

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.

---

**Final Brief of Appellants**

---

Susan P. MacDonald  
NELSON MULLINS RILEY & SCARBOROUGH LLP  
3751 Robert M. Grissom Parkway / Suite 300  
Post Office Box 3939 (29578-3939)  
Myrtle Beach, South Carolina 29577-3165  
843.448.3500

Michael J. Anzelmo  
NELSON MULLINS RILEY & SCARBOROUGH LLP  
1320 Main Street / 17th Floor  
Post Office Box 11070 (29211-1070)  
Columbia, South Carolina 29201  
803.799.2000

**RECEIVED**

MAR 18 2014

**SC Court of Appeals**

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.

---

**Final Brief of Appellants**

---

Susan P. MacDonald  
NELSON MULLINS RILEY & SCARBOROUGH LLP  
3751 Robert M. Grissom Parkway / Suite 300  
Post Office Box 3939 (29578-3939)  
Myrtle Beach, South Carolina 29577-3165  
843.448.3500

Michael J. Anzelmo  
NELSON MULLINS RILEY & SCARBOROUGH LLP  
1320 Main Street / 17th Floor  
Post Office Box 11070 (29211-1070)  
Columbia, South Carolina 29201  
803.799.2000

L. Morgan Martin  
L. Morgan Martin, P.A.  
1121 Third Avenue  
Conway, SC 29526  
843.248.3177

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

## Table of Contents

Table of Authorities .....	ii
Statement of Issues on Appeal .....	1
Statement of the Case .....	2
Statement of the Facts .....	3
Argument Summary .....	9
Argument .....	10
I. The Council committed an abuse of discretion in passing Resolution R-73-12 because the Horry County ordinances do not allow issuance of a “relocation permit.” .....	12
II. The Council committed an abuse of discretion in passing Resolution R-73-12 because American Tower failed to provide the proof that the ordinances required .....	15
Conclusion .....	17

Table of Authorities

CASES

Hodge v. Pollock, 223 S.C. 342; 75 S.E.2d 752 (1953) ..... 11, 15, 17

Peterson Outdoor Adver. v. City of Myrtle Beach, 327 S.C. 230, 489 S.E.2d  
630 (1997)..... 10, 11, 14

Sloan v. Greenville County; 356 S.C. 531, 590 S.E.2d 338 (Ct. App. 2003)..... 11

Wyndham Enterprises, LLC v. City of N. Augusta, 401 S.C. 144, 735 S.E.2d  
659 (Ct. App. 2012)..... 11, 12, 17

OTHER AUTHORITIES

Horry County Code of Ordinances ..... 2

Horry County Zoning Ordinances ..... passim

Statement of Issues on Appeal

- I. **The Council committed an abuse of discretion in passing Resolution R-73-12 because the Horry County ordinances do not allow issuance of a “relocation permit.”**
  
- II. **The Council committed an abuse of discretion in passing Resolution R-73-12 because American Tower failed to provide the proof that the ordinances required.**

### Statement of the Case

Appellants TriStar Investors, Inc. (“TriStar”), Minerva Realty, LLC (“Minerva”), and Angeline Johnson (“Ms. Johnson”) initiated this lawsuit as an appeal from a decision (“Resolution R-73-12”) by the Horry County Council (the “Council”). {Appellants’ Complaint and Application for Temporary Restraining Order and Preliminary Injunction dated November 8, 2012; R. 17}. Resolution R-73-12 required Respondent American Towers, LLC (“American Tower”) to remove the pre-existing, fully-functioning cell tower that it previously operated on land owned by Ms. Johnson and allowed American Tower to build a new cell tower on a different landowner’s property right across the street. This resolution passed in contravention of Chapter 13, Article VII, Section 13-73 of the Horry County Code of Ordinances and Article XVI, Section 1605 of the Horry County Zoning Ordinances. {Id. at p. 1, ¶ 2, p. 4; ¶ 15, p. 5, ¶ 17; R. 524}. Appellants requested a temporary restraining order and a preliminary injunction preventing American Tower from removing the existing cell tower and constructing the new tower until this appeal was fully resolved. {Appellants’ Application for Temporary Restraining Order and Preliminary Injunction; Appellants’ Memorandum in Support of Application for Temporary Restraining Order and Preliminary Injunction; R. 17, 227}.

