

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
THE HORRY COUNTY COUNCIL**

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STATEMENT OF ISSUES ON APPEAL

- I. Did the Lower Court Properly Affirm Horry County Council's Passage of Resolution R-73-12 Allowing Relocation of American Towers' Telecommunications Tower When the Record Evidence Establishes that Horry County Council's Approval of American Towers' Permit Application was a Proper Exercise of Discretion and of the Power and Authority Lawfully Vested in It?
- II. Do the Appellants, as Competitors of American Towers, Lack Standing to Bring This Appeal Challenging County Council's Action?
- III. Should the Lower Court's Decision be Affirmed Because Appellants Have Failed to Preserve the Issue of Whether the Horry County Ordinances Allow Issuance of a Relocation Permit?
- IV. In the event the Court Determines that the Co-location Provisions of the Horry County Ordinance Apply Herein, Should the Lower Court's Decision be Affirmed on the Additional Sustaining Ground that Horry County Council Waived the Co-location Requirements?

STATEMENT OF THE CASE

The instant action challenges Horry County Council's unanimous adoption of Resolution No. R-73-12 ("R-73-12") on October 16, 2012, approving a permit application by Respondent American Towers, LLC ("American Towers"), thereby allowing American Towers to move its communications and cell phone tower operations located at 215 Huggins Road in Loris, South Carolina, to a nearby location on Highway 9. Permit approval was conditioned upon American Towers' removal of the existing tower within 120 days of final inspection and approval of the newly constructed tower. (R. pp. 73-12, R. pp. 85-86; Affidavit of David Schwerd, R. p. 254, ¶7). The passage of R-73-12 by Horry County Council ("Horry County" or "County Council") was taken pursuant to Horry County, S.C., CODE OF ORDINANCES, ch. 13, art. VII, §13-72 (2013) which requires County Council approval of all requests for telecommunications tower permits. (R. p. 525).

On November 8, 2012, TriStar Investors, Inc., Minerva Realty, LLC, and Angeline Johnson (collectively "TriStar"), filed a Summons and Complaint appealing County Council's approval of R-73-12. On December 6, 2012, American Towers filed its Answer and affirmative defenses to the Complaint and filed a Supplemental Response on December 12, 2012. (Verified Answer and Affirmative Defenses to Plaintiffs' Original Complaint and Application for Temporary Restraining Order and Preliminary Injunction, R. pp. 45-50; American Towers' Supplemental Response in Opposition to Plaintiffs' Application for Temporary Restraining Order and Preliminary Injunction, R. pp. 421-429). On December 5, 2012, Horry County submitted and filed the Affidavit of David Schwerd, Principal Planner with The Horry County Planning and Zoning Department,

attesting to and attaching documents constituting the Record on Appeal in this matter. (Affidavit of David Schwerd Submitted by County Council in Response to Plaintiff's Application for Temporary Restraining Order, R. pp. 252-255). On November 16, 2012, County Council and American Towers were served with Tri-Star's Application for Temporary Restraining Order and Preliminary Injunction and a Notice of Hearing specifying a hearing date of December 7, 2012. Horry County filed its Additional Submittal to Court on December 10, 2012, and its Answer to the Complaint ("Answer") on December 17, 2012. (Additional Submittal to Court on Behalf of County Council, R. pp. 409-411; Answer of County Council, R. pp. 52-59).

On April 8, 2013, the Honorable Larry B. Hyman, Jr. issued an Order Granting Temporary Restraining Order and Preliminary Injunction and Reforming Caption, staying the matter until a full hearing could be conducted on the merits. (Order Granting Temporary Restraining Order and Preliminary Injunction and Reforming Caption filed April 8, 2013, R. pp. 1-3). On April 26, 2013, a merits hearing was conducted before the Honorable Benjamin H. Culbertson. By Order filed May 21, 2013, Judge Culbertson affirmed Horry County Council's passage of R-73-12 and vacated the Temporary and Preliminary Injunction Orders, declaring them null and void. (Order Entering Final Judgment Against Plaintiffs filed May 21, 2013, R. pp. 6-10).

Tri-Star filed its Notice of Appeal and moved for supersedeas relief pending appeal on May 22, 2013. (Notice of Appeal, R. pp. 442-443; Plaintiff's Motion for Supersedeas, R. pp. 444-451). On May 31, 2013, Judge Culbertson, following a hearing, denied TriStar's request for supersedeas relief. (Transcript of Hearing before the Honorable Benjamin H. Culbertson on May 31, 2013, R. pp. 177-226; Form 4 Order

Denying Appellants' Motion for Supersedeas dated May 31, 2013, R. p. 11).

