC portion of the property.

4. The landing pads are approximately 1350 ft. from the property line abutting residential property. The property is buffered by a large berm covered in fully grown trees.

5. A helicopter sight-seeing tour facility is not specifically referenced in any of the zoning districts, however the AC zoning district allows a variety of outdoor amusements and specifically lists sight-seeing depots.

6. On November 18, 2011, Steven Strickland, P.E., contacted Deputy Planning Director Carol Coleman via email about locating a helicopter sight-seeing tour facility on the above referenced property. Ms. Coleman advised that the zoning looked good.

7. On November 22, 2011, Zoning Administrator Rennie Mincey, wrote a letter to Mr. Strickland stating that a helicopter tour facility would be allowed in AC.

8. From November 21, 2011 through March 28, 2012, a series of site plan reviews and revisions were conducted by the Horry County Planning & Zoning, Code Enforcement, Engineering, and Stormwater Departments. A Stormwater Permit was issued on February 17, 2012, and final site plan construction approval granted on March 28, 2012.

8. On March 16, 2012, Helicopter Adventures submitted an application for a building permit and the permit was issued on April 10, 2012.

9. Since a portion of the property upon which a part of the business parking lot is located is within the city limits of the Myrtle Beach, a hearing before the City's Community Appearance Board (CAB) was required, advertised and held on May 3, 2012. The CAB granted approval.

10. A Certificate of Occupancy was issued by the Horry County Code Enforcement Department on May 25, 2012.

11. On June 22, 2012, the applicant filed this appeal requesting that the Board overturn the Zoning Administrator's decision and determine that such use is not an allowed use in the Amusement Commercial (AC) district. The request was deferred at the August 13, 2012 Board hearing.

12. ZBA members observe and question whether a helicopter tour ride can be classified as an Amusement.

What follows are the Board's **CONCLUSIONS OF LAW**:

1. Based on the evidence presented, the Board finds that this appeal was filed within a reasonable time after the application knew or should have known of the November 22, 2011 decision by the Zoning Administrator. Although the plans and permits referenced above were maintained as records of the county and available for public inspection for months before the appeal was filed, the appellant had no reason to inquire and lacked actual knowledge of them.

2. The Board overturns the decision of the Zoning Administrator finding that a helicopter tour facility is not a sight-seeing depot and is not consistent with the uses allowed in the AC zoning district. Therefore, the appeal is granted and the Zoning Administrator's decision is overturned.

E. Helicopter Adventures' Appeal to the Circuit Court

On September 10, 2012, Helicopter Adventures filed a Notice of Appeal of the Board's Order to the Horry County Circuit Court together with a Petition for a Writ of Supersedeas. (R., pp. 20-28). Helicopter Adventures subsequently filed a Verified Amended Petition for Writ of Supersedeas on September 18, 2012. (R. pp. 264-267). Following a hearing on September 19, 2012, the Circuit Court granted Helicopter Adventures' Petition for Writ of Supersedaes by Order filed September 28, 2012. This Order allowed Helicopter Adventures to remain in business during the pendency of the appeal. Following a hearing on

the merits of Helicopter Adventures' appeal on December 11, 2012, the Circuit Court reversed the Order of the Board by Order filed January 16, 2013. (R., pp. 7-16).

The Circuit Court's Order adopted the Board's Findings of Fact verbatim without contest from Helicopter Adventures, and reversed the Board's interpretation of the Ordinance. (R., pp. 7-16). In its Order, the Circuit Court determined that a "helicopter sight-seeing/tour facility" was a "sight-seeing depot" as permitted by the Ordinance. (R., pp. 7-16).

F. Hinde's and Board's Motions for Reconsideration

On January 28, 2013, Hinde and the Horry County Board of Zoning Appeals filed Motions for Reconsideration of the Circuit Court's Order. (R., pp. 269-280). Following a hearing on the Motion on February 13, 2013, the Circuit Court ordered the deletion of one sentence of one footnote from its previous Order, thereby granting the Motion in-part and denying the Motion in-part by Final Order filed April 19, 2013. (R., 19-23). Hinde's apparent concern as to whether a Final Order has been made is without merit.

G. Hinde's Appeal

On April 29, 2013, Hinde filed a Notice of Appeal of the Circuit Court's Order to this Court. (R., pp. 20-28). The Horry County Board of Zoning Appeals has not challenged the Circuit Court's ruling and has not filed a Notice of Appeal.