On March 26, 2013, the Honorable Larry B. Hyman, Jr., granted the temporary restraining order and preliminary injunction filed by Appellants. {Order Granting Temporary Restraining Order filed April 8, 2013; R. 1}. Thereafter, the circuit court held the hearing on Appellants’ appeal of Resolution R-73-12. {Transcript of Appeal dated April 26, 2013; R. 130}. The Honorable Benjamin H. Culbertson denied

Appellants' appeal and request for permanent injunction. {Order Entering Final Judgment filed May 21, 2103; R. 6}. That order also vacated the prior temporary restraining order and preliminary injunction entered by Judge Hyman. {Order Entering Final Judgment filed May 21, 2103 at p. 4 ¶ 2; R. 9}.

Appellants timely filed a Notice of Appeal from that order. {Notice of Appeal dated May 22, 2013; R. 442}. Appellants moved the circuit court to enter a writ of supersedeas. {Petition for a Writ of Supersedeas dated May 31, 2013; R. 494}. On May 31, 2013, the circuit court held a hearing and denied the supersedeas motion. {Transcript of Hearing on Writ of Supersedeas dated May 31, 2013; Order denying same dated May 31, 2013; R. 177, 11}. Appellants then sought emergency *ex parte* supersedeas relief from this Court. {Petition for *Ex Parte* Supersedeas Relief filed June 3, 2013; R. 458}. This Court denied that petition. {Order denying *Ex Parte* Supersedeas Relief dated June 5, 2013; R. 13}. Next, Appellants sought supersedeas relief pursuant to Rule 241 of the South Carolina Appellate Court Rules. {Appellants' Petition for Supersedeas Relief with Request for Expedited Decision filed June 6, 2013; R. 494}. This Court temporarily granted that request but ultimately denied the petition. {Order Temporarily Granting Supersedeas dated June 7, 2013; Order Denying Supersedeas dated June 13, 2013; R. 14, 15}.

### **Statement of the Facts**

Prior to the Council resolution at issue in this matter, American Tower operated a fully-functioning cell tower in Horry County pursuant to a lease (the "American Tower Lease") with Ms. Johnson. {American Tower's Memorandum of Lease Amendment; R. 125}. Ms. Johnson owns the property on which the cell tower is still

located, even though it is to be removed at a future date subsequent to the completion of the new tower. The American Tower Lease provided a term through January 13, 2015, and American Tower renewed the Lease on October 15, 2007 through 2030.<sup>1</sup> {American Tower's Memorandum of Lease Amendment; R. 125}.

In June of 2010, Ms. Johnson entered into an easement agreement with TriStar (the "TriStar Easement") pursuant to which TriStar acquired the right to operate a cell tower on Ms. Johnson's property after the American Tower Lease expires. {TriStar Easement; R. 340; Appellants' Complaint and Application for Temporary Restraining Order and Preliminary Injunction dated November 8, 2012 at p. 2 ¶ 3; R. 18}. Ms. Johnson also assigned to TriStar via the Easement Agreement the beneficial rights to the tower site on her property. {TriStar Easement; R. 340; Appellants' Complaint and Application for Temporary Restraining Order and Preliminary Injunction dated November 8, 2012 at p. 2 ¶ 3; R. 18}. This transferred Ms. Johnson's rights under the American Tower Lease to TriStar. {TriStar Easement; R. 340; Appellants' Complaint and Application for Temporary Restraining Order and Preliminary Injunction dated November 8, 2012 at p. 2 ¶ 3; R. 18}. TriStar promptly notified American Tower of the TriStar Easement. {Appellants' Complaint and Application for Temporary Restraining Order and Preliminary Injunction dated November 8, 2012 at p. 4, n. 2; R. 20}.

After American Tower learned about the TriStar Easement, American Tower sought approval from the Council to build a new tower directly across the street from the tower it had operated on Ms. Johnson's property for the last eighteen years.

---

<sup>1</sup> American Tower did not record this lease extension until September 2, 2010, and now claims that the American Tower Lease expires in 2015.

{American Tower's Application dated August 31, 2012 p. 1-8; R. 109-116}. In its application, American Tower noted that its request sought a "Telecommunications Tower Permit" pursuant to the Horry County Code of Ordinances. {Id. at p. 1; R. 109}. American Tower's application purported to set forth its entitlement to the new tower under "the relevant sections of the Horry County Telecommunications Facilities Ordinances, found in Article XVI and VII . . . ." {Id. at p. 1, R. 109}.

