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.

Appellate Case No. 2013-001178

FINAL BRIEF OF RESPONDENT AMERICAN TOWERS, LLC

ORAL ARGUMENT REQUESTED

David C. Slough, Esq.
NEXSEN PRUET, LLC
1101 Johnson Avenue, Suite 300
Myrtle Beach, SC 29577
Telephone: (843) 213-5400
Facsimile: (843) 213-5407

Thomas S. Tisdale, Esq.
Jonathan L. Yates, Esq.
Jason S. Smith, Esq.
HELLMAN YATES & TISDALE, PA
105 Broad Street
Charleston, SC 29401
Telephone: (843) 414-9754
Facsimile: (843) 266-9188

Attorneys for Respondent American Towers, LLC

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Statutes

STATEMENT OF ISSUES ON APPEAL

i. The Circuit Court properly affirmed the Horry County Council's decision to adopt Resolution No. R-73-12, allowing relocation of American Towers' communications tower.

ii. Appellants lack standing to bring this administrative appeal.

iii. Appellants failed to preserve their first issue on appeal.

STATEMENT OF THE CASE

On October 16, 2012, after examining a detailed factual record and conducting a public meeting, the Horry County Council voted on and unanimously approved Resolution No. R-73-12 (the "Resolution"). (Ex. E to Horry County Council's Return to Appellants' Petition for Supersedeas Relief, R. p. 85)[1]. The Resolution authorized Respondent American Towers, LLC ("American Towers") to relocate American Towers' communications and cell phone tower from its then-present location in Horry County to the current location also in Horry County. Id. The Resolution is based on authority granted to the Horry County Council under § 13-70, et. seq., of the Horry County Code of Ordinances and the Horry County Council's express determination that the presented evidence satisfied the criteria set forth in § 13-73. Id.

Soon after passage of the Resolution, on November 8, 2012, Appellants TriStar Investors, Inc. ("TriStar"), TriStar's wholly-owned subsidiary Minerva Realty, LLC ("Minerva"), and Angeline Johnson ("Angeline Johnson") (collectively, "Appellants") filed their Complaint seeking this administrative review. The Complaint acknowledged that county council decisions must be upheld unless arbitrary, capricious, or in obvious abuse of discretion (Cmplt. at p. 8, fn. 3, R. p. 24). Appellants argued that the Resolution was not supported by factual grounds and against the weight of the evidence. (Cmplt. at ¶ 29, R. p. 25).

On December 6, 2012, American Towers filed its Verified Answer and Affirmative Defenses (the "Answer"). (Am. Towers Answer, R. pp. 45-51). American Towers

[1] The copy of the Resolution attached to Appellants' Complaint is not a complete copy of the Resolution.

denied all material allegations in the Complaint and asserted the affirmative defense that Appellants, competitors of American Towers[2], lack standing to challenge the Resolution, as they do not have a protectable legal right at issue. (Am. Towers Answer at p. 6, ¶ 37, R. p. 50).

On April 26, 2013, the Circuit Court held a hearing on the merits of this case. (5/21/13 Order at p. 1, R. p. 6). Three days later, the Circuit Court emailed counsel to this action, announcing its decision to affirm passage of the Resolution.[3] The Circuit Court did not reach the issue of standing as it determined that Appellants' claim lacked merit on its face. The Circuit Court entered its Final Judgment Order against Appellants on May 21, 2013 (the "Judgment Order"). (5/21/13 Order, R. pp. 6-10). In part, the Judgment Order states:

> 1. ... As conceded by Plaintiffs, the decision of the Horry County Council must be affirmed unless arbitrary, unreasonable, an abuse of discretion, or in excess of lawfully delegated power. As also conceded by Plaintiffs, the evidence in this case is limited to the record before the Horry County Council....
>
> 2. The Court has reviewed the record before it and concludes that Horry County Council's unanimous decision enacting R-73-12, was based on a thorough documented review and record prepared by the Horry

---

[2] As admitted by Appellants at the October 16, 2012 hearing, a few days prior to the hearing, TriStar/Minerva had filed their own application to construct a new communications tower in Horry County. (Ex. I to Am. Towers Memo. in Opp. to Temp. Order, 10/16/12 Trans. at p. 16, R. p. 75).

[3] Pending the administrative review, Appellants sought a temporary restraining order. (Brief in Supp. of Plaintiffs' App. for Temp. Order, R. pp. 227-251). In an abundance of caution, the Honorable Larry B. Hyman, Jr. entered a status quo order staying the Resolution until hearing on the merits (the "Temporary Order"). While the Temporary Order required Appellants to post a security bond in the amount of $5,000.00, Appellants did not post their bond until May 7, 2013, over a week after the Circuit Court announced its ruling against Appellants on the merits of the case. The Circuit Court's Judgment Order vacated the Temporary Order, declaring it void.