On June 3, 2013, TriStar filed a Petition for *Ex Parte* Supersedeas Relief with this Court, which was denied on June 5, 2013, because TriStar had failed to serve the Respondents and failed to demonstrate exigent circumstances requiring *ex parte* action (Petition for *Ex Parte* Supersedeas Relief, R. pp. 458-474; South Carolina Court of Appeals' Order filed June 5, 2013, R. p. 13). TriStar then filed a Petition for Supersedeas Relief with Request for Expedited Decision with this Court on June 6, 2013. (Appellants' Petition for Supersedeas Relief with Request for Expedited Decision dated June 6, 2013, R. pp. 494-510). On June 7, 2013, the Court issued a Temporary Supersedeas pending the Court's final resolution of the Petition. (Order filed June 7, 2013, R. p. 14). By Order dated June 13, 2013, this Court denied Appellants' request for supersedeas relief. (Order filed June 13, 2013, R. pp. 15-16).

STATEMENT OF FACTS

American Towers filed an application with the Horry County Planning and Zoning Department ("Planning and Zoning") on August 31, 2012, seeking to relocate its existing communications and cell phone tower to a nearby property. The filing triggered a detailed, Code-required review by Planning and Zoning staff. Staff reviewed American Towers' submittal to ensure that it met all criteria and contained all submittal information required by Horry County, S.C., Code of Ordinances, ch. 13, art. VII (2013) and Horry County, S.C., Code of Ordinances, app. B, art. XVI, §1600 *et seq.*, (2013) (R. p. 524).

In its review, staff noted that the relocation not only met the Code's permitting requirements but was also a better location than the existing location because: (1) the fall

zone radius of the proposed relocated tower “lies well within the new property location,” while the current tower’s fall zone falls within the adjacent highway; and (2) the application met the current amended requirements of Article VII of the County’s Ordinance while the existing location, permitted under prior Code provisions, did not meet the current Code requirements. Additionally, the relocated tower would contain space for two additional carriers, expanding the capacity from 3 to 5 carriers. (County Council Decision Memorandum, R. p. 36).

Planning and Zoning staff determined that American Towers’ application met all required criteria of Horry County, S.C., Code of Ordinances, ch. 13, art. VII, §13-73 (2013) (“§13-73”) and Horry County, S.C., Code of Ordinances, app. B, art. XVI, §1607 (2013) (“§1607”). American Towers’ submittal included the following information responsive to §1607:

- Site plans and drawings referencing the carriers’ equipment locations;
- Engineer’s certification of compliance with Federal Communications Commission rules and regulations;
- Federal Aviation Administration’s Determination of No Hazard to Air and Navigation;
- Inventory and map of existing American Towers’ sites;
- Information pertaining to existing towers within 2.5 miles of the proposed relocated tower site;
- Design requirements information;
- Information pertaining to illumination, color and signage;
- Required acknowledgements;

- Information pertaining to compliance with setbacks and fall zone;
- Screening and landscaping information.

(Affidavit of David Schwerd, Attachment A, R. pp. 528-564, 567-576).

Information responsive to the criteria set forth in §13-73 was included in the submittal including:

- Tower height with drawings/exhibits;
- Information pertaining to proximity of the tower to residential structures and residential zoning district boundaries;
- Description of uses of adjacent and nearby properties;
- Information pertaining to topography and surrounding tree coverage and foliage;
- Information pertaining to tower design and characteristics with respect to effect of reducing and or eliminating visual obtrusiveness and regarding proposed ingress and egress; and
- Information pertaining to broadcast coverage from the proposed site.

(Affidavit of David Schwerd, Attachment A, R. pp. 528-564, 567-576).

American Towers responded to §13-73(b) (which applies in the event of the need for County Council approval of a waiver to the co-location requirements of §1605), that a co-location waiver was not necessary because it was seeking to relocate the existing tower (with existing leases with T-Mobile, Horry Telephone and Verizon Wireless) with continuation of service, and that the requested permit approval did not constitute a co-location because the existing tower would be removed upon its replacement by a tower in the new location. (Affidavit of David Schwerd, Attachment A, R. 528-564, 567-576).