Article XVI, Section 1605 of the Horry County Zoning Ordinances and Chapter 13, Article VII, Section 13-73 of the Horry County Code of Ordinances control the issuance of a Telecommunications Tower Permit. {Appellants' Complaint and Application for Temporary Restraining Order and Preliminary Injunction dated November 8, 2012; R. 17}. The rules of Section 1605 and Section 13-73 control all new tower construction in Horry County. See Horry County, S.C., Code of Ordinances ch. 13, art. VII, § 13-70 (2013) ("[a]ll new freestanding telecommunications towers shall be required to obtain a permit pursuant to the provisions of this article") (emphasis added). The Council must review the evidence provided in an application and may approve it only when the applicant complies with the ordinances. Horry County, S.C., Code of Ordinances ch. 13, art. VII, § 13-71 (2013).

Section 1605 of the ordinance prohibits cell towers from being built within 2.5 miles of any existing tower, absent a co-location waiver. Horry County, S.C., Zoning Ordinance art. XVI, § 1605. In its application, American Tower acknowledged that two pre-existing cell towers are located within the 2.5 mile radius

restriction.<sup>2</sup> {American Tower's Application dated August 31, 2012 p. 1; County Council Decision Memorandum p. 1 ("The applicant states that there are two towers within the 2.5 mile radius); R. 109, 36,}. American Tower was therefore required to seek and obtain a co-location waiver from the pre-existing towers in order to build the new cell tower within the restricted area.

American Tower's application, however, excluded any reference to Section 1605. {American Tower's Application dated August 31, 2012 p. 1-8; R. 109-116}. Instead, American Tower claimed the requirements of Section 1605 did not apply. {American Tower's Application dated August 31, 2012 p. 8, ¶ (c)(3); R. 109}. When asked to provide the proof 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," American Tower insisted that the co-location requirements were "not applicable, as we are proposing to relocate an existing tower . . . ." {Id. at p. 8, ¶(c)(3); R. 116}.

There are no special rules in Horry County for the "relocation" of a tower. Section 1605 governs all towers, and the Council has no discretion to waive the requirements in Section 1605 unless the applicant obtains a "co-location waiver" pursuant to Section 13-73(b).<sup>3</sup> Id. at § 1605(a)(2) ("No new proposed freestanding

---

<sup>2</sup> The pre-existing tower on Ms. Johnson's land is within 2.5 miles of American Tower's proposed new tower location. Another existing tower (the "SBA tower") is also within 2.5 miles of American Tower's proposed tower location. {Appellants' Complaint and Application for Temporary Restraining Order and Preliminary Injunction dated November 8, 2012; R. 17}.

<sup>3</sup> Section 1605 provides in full:

Freestanding telecommunication towers and associated equipment may receive a conditional use permit in the CFA, FA, LFA, AG1, AG2, AG3, OPI, PR1, PR2, RC, CC, NC, HC, LI, HI,

tower . . . . shall be located within two and one-half miles of an existing telecommunications tower without a co-location waiver.”). Section 13-73 allows for a waiver of the Section 1605 requirements if American Tower established that use of the two existing towers “is not practical or warranted.” Horry County, S.C., Code of Ordinances ch. 13, art. VII, § 13-73(b) (allowing for a co-location waiver “when such waiver is justified and the applicant can supply proof that co-location is not practical or warranted . . . .”). In order to obtain a co-location waiver, “the applicant [must] supply proof that co-location is not practical or warranted.” Id.

Section 13-73 outlines the proof—and the only criteria—that the Council may use in determining whether the applicant satisfied that burden.

The following information shall be provided justifying that co-location is not practical or warranted.

---

PA1, MA1, MA2 RE3, RE4 CR TRS; EIO AND RCS zoning districts as a principal or accessory use subject to the standards established herein.

Except for the exclusions listed above, no new freestanding telecommunication tower shall be permitted unless the applicant demonstrates that no existing telecommunication facility can accommodate the applicant’s proposed use; or that use of such existing facilities would prohibit the applicant from providing personal wireless services in the geographic search area to be served by the proposed antenna support structure.

- a. Requests to locate a new telecommunication tower shall be subject to the following co-location radius:
  1. No new proposed standard monopole shall be located within one and one-half (1½) miles of an existing telecommunication tower without a co-location waiver.
  2. No new proposed freestanding tower other than a standard monopole shall be located within two and one-half (2½) miles of an existing telecommunication tower without a co-location waiver.