> County Planning and Zoning Department; accordingly, I find that the relief requested by Plaintiffs is not warranted....
>
> **THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:**
>
> 1. The decision of the Horry County Council is (sic) passing Resolution No. R-73-12 is hereby affirmed. This appeal of Resolution Horry County Council No. R-73-12 is denied....

(5/21/13 Order at p. 4, R. p. 9).

On May 22, 2013, Appellants filed their Notice of Appeal. The next day, Appellants filed a motion with the Circuit Court seeking supersedeas relief pending appeal. On May 31, 2013, the Circuit Court held a hearing on Appellants' motion for supersedeas relief and denied it. (5/31/13 Trans., R. pp. 177-226; 5/31/13 Order, R. pp. 11-12). The Circuit Court's May 31, 2013 Order states: "The telecommunications tower is owned by the defendant American Tower Corporation... The plaintiffs' rights as property owner and easement owner will be unaffected pending the appeal of this case, regardless of whether their motion for supersedeas is granted or denied." (5/31/13 Order, R. p. 12).

On June 3, 2013, Appellants filed an *ex parte* petition with this Court seeking supersedeas relief. (Pet. for *Ex Parte* Supersedeas Relief, R. pp. 458-493). This Court denied that petition. (6/5/13 Order, R. p. 13). Appellants then filed another motion with this Court seeking supersedeas relief. This Court denied that petition as well. (6/13/13 Order, R. pp. 15-16) This Court's June 13, 2013 Order states:

> The petition for supersedeas is denied....
>
> As to TriStar and its subsidiary's efforts to enjoin American Towers, **the Rules of Appellate Procedure were never intended to allow a corporation that fails to outmaneuver its competitor in the marketplace to then invoke the power of the court to regain its lost competitive advantage**. The key fact we rely on in denying this supersedeas request is that TriStar and American Towers are competitors. In addition, while we do not intend to

> address the merits of the appeal, we find ourselves required to observe that there is no contractual relationship between them and they owe each other no legal duties. **The cell phone tower in dispute belongs to American Towers. Thus, TriStar seeks to control through the power of the court the ability of its competitor to dispose of the competitor's own property.** If American Towers wants to disassemble its own cell phone tower, and the objection to its doing so is voiced by a competitor with the stated intent that the competitor may eventually gain the use of a tower without having to pay to construct it, this court has no business, and no power, to interfere.

(6/13/13 Order, R. p. 15) (emphasis added). Despite these decisions, Appellants proceed with this appeal.

ARGUMENT

Summary

The Horry County Council Resolution at issue, which permitted the relocation of American Towers' tower, was expressly authorized and properly issued under §§ 13-70 and 13-73 of the Horry County Code of Ordinances. American Towers presented evidence on the relevant criteria, and the Horry County Council based its decision on the Ordinances and abundance of evidence before it. After reviewing the same evidence and conducting its own hearing, the Circuit Court determined that approval of the resolution was neither arbitrary nor an abuse of discretion, but rather based on a thorough, documented record. Under the applicable standard of review, which only allows judicial disturbance of the Council's decision if there is no evidence that reasonably supports it, this Court should affirm the Circuit Court in duly affirming the Council's decision.

Additionally, as a threshold matter, the Appellants lacked standing to bring this suit under a directly analogous South Carolina Supreme Court decision. The Appellants are merely competitors in the tower business with no protectable right to prevent American Towers from relocating its tower.

Appellants also failed to preserve their first issue on appeal, namely that the Horry County ordinances do not allow issuance of "relocation" permits, in general, as a matter of law. This argument is new and distinguishable from Appellants' preserved arguments in the record that are directed at the adequacy of the specific evidence presented by American Tower.

FACTUAL BACKGROUND

American Towers Owns The Tower Structure And The Tower Components

Since 1999, American Towers has owned and operated a telecommunications and cell phone tower in Horry County, South Carolina. Up until recently, the tower was located at the corner of Huggins Road and Route 9 in Myrtle Beach, South Carolina, on property owned by Angeline Johnson. American Towers has agreements in place with three cell phone carriers – T-Mobile, Horry Telephone, and Verizon Wireless – whereby the carriers broadcast from American Towers' Horry County tower. (Ex. G to Am. Towers Memo. in Opp. to Temp. Order at p. 1, R. p. 528).