STANDARD OF REVIEW

On appeal, this Court must determine whether the decision of the Board is correct as a matter of law. Vulcan Materials Co. v. Greenville County Board of Zoning Appeals, 342 S.C. 480, 536 S.E.2d 892 (Ct. App. 2000). "The decision of the zoning board will not be upheld where it is based on errors of law, . . . or where there is no legal evidence to support it, or where the acts arbitrarily or unreasonably, . . . or where, in general, the board has abused its discretion." Vulcan, 488, 896, quoting Peterson Outdoor Advertising v. City of Myrtle Beach, 327 S.C. 230, 235, 489 S.E.2d 630, 633 (1997).

ARGUMENT

I. THE CIRCUIT COURT CORRECTLY DETERMINED THAT THE INTERPRETATION OF A COUNTY ORDINANCE IS AN ISSUE OF LAW SUBJECT TO A BROAD STANDARD OF REVIEW.

The Circuit Court correctly ruled that the Board misinterpreted the Ordinance and, in doing so, made an error of law. In reviewing the questions presented by an appeal from a Board of Zoning Appeals, "the court must determine only whether the decision of the board is correct as a matter of law." S.C. Code Ann. 6-29-840(A) (Code of Laws 1976, as amended). South Carolina courts applying this standard of review have overturned Boards of Zoning Appeals when the Board has misinterpreted a local zoning ordinance. See Charleston County Parks and Recreation Commission v. Somers, 319 S.C. 153, 459 S.E.2d 841 (1995) (reversing the Board of Zoning Appeals on the ground the Board had committed an error of law by misinterpreting the definition of "municipal use" as used in the ordinance) and Stanton v. Town of Pawleys Island, 317 S.C. 498, 455 S.E.2d 171 (1995) (reversing the

Board of Zoning Appeals on the ground the Board had committed an error of law by misinterpreting the definition of "structure" as used in the ordinance).

"Issues involving the construction of an ordinance are reviewed as a matter of law under a broader standard of review than is applied in reviewing issues of fact." Mikell v. County of Charleston, 386 SC 153, 158, 687 SE2d 326, 329 (2009); See also Somers, infra. (holding that the interpretation of a zoning ordinance is an issue of statutory construction that is reviewed as an issue of law and not of fact). "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." Id. (internal quotations omitted).

In this case, the Circuit Court adopted, verbatim, the Board's findings of fact and made no additional or contrary findings of fact. The Circuit Court only reviewed for error the following "Conclusion of Law" from the Board's Order:

> **The Board overturns the decision of the Zoning Administrator finding that a helicopter tour facility is not a sight-seeing depot and is not consistent with the uses allowed in the AC zoning district. Therefore, the appeal is granted and the Zoning Administrator's decision is overturned.**

Both the Zoning Administrator and the Board made legal interpretations of the Ordinance. Hinde concedes that the Zoning Administrator made an "administrative interpretation" of the Ordinance. (Appellant's Brief, Statement of the Case, p. 2). Hinde appealed this "administrative interpretation" to the Board, requesting its reversal. Hinde did not challenge the use made by Helicopter Adventures of the Property; he merely requested the Board construe the Ordinance to prohibit the same use that the Zoning Administrator had

allowed. In construing the Ordinance, the Board made a legal conclusion. The Circuit Court was vested with the broad right to review whether that construction was correct as a matter of law.

II. THE CIRCUIT COURT PROPERLY RULED THAT THE BOARD OF ZONING APPEALS MADE AN ERROR OF LAW BY INTERPRETING THE ORDINANCE TO PROHIBIT THE PROPERTY FROM BEING USED TO OPERATE A HELICOPTER SIGHT-SEEING TOUR FACILITY.

A. Helicopter Adventures uses the Property to operate a helicopter sight-seeing tour business.

It is an undisputed fact that Helicopter Adventures uses the Property to operate a helicopter sight-seeing tour business. In Hinde's filed Return to Helicopter Adventures' Notice of Appeal of Order of the Horry County Board of Zoning Appeals, Hinde admits that Helicopter Adventures "constructed a helicopter sight-seeing tour business" upon the Property and "operates a helicopter sight-seeing tour business" upon the Property. (R., pp. 29-31). The Board found as a matter of fact that Helicopter Adventures operates a "helicopter sight-seeing tour facility" upon the Property, and the record reflects the same. (R., pp. 285-288).

Hinde challenged the Zoning Administrator's interpretation of the Ordinance arguing that the permitted use of a "sight-seeing depot" should be interpreted to allow only land based sight-seeing depots. Before the Board, Hinde testified "I knew specifically that he was going to operate a helicopter tour ... the day of the grand opening." (R., p. 48). Hinde's counsel also conceded that, because the helicopter tours originated from and terminated at

the same location, "[t]his is a sight-seeing depot. This is not an airport," which Hinde's counsel seemed to distinguish as involving transportation from point A to point B. (R., pp. 97-98).