- (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 did not attempt to establish the criteria for a co-location waiver. {American Tower's Application dated August 31, 2012 p. 1-8; R. 109-116}. American Tower provided no evidence to show that use of either the SBA tower or the existing tower on Ms. Johnson's property was not practical or warranted as required by Section 13-73(b) or as to how a "co-location waiver" was necessary. {American Tower's Application dated August 31, 2012 p. 1-8; R.109-116}.

The Council considered American Tower's application on October 16, 2012, and granted the permit in the form of Resolution R-73-12. {R-73-12, attached as Exhibit A to Appellants' Complaint and Application for Temporary Restraining Order and Preliminary Injunction dated November 8, 2012; R. 34}.

### Argument Summary

This is not a case of whether divergent evidence supports the Council's decision or whether the Council properly exercised discretion in applying the ordinances. To the contrary, this matter is about American Tower and the Council's refusal to follow and apply the relevant ordinances. The Council did not exercise its discretion. Instead, it approved American Tower's application on a basis that does not exist in the Horry County Ordinances. Accordingly, the Council exercised no discretion in approving the application.

The Horry County telecommunications ordinance was enacted to prevent the proliferation of cell towers, and the ordinances outline a straight-forward application and review process for the construction of new cell towers. All applicants, including American Tower, must follow the mandates of Chapter 13, Article VII, Section 13-73 of the Horry County Code of Ordinances and Article XVI, Section 1605 of the Horry County Zoning Ordinances. See Horry County, S.C., CODE OF ORDINANCES ch. 13, art. VII, § 13-70 (2013) ("all new freestanding telecommunications towers shall be required to obtain a permit pursuant to the provisions of this article") (emphasis added). The Council must review the evidence provided in the application and may approve it only when the applicant complies with the ordinances. Horry County, S.C., CODE OF ORDINANCES ch. 13, art. VII, § 13-71 (2013). American Tower and the Council failed to follow that statutory process in this matter.

American Tower applied for a permit to allow "relocation" of its pre-existing cell tower. {American Tower's Application dated August 31, 2012 p. 1-8; R. 109-116}. American Tower purported to decree that Sections 1605 and Section 13-73 did

not apply because this was a “relocation.” {American Tower’s Application dated August 31, 2012 p. 7-8; R. 115-116}. Sections 1605 and 13-73, however, do not allow the Council to ignore the mandates they impose. Further, the ordinances do not create an application procedure for a “relocation permit.” The only procedures that govern application for and construction of a new cell tower are those in Section 13-73 and Section 1605.

Despite these facts, the Council analyzed and approved American Tower’s application as “a relocation permit.” {Transcript dated April 26, 2013, at p. 23, lines 22-23; p. 24, lines 5-11; p. 25, lines 6-14; p. 26, lines 15-22; R. 152-155}. This means that the Council applied a non-existent procedure to approve American Tower’s application. The Council’s failure to observe the standards prescribed by ordinance establishes that it **failed to apply any discretion** in rendering its decision. Even if the Council had applied the proper ordinances, the decision to pass Resolution R-73-12 constitutes an abuse of discretion because American Tower failed to provide any of the required proof. Therefore, the Council acted in an arbitrary and capricious manner in issuing Resolution R-73-12, and this Court should reverse.

### **Argument**

The passage of Resolution R-73-12 was an abuse of discretion for two reasons. First, the Council acted in an arbitrary and capricious manner by implementing a non-existent review procedure to approve American Tower’s application. A council must exercise its discretion based on the standards set forth in the ordinance. See, e.g., Peterson Outdoor Adver. v. City of Myrtle Beach, 327 S.C. 230, 235-37, 489 S.E.2d 630, 633-34 (1997) (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). The Council failed to do so. Second, the decision lacks any evidentiary support because American Tower failed to provide the required proof under the controlling ordinances. The decision of the Council must be supported by the evidence that the Code requires. See, e.g., Wyndham Enterprises, LLC v. City of N. Augusta, 401 S.C. 144, 151, 735 S.E.2d 659, 663 (Ct. App. 2012). R-73-12, however, is not supported by any evidence. Either mistake constitutes reversible error. Accordingly, this Court must reverse.