American Towers leased the property beneath its original Horry County tower from Angeline Johnson pursuant to a January 14, 1995 property lease to which American Towers and Angeline Johnson are both successors-in-interest (the "Lease"). (Appellants' Brief at p. 3). Under the Lease, the steel tower structure remained American Towers' personal property at all times and must be removed at the expiration of the Lease. Paragraph 8 of the Lease specifically states:

> 8. Removal of Lessee's Improvements Upon Termination. Lessor (Johnson) covenants and agrees that no part of the improvements constructed, erected or placed by Lessee (American Tower) on the Demised Premises shall become, or be considered as being affixed to or a part of, the Demised Premises, any and all provisions and principles of law to the contrary notwithstanding, it being the specific intention of Lessor that all improvements of every kind and nature constructed, erected or placed by Lessee on the Demised Premises shall be and remain the property of Lessee. Lessee, **upon termination of this Agreement shall within 120 days, remove all such improvements, including without limitation the tower, equipment building and any fencing, from the Demised Premises. The Demised Premises shall be returned in a condition that reasonably matches its original condition** (except for any tree, shrub or other vegetation that was removed), reasonable wear and tear excepted. Lessee shall compensate Lessor, on a pro rata basis, for each day said personal property and fixtures remain on the Demised Premises after termination of this Agreement, at the

monthly rent in effect at the time of termination until such time as removal of the improvements is completed.

(Exhibit A to Am. Towers' Memo. in Opp. to Temp. Order at ¶ 10, R. p. 336) (emphasis added). Nothing in the Lease prevents American Towers from deconstructing or removing the tower at any point in time, even before termination of the Lease— the tower is American Towers' exclusive property.

Pursuant to its terms, the Lease runs through January, 2015. (Appellants' Brief at p. 4). However, in October, 2007, American Towers and Angeline Johnson negotiated and signed an amendment to the Lease to extend the term of the Lease through January, 2030 (the "Lease Extension"). Id.

Appellants' Own Acts Caused American Towers To Move Locations

Subsequently, in June, 2010, at the inducement of TriStar/Minerva, Angeline Johnson entered into a separate Exclusive Easement and Assignment Agreement with Minerva (the "Easement Agreement"). Pursuant to the Easement Agreement, Angeline Johnson sold Minerva an easement to the same land already leased to American Towers. (Cmplt. at ¶ 12, R. pp. 19-20). Angeline Johnson received an up-front $100,000 payment from Minerva for the easement and TriStar/Minerva received the right to re-negotiate American Towers' lease and collect the monies therefrom. (Id. at ¶ 3, R. p. 18).

Once American Towers learned of the Easement Agreement, American Towers filed suit against Appellants to determine the rights of the parties (the "Lease Lawsuit"), Case No. 2012-CP-26-2912, *American Towers, LLC v. TriStar Investors, Inc., et. al.*, pending in Horry County. (Ex. C to Am. Towers' Memo. in Opp. to Temp. Order, R. pp. 351-374). In the Lease Lawsuit, due to the Lease Extension, American Towers alleged that the term of its Lease with amendment runs through January, 2030, however, in their Answer, Appellants

denied that fact. (Exhibit D to Am. Towers' Memo. in Opp. to Temp. Order at ¶ 11, R. p. 377). Appellants took the position that the Lease Extension is unenforceable because TriStar/Minerva did not have notice of the Lease Extension when Minerva signed the Easement Agreement. (Cmplt. at ¶ 12, ft. 1, R. p. 19).

After Appellants denied the enforceability of the Lease Extension, and given that the original terms of the Lease would soon end in 2015, American Towers sought an alternative location for its tower and ultimately found a better broadcasting location on the property of Brenda Huggins. To move forward with this better location and secure tower space for the carriers in a timely way as the carriers require[4], American Towers signed an agreement with landowner Brenda Huggins to lease certain real property for relocating the tower (the "Huggins Lease"). (Ex. G to Am. Towers Memo. in Opp. to Temp. Order at pp. 1, 41-48, R. pp. 528, 569-575). Pursuant to the Huggins Lease, American Towers started paying Brenda Huggins rent in April, 2013.[5]

After Appellants denied the enforceability of the Lease Extension, American Towers also filed an application with Horry County, seeking to relocate American Towers' existing tower to the Huggins Property (the "Relocation Application"). (Ex. G to Am. Towers Memo. in Opp. to Temp. Order at pp. 1-48, R. pp. 528-575). Section 13-73 of the Horry County Code of Ordinances lists criteria the Horry County Council should consider when

---

[4] American Towers' customers (the cellular companies) want to and choose to secure tower space far in advance of the time needed in order to test equipment, determine whether the tower site works with its current network, and generally guarantee ample service coverage to the public.