Hinde's contention in his brief that the Board made a factual finding that the use was a "helicopter landing facility" is misleading. (Brief of Appellant, p. 3). Those words never appear in the Board's Order. Similarly, Hinde's contention in his brief that the Board "found as fact that the Helicopter Solutions' use of the property as an airport..." is misleading. (Brief of Appellant, p. 7). Again, no such finding appears in the Board's Order.

The issue on appeal to the Circuit Court was not whether the manner of use by Helicopter Adventures was allowed by the Ordinance. The only issue before the Circuit Court was whether the Zoning Administrator or the Board correctly interpreted the Ordinance's application to a "helicopter sight-seeing tour facility." That issue centered around the definition of "depot" within the context of "sight-seeing depot," a use permitted by the Ordinance.

B. The Ordinance permits the Property to be used as a "sight-seeing depot" and a "helicopter sight-seeing tour facility" is a "sight-seeing depot."

The Circuit Court correctly held that the Ordinance, on its face, permits the use of a helicopter sight-seeing tour facility. The Ordinance provides, "[t]he intent of the Amusement Commercial District is to allow for the mixing of certain specified land uses in the county where both residential and limited business uses are competing for land and accelerated transition is in evidence." Permitted uses within the Amusement/Commercial zone include

"[e]stablishments providing entertainment primarily as a commercial activity, including but not limited to theaters, ... water slides, skating rinks, dance halls, shooting galleries, ... clubs, amusement parks, piers, arcades, miniature and par-three golf, driving ranges, ... **and sight-seeing depots**" (emphasis added).

The Ordinance does not define "sight-seeing depots." Thus, the Ordinance provides that such term be given its "customary dictionary definition." There exists no dictionary definition of the term "sight-seeing depots." Since there was no apparent dispute as to the meaning of "sight-seeing," Hinde and Helicopter Adventures both submitted definitions of the word "depot" to the Board for review.

Helicopter Adventures submitted the Oxford Dictionary definition, which defined "depot" as "a place where vehicles are kept and maintained." Hinde submitted two definitions, one from FreeDictionary.com and another from Wikipedia. Wikipedia's definition of "depot" included "train station," "bus station," "bus garage, where buses are stored when not in use." FreeDictionary.com defined "depot" as "a station where transport vehicles load or unload passengers or goods," "a railroad or bus station." The definition also included the synonym "air terminal," which FreeDictionary.com defined as "a terminal that serves air travelers or air freight." (R., pp. 7-16). None of these give insight to the definition of "sight-seeing depot" and thus the term requires interpretation.

Based upon the record before it, the Circuit Court properly interpreted the phrase "sight-seeing depot" to unambiguously contemplate "a facility that is used for the purpose of transporting passengers by helicopter for a sight-seeing tour." (R., pp. 7-16). "The primary rule of statutory construction is to ascertain and give effect to the intent of the

legislature." See Mikell, 160, 330. "When interpreting an ordinance, the legislative intent must prevail if it can be reasonably discovered in the language used." Id. In this case, that intent is clear from the plain language used in the Ordinance, "sight-seeing depot," and no additional inquiry is required. See Somers. infra. (interpreting "municipal use"), Stanton, infra. (interpreting "structure"), and Moise. ibid. (interpreting "hotel"), all on the face of the Ordinance.

Hinde's counsel conceded at the hearing before the Circuit Court that "sight-seeing depot" included a sight-seeing tour facility operating through a form of "ground transportation" such as a "bus ride [or] jeep ride." (R., p. 217). Under the definition proposed by Hinde to the Circuit Court, he would have thus added the words "by ground transportation" or "by bus or jeep" to the ordinance to restrict its scope. South Carolina Courts are prohibited from writing more restrictive language into an Ordinance that limits property rights. It is a "well founded principle of law that ... ordinances in derogation of natural rights of persons over their property are to be strictly construed as they are in derogation of the common law right to use private property so as to realize its highest utility and should not be impliedly extended to cases not clearly within their scope and purpose." Purdy v. Moise, 223 S.C. 298, 302, 75 S.E.2d 605, 607 (1953). "It follows that the terms limiting the use of the property must be liberally construed for the benefit of the property owner." Id.

In Purdy, a property owner applied for a building permit to construct a "tourist court" or "motor court" upon property located within a residential zoning district. The applicable ordinance did not list "tourist court" or "motor court" as permissible buildings to be

constructed, but did list "boarding houses, lodging houses, and hotels" as permissible structures one could build. The Sumter County Zoning Board and City Council both refused to issue a permit based upon their interpretation of the Ordinance. The Circuit Court reversed. On appeal, the Zoning Board argued that the words "tourist court" and "motor court" were not hotels. In affirming the decision of the Circuit Court, the Supreme Court held the definition of the term hotel encompassed that of a "tourist court" or "motor court," reasoning "[t]he services rendered to the public may be of wide variances but such variances are in the method or quality rather than the character of such services." Similarly in this case, the service to be provided by Helicopter Adventures, sight-seeing tours, may vary in method or quality depending upon whether conducted by jeep, bus, van, boat, or helicopter, but the character of such services, sight-seeing tours for tourists visiting the Grand Strand area, do not.