This Court reviews decisions of legislative bodies to ensure that the decision was not made in an arbitrary or unreasonable manner, in an obvious abuse of discretion, or in excess of lawfully delegated power. Sloan v. Greenville County, 356 S.C. 531, 560, 590 S.E.2d 338, 353 (Ct. App. 2003). When exercising discretion, a local government entity must be guided by standards which are specific in order to prevent the ordinance from being invalid and arbitrary. Peterson Outdoor Adver. v. City of Myrtle Beach, 327 S.C. 230, 235, 489 S.E.2d 630, 633 (1997).

Notably, when the legislative body fails to observe the standards prescribed by ordinance for its decision, the decision is an abuse of discretion and must be overturned. Hodge v. Pollock, 223 S.C. 342, 348, 75 S.E.2d 752, 755 (1953) (overturning a legislative body's decision because the body made a decision that "appeal[ed] to its sense of justice" instead of following the requirements of the local ordinances). An abuse of discretion exists in such a case because the legislative body "must abide by and comply with the standard prescribed by the local ordinance." Id. When a legislative body declines to follow the specific requirements set out by

ordinance, its action is routinely declared to be arbitrary and an abuse of discretion. See, e.g., Peterson Outdoor Adver., 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); Wyndham Enterprises, 401 S.C. at 151, 735 S.E.2d at 663 (holding that the zoning board's decision was arbitrary and capricious because the board failed to use proper evidence to support its decision as required by its development code).

**I. The Council committed an abuse of discretion in passing Resolution R-73-12 because the Horry County ordinances do not allow issuance of a “relocation permit.”**

The Council acted in an arbitrary and capricious manner by approving American Tower's application as a “relocation permit.” A “relocation permit” does not exist in any Horry County ordinance. The only procedures that govern application for and construction of a cell tower are those in Section 13-73 and Section 1605. See Horry County, S.C., CODE OF ORDINANCES ch. 13; art. VII, § 13-70 (2013) (requiring that “[a]ll new freestanding telecommunications towers shall be required to obtain a permit pursuant to the provisions of this article”) (emphasis added). All new cell tower applications fall within the ambit of this ordinance. Id. § 1605(a) (“Requests to locate a new telecommunication tower shall be subject to the following co-location radius . . . .”). Therefore, all applicants seeking to construct a cell tower in Horry County must comply with these zoning requirements.

American Tower's application requested construction of a new cell tower in Horry County. {American Tower's Application dated August 31, 2012 p. 1-8; R. 109-116}. Rather than follow the controlling ordinances for new cell tower construction set

forth in Sections 1605 and 13-73, American Tower's application disregarded these mandates by claiming the ordinances were "not applicable" to construction of its proposed cell tower in Horry County. {American Tower's Application dated August 31, 2012 p. 1-8; R. 109-116}. The Council followed American Tower's suggestion to ignore Sections 1605 and 13-73 and it approved the application solely as a "relocation permit."

At the hearing before the circuit court, the Council admitted its decision was based solely on a relocation analysis:

[The Council]: First of all this is a decision of the Horry County Council and I think to clear up the record from the beginning, to put things in perspective, this was a relocation permit, not a co-location permit . . .

{Transcript dated April 26, 2013, p. 23, lines 19-23; R. 152}. The Council took this position despite its admission that no relocation ordinance exists:

The Court: Is there a different ordinance you go under for a relocation?

[The Council]: No, sir, there is not . . . .

. . . .

The Court: Well, is there an ordinance that deals with relocation or it is just a permitting for a new tower?

[The Council]: You Honor, it is just a permitting consideration within the parameters of the current ordinance.

{Transcript dated April 26, 2013, p. 24, lines 5-7; R. 153; Transcript dated April 26, 2013, p. 45, lines 9-15; R. 175}. The Council also took the position that it should not apply the "co-location" requirements because American Tower claimed this was a relocation. {Transcript dated April 26, 2013, p. 25, line 6-14; R. 154}. The Council

confirmed that it approved the application because it wanted to, without considering the required criteria.

The Court: Excuse me for interrupting you but as I understand your argument . . . it is a relocation so we can basically move it **because we just think it is better to move it and we don't have to show that the old tower cannot reasonably be utilized.**

[The Council]: That's correct.

{Transcript dated April 26, 2013, p. 26, line 15-22; R. 155}.