Upon review of American Towers' application, Planning and Zoning staff

determined that the application met the requirements of the applicable Horry County Ordinances and made the following recommendation to the Horry County Council in its County Council Decision Memorandum:

Staff recommends approval of the telecommunications tower permit based on the applicant meeting the required criteria set forth in Article VII, Section 13-73 of the Horry County General Code of Ordinances relating to the granting of a telecommunications tower permit. Staff also recommends that American Towers remove the existing tower within 120 days of the final [inspection and approval] on the new tower.

(Affidavit of David Schwerd, R. p. 254, ¶6; County Council Decision Memorandum, R. pp. 312-313; Horry County Council Transcript, p. 3, l. 8-17, R. p. 62).

As set forth in the Affidavit of David Schwerd¹, Principal Planner with Planning and Zoning, in its review staff noted that the proposed relocated tower was being relocated to a more favorable location than the existing location because the fall zone radius of the proposed relocated tower “lies well within the new property location, while the fall zone of the current tower falls within the adjacent highway; accordingly, the proposed relocated tower advances the public safety interests of Horry County.” (Affidavit of David Schwerd, R. p. 254, ¶5). Moreover, as staff also observed, the existing tower did not conform to the design requirements of Article XVI, §1611 of the Horry County Zoning Ordinance (the Ordinance was enacted after the location of the existing tower) and “the proposed relocated tower is designed to meet all requirements of the Article XVI, and will provide space for additional carriers.” (Affidavit of David Schwerd, R. p. 254, ¶4).

¹ Mr. Schwerd was also the Planning Department staff member who drafted Horry County’s ordinance regulating telecommunications tower permits for review and approval and has been involved in the review of all telecommunication towers since the ordinance’s adoption. Mr. Schwerd has been employed with Planning and Zoning since 2004 and was the staff liaison for the Telecommunications Committee, a subcommittee of the Horry County Planning Commission from March through December, 2006. (Affidavit of David Schwerd, R. p. 253, ¶1).

Planning and Zoning also determined from its review that the proposed new tower location did not violate the co-location provisions of Horry County, S.C., Code of Ordinances, ch. XII, art. VII, §13-73(b) and (c) (2013) or Horry County, S.C., Code of Ordinances, app. B, art. XVI, §1605 (2013) (“§1605”). Section 1605 provides that “[n]o new proposed freestanding tower...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 (2013), R. p. 524). American Towers was required, however, as an express condition of approval set forth in R-73-12, to remove the existing tower within 120 days of final completion and approval of the new tower, thereby removing the tower location from the 2½ mile radius. (R-73-12, R. p. 34). Another existing tower, the SBA tower, was not considered by staff to violate the 2½ mile radius provision because the SBA tower did not currently serve cellular antennas; moreover, the SBA tower had previously been granted a co-location waiver from the existing American Towers site in 2003, which preexisting site was being replaced by the new proposed and more favorable site by American Towers. (Affidavit of David Schwerd, R. pp. 235-255).

Notice of the proposed relocation was provided to all adjacent property owners by written notice dated October 1, 2012.² (Affidavit of David Schwerd, ¶8 and Attachment D, R. pp. 255, 102).³ County Planning Staff prepared a County Council Decision Memorandum for submission for County Council recommending approval of American

² After County Council provided notice of its meeting, by letter dated October 11, 2012, of the proposed relocation to adjacent property owners, and before the scheduled County Council meeting, TriStar submitted an application for construction of a replacement cellular tower within ½ mile of the same site as the existing American Towers site. Staff recommended disapproval because, *inter alia*, removal of the tower had been made a condition of approval of American Towers’ new tower (Affidavit of David Schwerd, R. p. 255, §§11,12; and Attachments, R. pp. 256-316).

³ By letter to the Court dated May 15, 2014, Appellants counsel stipulated that Horry County Council provided Public Notice of the October 16, 2012, hearing.

Towers' application. (County Council Decision Memorandum, R. p. 36). Planning and Zoning's extensive review of American Towers' relocation application is documented in the Record, as established by the attachments to and the Affidavit of David Schwerd, Principal Planner with the Horry County Planning and Zoning Department. (Affidavit of David Schwerd and attachments, R. pp. 36-44, 85-86, 101-102, 256-316, 528-576).