[5] American Towers started paying Brenda Huggins rent in April, 2013 and will continue to pay Angeline Johnson rent through January, 2015, the date Appellants contend the Lease expires.

determining whether to grant or deny a permit for a communications tower, and American Towers' Relocation Application outlined, addressed, and presented evidence on each of those criteria. Id. After reviewing the Relocation Application with the detailed supporting materials, the Horry County Planning & Zoning Department recommended that the Horry County Council approve the Relocation Application (the "Zoning Recommendation"). (Ex. A to Horry County Council's Return to Appellants' Petition for Supersedeas Relief at ¶ 10, R. p. 255).

Subsequently, on October 16, 2012, the Horry County Council held a public hearing to vote on the Relocation Application. American Towers made a presentation at that hearing and members of the Horry County Council asked questions. A representative from at least one of American Towers' cellular carriers appeared at the hearing. (Ex. A to Horry County Council's Return to Appellants' Petition for Supersedeas Relief at ¶ 9, R. p. 255). Appellants also appeared at the hearing, made a presentation, and were the only persons/entities that objected to the Relocation Application. (Ex. I to Am. Towers Memo. in Opp. to Temp. Order at pp. 10-16, R. pp. 69-75).

The Horry County Council unanimously approved the Relocation Application. The Resolution, as amended, states that:

> **WHEREAS**, Section 13-70 of the Horry County Code of Ordinances authorizes Horry County Council to permit all new freestanding telecommunications towers in Horry County...
>
> **WHEREAS**, County Council finds that the request adequately satisfies the criteria of review stated in Section 13-73.
>
> **NOW THEREFORE**, Horry County Council resolves to approve the permit to locate a 300 ft self support telecommunications tower on TMS# 038-00-01-020 located on a .25 acre parcel off W. Hwy. 9 Business on Huggins Rd Horry County, South Carolina. However, the Applicant, American Tower, shall be required to remove its old tower from the current location on Hwy 9 Business

at TMS# 037-00-02-075 within 120 days of the final inspection and approval of the new tower.

(Ex. E to Horry County Council's Return to Appellants' Pet. for Supersedeas Relief, R. p. 85).

Relocation Of The Tower

On May 30, 2013, after the Circuit Court entered the final Judgment Order against Appellants, Horry County issued a building permit for construction of American Towers' relocated tower. After significant costs to American Towers, construction of the relocated tower is now complete. Two of the three wireless carriers moved and tested their equipment at the replacement site and are fully operating from the relocated tower. It is anticipated that the third wireless carrier will be operating from the relocated tower no later than January, 2014. Once the third wireless carrier moves its equipment over, the old tower will promptly be torn down as required by the Resolution and ¶ 8 of American Towers' Lease with Angeline Johnson.

In essence, through this appeal, Appellants are trying to require the wireless carriers (which they have no relationships with) to switch back to the old tower. Appellants are also trying to require American Towers to tear down the brand new replacement tower and use the old tower, only for it to be dismantled by January, 2015 pursuant to the Lease.

STANDARD OF REVIEW ON ADMINISTRATIVE APPEAL

As admitted by Appellants, the Horry County Council's decision is reviewed under the same standard as a zoning board decision, which shall not be upset unless arbitrary, unreasonable, in obvious abuse of discretion, or in excess of lawfully delegated power. S.C. Code Ann. § 6-29-840 (Supp. 2012); (Cmplt. at p. 8, fn. 3, R. p. 24). This standard has been interpreted to require that a court not disturb a board's findings and decision unless there is

no evidence that reasonably supports the decision. Vulcan Materials Co. v. Greenville Cnty. Bd. of Zoning Appeals, 342 S.C. 480, 488, 536 S.E.2d 892, 896 (Ct. App. 2000).

Further, on an administrative appeal, a reviewing court must refrain from substituting its judgment for that of the governing body, even if it disagrees with the decision. McSherry v. Spartanburg Cnty. Council, 371 S.C. 586, 590 641 S.E.2d 431, 433 (2007) ("(I)n reviewing the discretionary decision of a legislative body, our courts have been loath to substitute their judgment for that of elected representatives."); Rest. Row Assocs. v. Horry Cnty., 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999). The evidence in such cases is limited to the record before the governing entity. Vulcan Materials Co., 342 S.C. at 491, 898; see S.C. Code Ann. § 1-23-610(B) ("The review of the administrative law judge's order must be confined to the record.").