Sections 1605 and 13-73 do not allow the applicant to seek a “relocation permit.” Nor do these ordinances allow the Council to approve a “relocation permit.” Rather, the ordinances allow the Council to approve construction of a new cell tower only if the applicant can “supply proof” that the criteria in Section 1605 or Section 13-73 would be met. Horry County, S.C., Code of Ordinances ch. 13, art. VII, § 13-73; Horry County, S.C., Zoning Ordinance art. XVI, § 1605; Horry County, S.C., Code of Ordinances ch. 13, art. VII, §§ 13-71, 13-72. The Council has no authority to waive the mandate that all applicants seeking to construct a cell tower in Horry County must comply with Section 1605 or with the “co-location waiver” requirement. See Peterson Outdoor Adver, 327 S.C. at 235-37, 489 S.E.2d at 633-34 (holding zoning board’s decision was an abuse of discretion when it failed to apply the specific criteria of the ordinance).

The Council did not review American Tower’s application under Section 1605 and Section 13-73. Rather, as it admitted to the circuit court, the Council based its decision on (a) its determination that this application sought a “relocation permit,” (b) its unilateral rejection of the Section 1605 and Section 13-73 mandates, and (c) its

subjective belief<sup>4</sup> that “it [was] better to move it.” {Transcript dated April 26, 2013, p. 26, line 15-22; R. 155}. As a result, the Council failed to abide by and comply with the standards prescribed by the local ordinances for approval of a new cell tower application. The Council acted in an arbitrary and capricious manner by approving American Tower’s application as a “relocation permit”. This Court should reverse on that basis alone.

**II. The Council committed an abuse of discretion in passing Resolution R-73-12 because American Tower failed to provide the proof that the ordinances required.**

This Court should also reverse the Council’s decision because it lacks any evidentiary support. The decision of the Council must be supported by the evidence required by the controlling ordinances. The failure of American Tower to provide the evidentiary support renders the passage of Resolution R-73-12 an abuse of discretion.

Section 1605 of the ordinance prohibits a cell tower from being built within 2.5 miles of any existing tower. Horry County, S.C., Zoning Ordinance art. XVI, § 1605. There are two pre-existing cell towers within the restricted 2.5 mile area of American Tower’s new tower location. {American Tower’s Application dated August 31, 2012 p. 1; County Council Decision Memorandum p. 1 (“The applicant states that there are two towers within the 2.5 mile radius); R. 109, 36}. The Council has no discretion to waive the prohibition in Section 1605 unless the applicant obtains a “co-location waiver” pursuant to Section 13-73(b). Horry County, S.C., Zoning Ordinance art. XVI, § 1605(a)(2) (“No new proposed freestanding tower . . . shall be

---

<sup>4</sup> Such a basis for a decision is reversible error. See *Hodge*, 223 S.C. at 348, 75 S.E.2d at 755 (overturning a legislative body’s decision because the body made a decision that “appeal[ed] to its sense of justice” instead of following the requirements of the local ordinances).

located within two and one-half miles of an existing telecommunications tower without a co-location waiver.”). American Tower was required to seek and obtain a co-location waiver from both of the pre-existing towers in order to build its new cell tower.

Section 13-73 allows for a waiver of Section 1605 if American Tower established that use of the existing tower “is not practical or warranted.” Horry County, S.C., Code of Ordinances ch. 13, art. VII, § 13-73(b) (allowing for a co-location waiver “when such waiver is justified and the applicant can supply proof that co-location is not practical or warranted . . . .”). In order to obtain a co-location waiver, “the applicant [must] supply proof that co-location is not practical or warranted.” Id.

Section 13-73 identifies the proof that an applicant must submit in order to obtain a waiver of Section 1605. See supra, at 10. This is the only criteria the Council may use in determining whether the applicant satisfied that burden. Id. When asked to provide the proof 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,” American Tower insisted that the co-location requirements were “not applicable, as we are proposing to relocate an existing tower. . . .” {Id. at p. 8, ¶(c)(3); R. 116}.

American Tower provided no evidence to show that use of either existing tower was not practical or warranted as required by Section 13-73(b).<sup>5</sup> The Council therefore had no evidence on which to base its approval of American Tower’s application. This

---

<sup>5</sup> Indeed, American Tower and the Horry County Council admitted in the supersedeas hearing before the circuit court that if this Court finds that the Council erred in granting the permit to American Tower, then American Tower will “take their new tower down and put up the old one.” {Transcript dated May 31, 2013, p. 21, line 6-9, R. 197}.

lack of evidentiary support constitutes an abuse of discretion. See Wyndham Enterprises, 401 S.C. at 151, 735 S.E.2d at 663.