On October 16, 2012, Horry County Council held a public hearing, following notice to the public as required by Horry County, S.C., Code of Ordinances, ch. 13, art. VII, §13-72 (2013), to consider and vote on American Towers' relocation permit application. (Horry County, S.C., Code of Ordinances, ch. 13, art. VII, §13-72 (2013), R. p. 525; October 1, 2012, letter from David Schwerd to Property Owner, R. p. 102; County Council Agenda for October 16, 2012, Meeting, R. pp. 95-98; Transcript of October 16, 2012 County Council Meeting, R. pp. 60-82). Representatives of both American Towers and TriStar appeared at the meeting and made presentations. Planning and Zoning staff provided County Council a memorandum setting forth the results of staff's review and recommendation. Additionally, Janet Carter, Planning Director/Infrastructure and Regulation Counsel for Horry County, provided a briefing to County Council regarding staff's review of American Towers' application, including a discussion of the site advantages of the new tower location, and staff's recommendation of approval of R-73-12 granting American Towers' permit request for the tower relocation. Ms. Carter explained the recommendation that County Council's approval included the requirement that the existing tower be removed within 120 days of final inspection and approval of the new tower. (Affidavit of David Schwerd, R. p. 255, ¶10; County Council Decision Memorandum, R. p. 36; Transcript of Proceedings before

Horry County Council During Regular Council Meeting held on October 16, 2012, P. 2, lines 7- P. 3, line 17, R. pp. 61-62).

Following public hearing and staff review and recommendation, Horry County Council unanimously approved R-73-12 authorizing American Towers to relocate its existing communications tower to the nearby property, conditioned upon removal of the existing tower within 120 days of final inspection and approval of the new tower. (Affidavit of David Schwerd, R. p. 255, ¶10; R-73-12, R. p. 85; Transcript of County Council proceedings, PP. 1-23, R. pp. 60-82).

ARGUMENT

I. Because the Record Evidence Establishes that Horry County Council's Approval of American Towers' Permit Application was a Proper Exercise of Discretion and of the Power and Authority Lawfully Vested in It, the Lower Court Properly Affirmed County Council's Passage of Resolution R-73-12 Allowing Relocation of American Towers' Telecommunications Tower.

A. Standard of Review

Under the well established South Carolina caselaw, the scope of review of Horry County Council's decision in this matter is limited. County Council's approval of R-73-12 is subject to the same standard as a zoning board decision, which shall not be upset unless arbitrary, unreasonable, an obvious abuse of discretion, or in excess of lawfully delegated power. S.C. Code Ann. §6-29-840 (Supp. 2012). See *Historic Charleston Foundation v. Krawcheck*, 313 S.C. 500, 505-506, 443 S.E.2d 401 (Ct. App. 1994) ("We give great deference to the decision of those charged with interpreting and applying local zoning ordinances."). In this regard, the lower court properly applied the applicable scope of review:

This Court's scope of review in this matter is limited. 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. See *Gay v. City of Beaufort*, 364 S.C. 252, 254; 612 S.E.2d 467 (Ct. App. 2005) (City council decision should not be disturbed unless decision is arbitrary, unreasonable, or obvious abuse of discretion); *McSherry v. Spartanburg County Council*, 371 S.C. 586, 589; 641 S.E.2d 431 (2007) (in reviewing the discretionary decision of a legislative body, our courts are loath to substitute their judgment for that of elected representatives”) (citation omitted).

(Order Entering Final Judgment Against Plaintiffs, Page 3, ¶1, filed May 21, 2013, R. p. 8). As observed by this Court in *Vulcan Materials Co. v. Greenville Cnty. Bd. of Zoning Appeals*, 342 S.C. 480, 488, 536 S.E.2d 892, 896 (Ct. App. 2000), the applicable standard equates the findings of the governing body to those of a jury and the finding and decision will not be disturbed on appeal unless there is *no evidence* to support the decision. The evidence in such cases is limited to the record before the governing entity. *Vulcan Materials Co.*, 342 S.C. at 491.

B. The Lower Court Properly Affirmed R-73-12 Because American Towers Met All Required Ordinance Criteria For Relocation of Its Cell Phone Tower.

The lower court afforded the proper deference to the record evidence and the interpretation of the Zoning Ordinance by those charged with its interpretation as evidenced by its finding that “Horry County Council’s unanimous decision enacting R-73-12 was based on a thorough documented review and record prepared by the Horry County Planning and Zoning Department,” forming the proper underpinning for the Court’s legal conclusions that TriStar’s requested relief seeking reversal of R-73-12 was neither warranted nor had County Council “act(ed) arbitrarily, unreasonably, in an abuse of its discretion, or in excess of lawfully delegated power.” (Order Entering Final Judgment Against Plaintiffs filed May 21, 2013, Page 3, ¶¶2, 3, R. p. 8). Because the

lower court's ruling upholding County Council's enactment of R-73-12 is amply supported by uncontroverted record evidence, the lower court's decision should be affirmed under the governing standard of review.