Courts are bound to afford substantial deference to the decisions of those charged with interpreting and applying local zoning ordinances. Clear Channel Outdoor v. City of Myrtle Beach, 360 S.C. 459, 465, 602 S.E.2d 76, 79 (Ct. App. 2004), aff'd, 372 S.C. 230, 642 S.E.2d 565 (2007).

I. The Circuit Court Properly Affirmed The Horry County Council Resolution Allowing Relocation Of The Cell Phone Tower.

A. The Appeal Fails As The Relocated Tower Is Authorized By § 13-73(a).

Contrary to Appellants' argument, the Resolution was in compliance with the applicable law: § 13-73 of the Horry County Code of Ordinances. (Horry County, S.C., Code of Ordinances Ch. 13, Art. VII, §§ 13-71, 13-73 (2013)). The Horry County Council is authorized to issue permits for construction of telecommunications towers in Horry County. (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"). When doing so, the Horry County Council is to review the criteria set forth in § 13-73.[6] (Horry County, S.C., Code of Ordinances Ch. 13, Art. VII, §§ 13-71, 13-73 (2013)). Section 13-73(a) lists items the Horry County Council should consider when determining whether to grant or deny a permit for a communications tower and provides that:

> County council shall consider the following in determining whether the request should be approved or disapproved.
>
> (1) Height of the proposed tower;
>
> (2) Proximity of the tower to residential structures and residential zoning district boundaries;
>
> (3) Nature of uses on adjacent and nearby properties;
>
> (4) Surrounding topography;
>
> (5) Surrounding tree coverage and foliage;
>
> (6) Design of the tower, with particular reference to design characteristics that have the effect of reducing or eliminating visual obtrusiveness; and
>
> (7) Proposed ingress and egress.

(Horry County, S.C., Code of Ordinances Ch. 13, Art. VII, § 13-73(a) (2013)).

Appellants completely ignore these elements and the authority granted the Horry County Council under this Section to issue permits. The Relocation Application expressly listed and addressed each of these elements. (Ex. G to Am. Towers Memo. in Opp. to Temp. Order at pp. 6-7, R. pp. 114-115). American Towers further presented a number of drawings, maps, specifications, approvals, and other documents to provide further evidence on these items. (Ex. G to Am. Towers Memo. in Opp. to Temp. Order at pp. 8-

[6] Sections 13-73(b-c), the only provisions cited by Appellants, exclusively deal with co-location. (Horry County, S.C., Code of Ordinances Ch. 13, Art. VII, § 13-73 (2013)).

48, R. pp. 535-575). Upon review of this evidence, the Horry County Council expressly determined that the submitted evidence satisfied the requirements and that finding should be given deference. (Ex. E to Horry County Council's Return to Appellants' Petition for Supersedeas Relief, stating "**WHEREAS**, County Council finds that the request adequately satisfies the criteria of review stated in Section 13-73..." R. p. 85).

Appellants argue, citing Hodge v. Pollock, 223 S.C. 342, 75 S.E.2d 752 (1953), Peterson Outdoor Adver. v. City of Myrtle Beach, 327 S.C. 230, 489 S.E.2d (1997), and Wyndham Enterprises, LLC v. City of N. Augusta, 401 S.C. 144, 735 S.E.2d 659 (Ct. App. 2012), that a legislative body abuses its discretion when ignoring the statutory standards. However, these cases are inapplicable as 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.

Appellants further argue that the Resolution violated §§ 1605(a)(2) and 13-73 of the Horry County Code of Ordinances governing Telecommunications Facilities. Section 1605(a)(2) provides: "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." (Horry County, S.C., Code of Ordinances, App. B, Art. XVI, § 1605(a)(2)., Ch. 13, Art. VII, § 13-73). Section 13-73(b) states that the County may approve a waiver of the co-location requirements when the waiver is justified and the applicant can supply information outlined in § 13-73(c) that co-location is not practical or warranted. (Horry County, S.C., Code of Ordinances, Ch. 13, Art. VII, § 13-73).

However, Appellants' argument ignores the actual situation at hand and the evidence provided to the Horry County Council. American Towers already had an existing tower.

American Towers did not seek to operate multiple towers but to relocate its existing tower. (August 31, 2012 letter at Exhibit A) ("(W)e are proposing to relocate the tower, including all existing tenants, to the new location at 215 Huggins Road. The existing tower will be removed once all tenants relocate their equipment to the new tower."). The co-location requirements are therefore inapplicable.