The very purpose of Horry County’s prohibition of multiple cell towers within a 2.5 mile radius is to avoid the proliferation of cell towers. The intent of the ordinance is to “minimize adverse visual effects of communication towers through careful design, [and] siting . . . ; [and] [m]aximize use of any new or existing communication towers by encouraging co-location of multiple communication facilities to a single tower or tower site.” Horry County, S.C., Zoning Ordinance art. XVI, § 1600(b), (d). The 2.5 mile radius at issue now houses three cell towers—exactly what the ordinances were designed to avoid.

The Council allowed American Tower to build the new tower despite failing to meet the statutory mandates. The Council abused its discretion by failing to “abide by and comply with the standard prescribed by the local ordinance” as required by well-settled South Carolina precedent. See Hodge, 223 S.C. at 348, 75 S.E.2d at 755. This was arbitrary and capricious, and this Court must reverse.

### Conclusion

Based on the foregoing, this Court should: (1) reverse the circuit court; (2) find the 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; (4) and order American Tower to reconstruct the old tower on Ms. Johnson’s property in the event it has been removed by the date of this Court’s decision, which the Council ordered to be removed pursuant to R-73-12.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

Susan P. MacDonald

SC Bar No. 007943

E-Mail: susan.macdonald@nelsonmullins.com

3751 Robert M. Grissom Parkway / Suite 300

Post Office Box 3939 (29578-3939)

Myrtle Beach, South Carolina 29577-3165

843.448.3500

Michael J. Anzelmo

SC Bar No. 72933

E-Mail: michael.anzelmo@nelsonmullins.com

1320 Main Street / 17th Floor

Post Office Box 11070 (29211-1070)

Columbia, South Carolina 29201

803.799.2000

L. Morgan Martin

S.C. Bar No. 3667

mmartin@lmorganmartin.com

L. Morgan Martin, P.A.

1121 Third Avenue

Conway, SC 29526

843.248.3177

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

Columbia, South Carolina

March 18, 2014

HE 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.

---

CERTIFICATE OF COUNSEL

---

The undersigned counsel for Appellants' TriStar Investors, Inc., Minerva Realty, LLC and Angeline Johnson, certifies that the Final Brief and Reply Brief complies with Rule 211(b), SCACR.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

Susan P. Macdonald

SC Bar No. 007943

E-Mail: susan.macdonald@nelsonmullins.com

3751 Robert M. Grissom Parkway / Suite 300

Post Office Box 3939 (29578-3939)

Myrtle Beach, South Carolina 29577-3165

843.448.3500

Michael J. Anzelmo

SC Bar No. 72933

E-Mail: michael.anzelmo@nelsonmullins.com

**RECEIVED**

MAR 18 2014

**SC Court of Appeals**

1320 Main Street / 17th Floor  
Post Office Box 11070 (29211-1070)  
Columbia, South Carolina 29201  
803.799.2000

L. Morgan Martin  
S.C. Bar No. 3667  
mmartin@lmorganmartin.com  
L. Morgan Martin, P.A.  
1121 Third Avenue  
Conway, SC 29526  
843.248.3177

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

Columbia, South Carolina

March 18, 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  
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.

I, the undersigned Paralegal of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Appellants 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, to the following address(es):

Pleadings: FINAL BRIEF OF APPELLANTS

Counsel Served:

David C. Slough, Esquire  
Nexsen Pruet, LLC  
1101 Johnson Avenue, Suite 300  
Myrtle Beach, SC 29577  
*Attorneys for Defendant American Tower, LLC*

Jonathan L. Yates, Esquire  
Hellman Yates & Tisdale, PA  
145 King Street, Suite 102  
Charleston, SC 29401  
*Attorneys for Defendant American Tower, LLC*

**RECEIVED**

MAR 18 2014

**SC Court of Appeals**

Emma Ruth Brittan, Esquire  
J. Jackson Thomas, Esquire  
Thomas & Brittan, P.A.  
Post Office Box 1290  
Myrtle Beach, SC 29578  
Attorney for Respondent Horry County Council



---

Meredith S. Keane  
Paralegal

March 18, 2014