Contrary to Tri-Star's argument, R-73-12 is compliant with the governing law: Horry County, S.C., Code of Ordinances, ch. 13, art. VII, §13-70 et seq. (2013). (Horry County, S.C., Code of Ordinances, ch. 13, art. VII, §13-70 et seq. (2013), R. p. 525-526). Its application also meets all applicable requirements of §1600 et seq., Horry County, S.C., Code of Ordinances, app. B, art. XVI, §1600 et seq., (2013), which sets forth standards "relative to the construction and location of transmission towers necessary to support the needs of the wireless communication industry within Horry County," and addresses County Council's statutory intent as to tower locations, including the minimization of adverse visual effects, avoidance of property damage through tower failure, and maximization of use of new or existing towers. (Horry County, S.C., Code of Ordinances, app. B, art. XVI, §1600 et seq., (2013), R. p. 524).

Section 13-70 governs the issuance of telecommunications permits for freestanding telecommunication towers, with the exception of certain exclusions inapplicable to the instant action. Horry County Council is the permitting authority for construction of telecommunication towers, and permits are required for all new towers. A request for a telecommunications tower permit must be initiated by submission of a conditional use application to the Horry County Director of Planning and Zoning addressing the criteria set forth in §13-73. (Horry County, S.C., Code of Ordinances, ch. 13, art. VII, §§13-70, 13-73(a) (2013), R. p. 525). A list of

supplemental information necessary to meet the application requirements is contained in HORRY COUNTY, S.C., CODE OF ORDINANCES, app. B, art. XVI, §1607 (2013). (HORRY COUNTY, S.C., CODE OF ORDINANCES, app. B, art. XVI, §1607 (2013), R. p. 524). Section 13-72 requires that all telecommunications tower permits be placed on the County Council agenda for public hearing and approval or disapproval by resolution. (HORRY COUNTY, S.C., CODE OF ORDINANCES, ch. 13, art. VII, §13-72 (2013) (“§13-72”), R. p. 525).

Section 13-73(a) specifies the criteria to be considered by County Council in deciding whether to grant or deny a request for issuance of a telecommunications tower permit:

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), R. p.

525).

Sections 13-73(b) and (c) contain provisions relating to waiver of co-location requirements of §1605 of the Horry County Zoning Ordinance. Planning and Zoning staff concluded that the co-location provisions are inapplicable to Tri-Star's application, and the lower court affirmed this position in its finding that "American Towers' application did not seek to operate multiple towers but to relocate its existing tower." (Order Entering Final Judgment filed May 21, 2013, R. pp. 6-10; HORRY COUNTY, S.C., CODE OF ORDINANCES, app. B, art. XVI, §1605 (2013), R. p. 524).

American Towers submitted a detailed application, including exhibits, requesting a conditional use telecommunications tower permit for the "proposed relocation" of the existing tower. The submittal addressed all criteria of §1607 and §13-73 in detail, including appropriate attachments. (Affidavit of David Schwerd, Attachment A, R. pp. 528-564, 567-576). The information provided by American Towers was specific in its response to each criterion required by the Horry County Code of Ordinances as necessary for County Council's consideration in reaching its determination whether to approve or disapprove the permit request. No criterion went unaddressed by American Towers. Moreover, none of the information provided by American Towers in its application was controverted by TriStar.

Staff's briefing recommendation of approval to County Council was unequivocal. (County Council Decision Memorandum, R. p. 36). Upon its review of the evidence, County Council expressly determined that American Towers' application and the evidence before it satisfied the requirements of the governing Ordinances; based on that finding, Resolution R-73-12, is entitled to deference. (Affidavit of David Schwerd,

Attachment E, R. pp. 85-86 (stating “**WHEREAS**, County Council finds that the request adequately satisfies the criteria of review stated in Section 13-73....”).