The Zoning Recommendation addressed this point, recommending that the existing tower be removed, and the Horry County Council's Resolution specifically approved of the relocation, requiring that American Towers remove its old tower within 120 days of the final inspection and approval of the relocated tower. (Ex. E to Horry County Council's Return to Appellants' Petition for Supersedeas Relief, R. p. 85).

At page 17 of its Brief, Appellants assert: "The 2.5 mile radius at issue now houses three cell towers- exactly what the ordinances were designed to avoid." (Appellants' Brief at p. 17). However, American Towers' relocated tower was just constructed and the old tower will soon be removed as always contemplated by the Relocation Application, the Resolution, and the Lease. Further, Appellants' feigned concern for the number of towers in the area is disingenuous as Appellants TriStar/Minerva filed their own petition to construct a cell tower within the same radius. (Am. Towers Memo. in Opp. to Temp. Order at Ex. I, 10/16/12 Trans. at p. 16, R. p. 75).

In summary, the Horry County Council Resolution permitting relocation of American Towers' tower is expressly authorized under §§ 13-70 and 13-73 of the Horry County Code of Ordinances. American Towers presented evidence on the relevant criteria, and the Horry County Council based its decision on the Ordinances and abundance of information it obtained. Accordingly, the Court should affirm the Circuit Court Order,

which affirmed the Horry County Council Resolution.

B. The Appeal Fails As The Relocated Tower Is Authorized By § 13-73(c).

The co-location requirements of § 1605(a) only apply to adding a tower, not moving a tower. American Towers nonetheless presented sufficient evidence for the Horry County Council to waive the co-location requirements under § 13-73(b-c). Section 13-73(b-c) allows the Horry County Council to waive the co-location requirements in its discretion when the waiver is justified and the applicant can supply proof that co-location is not practical or warranted. This provision allows the Horry County Council to address case-specific scenarios, like the instant one. Such flexibility is necessary to enable the Council to make reasonable decisions with respect to towers, given the quickly changing and always advancing technology at issue.

If ever a case existed to justify a waiver of the co-location requirements, this is it, as the old tower will be deconstructed. (Horry County, S.C., Code of Ordinances, Ch. 13, Art. VII, § 13-73(b-c)). Section 13-73(c) addresses the determination on whether co-location is not practical or warranted and states:

> 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)).

Appellants mistakenly assert that American Towers did not provide evidence to justify a waiver. In its Relocation Application, American Towers listed and provided information on each of these elements. (Ex. G to Am. Towers Memo. in Opp. to Temp. Order at pp. 1, 7-8, R. pp. 528, 534-535). Specifically, American Towers provided information on relocation of its tower and how the only other tower in the nearby radius, a tower owned by a third party, could not accommodate the needs of the three carriers broadcasting from American Towers' tower. (Id., R. pp. 528, 534-535; Ex. I to Am. Towers Memo. in Opp. to Temp. Order at pp. 18-19, R. pp. 77-78). The evidence set forth by American Towers was discussed at the October 16, 2012 Horry County Council meeting, and Council members posed questions to American Towers' representatives. (Ex. I to Am. Towers Memo. in Opp. to Temp. Order, R. pp. 60-82).

Likewise, the Zoning Recommendation examined the practicality of a waiver. In particular, the Zoning Recommendation stated: "The applicant states that there are two towers within a 2.5 mile radius and therefore are requesting a waiver. The closest tower is a tower that they currently own. The second tower owned by SBA is located just over 1 mile away. That tower does not currently serve cellular antennas." (R. p. 99). Only after receiving this Zoning Recommendation, based on the abundance of evidence, and after public hearing, the Horry County Council expressly found that the Relocation Application satisfied the criteria of § 13-73 and approved the Resolution.

As admitted by Appellants, the co-location requirement is meant to limit the number

of towers in a geographic area. (Brief at p. 9 "The Horry County telecommunications ordinance was enacted to prevent the proliferation of cell towers"). The evidence presented to the Horry County Council that the existing tower will be removed upon completion of the relocated tower reasonably and overwhelmingly justifies waiver of the co-location requirement.

II. Appellants Lack Standing To Bring This Administrative Review.[7]

Standing to sue is a fundamental requirement in instituting an action. Joytime Distribs. & Amusement Co. v. State, 338 S.C. 634, 639, 528 S.E.2d 647, 649 (1999). Before reaching the merits of a case, a court must determine whether a plaintiff possesses standing to present its claim. See Ex parte State ex rel. Wilson, 391 S.C. 565, 573, 707 S.E.2d 402, 407 (2011). As a general matter, a plaintiff must possess standing based on a statute, by having suffered an injury to a legally protected interest, or through the public importance exception. ATC South, Inc. v. Charleston Cnty., 380 S.C. 191, 669 S.E.2d 337 (2008).