By adopting the Ordinance without electing to add words limiting or restricting "sight-seeing depots" to that of a certain kind or character, this Court must liberally construe the ordinance in favor of a broader range of uses favoring the property owner. Doing so will give the Ordinance in this case the "practical, reasonable, and fair interpretation consonant with the purposes, design, and policy of the lawmakers" who adopted it. Restaurant Row Associates v. Horry County, 327 S.C. 383, 391, 489 S.E.2d 641, 645 (Ct. App. 1998). Not doing so will result in this Court's retroactive amendment of the Ordinance to include the words "land-based" before the words "sight-seeing depots."

C. Additional evidence in the record exists to confirm that a reasonable interpretation of the term "sight-seeing tours" includes sight-seeing tours by helicopter.

Hinde submitted a South Carolina Technical Advice Memorandum to the Board of Zoning Appeals in an effort to support his appeal to reverse the Zoning Administrator's interpretation of the Ordinance. The Memorandum bolsters the interpretation assigned to "sight-seeing depot" by both the Zoning Administrator and the Circuit Court. The Memorandum presented the following facts:

> **Tourist areas in South Carolina provide a variety of sight-seeing tours to our State's visitors. The mode of tour includes boats, buses, motorized trollies, helicopters, airplanes and horse drawn carriages.....**
>
> **Question: Are fees paid for sight-seeing tours conducted by carriage, bus, helicopter, airplane, trolley, boat, and other similar modes subject to the admissions tax...?**
>
> **Conclusion: Fees paid for sight-seeing tours conducted by carriage, bus, helicopter, airplane, trolley, boat, and other similar modes are not subject to the admissions tax....**

In a situation in which a dictionary does not define "sight-seeing tour" or "sight-seeing depot," this Memorandum was recognized by the Circuit Court to be probative of the definition of "sight-seeing depot" raised by Helicopter Adventures, and rightfully so in a Court's attempt to ascertain "[t]he generally accepted meaning of words used in statutes or ordinances." Purdy, infra. at 304, 608.

D. The availability of other zoning districts is irrelevant to the inquiry of whether the Ordinance permits helicopter sight-seeing depots.

Whether other zoning districts were available for so-called "airport operations" (Brief of Appellant, pp. 10-12) is not germane to the issue of whether the plain and ordinary meaning of the language of the Amusement/Commercial zoning district allows helicopter sight-seeing tours as a permitted use. Nonetheless, all County employees who testified before the Board stated that the County had always considered helicopter sight-seeing tours as outdoor amusements permitted in the Amusement/Commercial zoning district. (R., pp. 56-60; 60-75; 144-146; 154-155). Likewise, whether a "heliport" or an "airport" is a permitted use within the Amusement/Commercial zoning district (Brief of Appellant, pp. 12-16) is also irrelevant since Helicopter Adventures operates neither a heliport nor an airport, but a tour business.

CONCLUSION

Based upon the foregoing, Respondent Helicopter Adventures respectfully requests this Court to affirm the decision of the Horry County Circuit Court.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief complies with Rule 211(b), SCACR.

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of whom Richard Hinde is ..... Appellant.

PROOF OF SERVICE

The undersigned certifies that he is employed with the law firm of Bellamy, Rutenberg, Copeland, Epps, Gravely & Bowers, P.A., attorneys for the Respondent, Helicopter Solutions, Inc. d/b/a Helicopter Adventures, that he has mailed a copy of the Respondent's Final Brief and Proof of Service to Counsel listed below this 6th day of January, 2014, with proper postage attached thereto:

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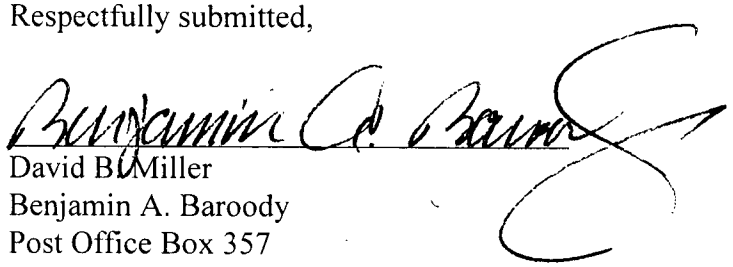
Respectfully submitted,



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