Here, Appellants do not possess standing to appeal the Horry County Council Resolution. Appellants have not cited any statute which would confer standing, have not suffered injury to a legally protected interest, and do not meet the requirements for the public importance exception. Appellants are admitted competitors trying to use the legal

---

[7] This issue was presented to the Circuit Court but not ruled upon as the Circuit Court held against Appellants as Appellants' Complaint lacked merit. The Court may affirm the Judgment Order on this additional sustaining ground. I'on, LLC v. Town of Mt. Pleasant, 526 S.E.2d 716, 723, 338 S.C. 406, 421 (2000); S.C. Dept. of Labor, Licensing and Reg. v. Chastain, 392 S.C. 259, 262, 708 S.E.2d 818, 820 (Ct. App. 2011) (on appeal, a respondent may raise any additional reasons the appellate court should affirm, even if those issues were not previously presented or ruled upon).

system to prevent competition.[8]

Appellants claim an "injury" but only to their goals and desires. Appellants hope that American Towers will leave the old tower for Appellants' own use at the expiration of the Lease.[9] However, Appellants' desire to obtain the tower without incurring construction costs does not constitute a protectable legal right. Upon questioning by the Circuit Court at the hearing in this matter, Appellants admitted that American Towers owns the tower. (4/26/13 Trans. at 21:5-7, R. p. 150). Further, pursuant to ¶ 8 of the Lease, American Towers is required to remove the tower upon expiration of the Lease and is not prevented from doing so sooner.

Importantly, as previously recognized by this Court, Appellants have not and cannot point to any contractual provision that is being violated. TriStar is not even a party to any of the agreements at issue. (6/13/13 Order, R. pp. 15-16) ("(W)e find ourselves required to observe that there is no contractual relationship between them and they owe each other no legal duties.").

In an analogous case, ATC South v. Charleston County, the Supreme Court of South Carolina addressed whether a cellular tower company possessed standing to challenge a Charleston County decision allowing an applicant to construct a cellular communications tower. In no uncertain terms, the Supreme Court of South Carolina determined that competitors lack standing to challenge local zoning decisions made by a county

---

[8] At the hearing in this matter, Appellants admitted they are competitors of American Tower. (4/26/13 Trans. at 11:13-18, 22:19-21, R. pp. 140, 151).

[9] While Appellants initially (and improperly) argued in their Complaint that they possessed an interest in American Towers' tower, Appellants appear to have abandoned this argument on appeal, making any claim to standing even more questionable.

government. Id. at 197-198. Specifically, the court determined that competitors in the cellular tower industry do not have a protectable right which would confer standing to construct towers or prevent a competitor from constructing a tower. Id. The court also determined that the case did not fall under the public importance exception— that a cellular tower company's efforts to "cloak" a zoning challenge as a matter of public importance would not gain traction with the Supreme Court. Id. at 200. The court affirmed the dismissal of the case based on plaintiff's lack of standing to challenge the county action. Id.

Here, Appellants are competitors with no protectable interest in American Towers' tower or Relocation Application. Accordingly, due to Appellants' lack of standing and the Supreme Court of South Carolina's ruling in the ATC South v. Charleston County case, the Court should affirm judgment against Appellants.

III. Appellants Failed To Preserve Their First Issue On Appeal.

An appellant fails to preserve an issue for appeal unless the appellant both raises the issue to the trial court and obtains a ruling on that issue. Mathis v. Brown & Brown of S.C., Inc., 389 S.C. 299, 311, 698 S.E.2d 773, 779 (2010); I'on, LLC v. Town of Mt. Pleasant, 526 S.E.2d 716, 724, 338 S.C. 406, 422 (2000).

In the instant case, Appellants failed to preserve their first issue on appeal. Appellants argue for the first time to this Court that the "Horry County ordinances do not allow issuance of a 'relocation permit.'" (Brief at p. 1). This argument, which seeks a ruling that "relocation" permits, in general, are not authorized as a matter of law, is new and distinguishable from Appellants' preserved arguments in the record that are directed at the adequacy of the specific evidence presented by American Tower.

Specifically, in the record, Appellants argued that: "the Horry County Council's approval of Resolution R-73-12 was not supported by any factual grounds and was clearly contrary to the weight of the evidence." (Cmplt. at ¶ 29, R. p. 25). Appellants also argued that the evidence did warrant waiver of § 1605. (Cmplt. at ¶ 30-35, R. pp. 25-27) ("The Council's decision to waive the co-location requirement of Section 1605 was not supported by any evidence and therefore should be considered arbitrary and should not be sustained."). Similarly, at the hearing in this matter, Appellants argued that:

> American Tower in this case made application to Horry County Council for a permit for a new tower and it is our contention that they did not provide nor follow and that *the county council did not require them to provide the information and the proof* that a new tower was in the terms of the statute, quote, practical – strike that. That the continued use of the old existing tower was, quote, neither practical nor warranted, which that is what the ordinances requires that the council find in order to allow the permitting of this new tower.

(4/26/13 Trans. at 7:18-8:4, R. pp. 136-137) (emphasis added).

Accordingly, Appellants' first issue on appeal – whether the Horry County ordinances allow issuance of a 'relocation permit' – should be disregarded.

CONCLUSION

In no way was the Horry County Council's decision arbitrary or outside of the bounds of its authority. The Horry County Code of Ordinances expressly tasks the Horry County Council with reviewing and issuing permits to construct towers. As detailed above, the Horry County Council reviewed the record presented, made findings, and approved the Relocation Application. Appellants furthermore lack standing as mere business competitors and they failed to preserve the lead issue in their brief for appeal. For these reasons, American Towers respectfully requests that this Court affirm the Circuit Court's May 21, 2013 Judgment Order against Appellants and re-affirm the Horry County Council's

adoption of Resolution No. R-73-12.

Date: March 14, 2014

Respectfully submitted,

Thomas S. Tisdale, Esq.
Jonathan L. Yates, Esq.
Jason S. Smith, Esq.
HELLMAN YATES & TISDALE, PA
105 Broad Street
Charleston, SC 29401
Telephone: (843) 414.9754
Facsimile: (843) 266.9188

David C. Slough, Esq.
NEXSEN PRUET, LLC
1101 Johnson Avenue, Suite 300
Myrtle Beach, SC 29577
Telephone: (843) 213-5400
Facsimile: (843) 213-5407

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.

Appellate Case No. 2013-001178

CERTIFICATE OF COUNSEL

The undersigned counsel for Respondent American Towers, LLC, certifies that this Final Brief complies with Rule 211(b), SCACR.

Date: March 14, 2014

Respectfully submitted,

Thomas S. Tisdale, Esq.
Jonathan L. Yates, Esq.
Jason S. Smith, Esq.
HELLMAN YATES & TISDALE, PA
105 Broad Street
Charleston, SC 29401
Telephone: (843) 414-9754
Facsimile: (843) 266-9188

David C. Slough, Esq.
NEXSEN PRUET, LLC
1101 Johnson Avenue, Suite 300
Myrtle Beach, SC 29577
Telephone: (843) 213-5400
Facsimile: (843) 213-5407

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson
Circuit Court Judge

RECEIVED
MAR 17 2014
SC Court of Appeals

Case No.: 2012-CP-26-8652
Appellate Case No.: 2013-001178

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

v.

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

---

PROOF OF SERVICE

I, Ann Skipper Ballenger, paralegal for the attorneys representing Respondent American Towers, LLC, 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 Respondent American Towers, LLC

Counsel Served:

Susan P. MacDonald, Esquire
Nelson, Mullins, Riley & Scarborough, LLP
3751 Robert M. Grissom Parkway, Suite 300
Post Office Box 3939 (29578-3939)
Myrtle Beach, S.C. 29577-3165
Attorney for Appellants TriStar Investors, Inc., Minerva Realty, LLC, and Angeline Johnson

Michael J. Anzelmo, Esquire
Nelson, Mullins, Riley & Scarborough, LLP
1320 Main Street, 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, S.C. 29201
Attorney for Appellants TriStar Investors, Inc., Minerva Realty, LLC, and Angeline Johnson

L. Morgan Martin, Esquire
L. Morgan Martin, P.A.
1211 Third Avenue
Conway, S.C. 29526
Attorney for Appellants TriStar Investors, Inc., Minerva Realty, LLC, and Angeline Johnson

Emma Ruth Brittain, Esquire
J. Jackson Thomas, Esquire
Thomas & Brittain, P.A.
Post Office Box 1290
Myrtle Beach, S.C. 29578
Attorneys for Respondent Horry County Council

Date: March 14, 2014

Ann Skipper Ballenger
HELLMAN YATES & TISDALE, PA
105 Broad Street
Charleston, SC 29401
Telephone: (843) 266-9099
Facsimile: (843) 266-9188