Appellants’ reliance on *Hodge v. Pollock*, 223 S.C. 342, 75 S.E.2d 753 (1953), *Peterson Outdoor Adver. v. City of Myrtle Beach*, 327 S.C. 230, 489 S.E.2d 230 (1997), and *Wyndham Enterprises, LLC v. City of N. Augusta*, 401 S.C. 144, 735 S.E.2d 659 (Ct. App. 2012) for the proposition that the County Council abused its discretion as a legislative body in passing R-73-12 is misplaced. American Towers’ application submittal addressed and met each required criteria applicable to its permit request. County Council made an express finding that these elements were satisfied (Horry County Council Resolution R-73-12, R. pp. 85-86). Appellants presented no evidence to the contrary. Accordingly, the lower court’s affirmance of County Council’s approval of R-73-12 is consistent with this Court’s holdings in these cited cases. *See Wyndham*, 401 S.C. at 147-148 (finding that: (a) zoning board’s findings of fact are to be treated in same manner as jury findings of fact; and (b) the “court will refrain from substituting its judgment for that of the reviewing body, even if it disagrees with the decision”; and (c) a decision will only be overturned if “arbitrary, capricious, has no reasonable relation to a lawful purpose, or if the board has abused its discretion”); *see also Hodge*, 223 S.C. at 348 (decision of zoning board is afforded “great weight” and “not interfered with unless arbitrary or clearly erroneous”); and *Peterson*, 327 S.C. at 235 (“presumption exists in favor of the validity and application of zoning ordinances”; zoning decision “will not be disturbed if there is evidence in the record to support its decision”; the “court will refrain from substituting its judgment for that of the reviewing body, even if it disagrees with the decision.”). In contrast to *Wyndham*, in which this Court found that the record before it

was “void of any factual evidence” but was based on “opinion and speculation testimony,” thereby justifying reversal of the lower court’s affirmance of a zoning board decision, the record in the instant action is replete with competent, substantial, and material evidence supporting Horry County Council’s decision and the affirmance by the lower court. *See Wyndham*, 401 S.C. at 151.

C. The Lower Court Properly Affirmed R-73-12 Because the Co-Location Requirements Do Not Prohibit the Decision Reached by Horry County Council In Its Adoption of R-73-12.

TriStar’s argument that the co-location requirements of Horry County’s ordinance prohibits County Council from approving a permit allowing American Towers to change its current tower location to another, more favorable, location is without statutory or evidentiary support. Tri-Star’s contention on pages 10-15 of their Brief that County Council’s approval of American Towers’ permit application is forwarded on a basis that does not exist in the governing Ordinances, and therefore constitutes an abuse of discretion, and is without factual or legal merit.

As this Court has observed, it is appropriate to apply a “common sense approach” to the interpretation of zoning ordinances. *Historic Charleston Foundation v. Krawcheck*, 313 S.C. 500, 507, 443 S.E.2d 401(Ct. App. 1994). The record evidence is unequivocal that American Towers satisfied all §13-73 criteria applicable to its permit request. The lower court’s rejection of Appellants’ argument that the co-location requirements of §13-73(b) and (c) prohibited County Council’s approval decision is consistent with the governing ordinances and the record before the Court. David Schwerd’s Affidavit squarely addresses this issue:

The application submitted by American Towers, LLC to Horry County Planning and Zoning meets the requirements of the Horry County

Planning and Zoning Ordinance, and was reviewed as a relocation application, and not as a co-location application under Section 1605 (as alleged in the Complaint).

The application of American Towers, LLC, was approved by Horry County Council Resolution No. 73-12; the approval also requires American Towers, LLC, to remove the current tower within 120 days; under this requirement the co-location of the current tower does not violate the two and one-half mile requirement under Section 1605; the SBA tower was not considered by staff to violate the two and one-half mile requirement as that tower does not currently serve cellular antennas; the SBA tower was previously granted a co-location waiver from the existing American Towers site in 2003 by the Planning Commission (the approving body under the ordinance which was in effect in 2003) (See Attachment C: Horry County Decision Memorandum submitted by the Planning Department to Horry County Council).

(Affidavit of David Schwerd, R. p. 254, ¶¶ 6, 7).

The lower court found, in its Conclusions of Law, that the County Council, in its approval of Resolution No. R-73-12 “did not act arbitrarily, unreasonably, in an abuse of its discretion, or in excess of lawfully delegated power.” The court further held:

American Towers’ application did not seek to operate multiple towers but to relocate its existing tower. The record, including Defendant TriStar’s application and Horry County Council’s amendment to the resolution requiring demolition of the existing tower within 120 days of final inspection and approval of the new tower, clearly establishes that American Towers’ new tower approved by Horry County Council Resolution No. R-73-12 is a re-location rather than a co-location.

4. The Court further finds that approval of the tower as a relocation is within the lawfully delegated power of Horry County Council, and, based on the record before the Court, is neither arbitrary or capricious nor an abuse of discretion. The Court finds the restrictive reading urged by Plaintiffs is not supported by the language of the county’s zoning ordinance.

(Final Order of lower court, R. pp. 8-9).

County Council’s decision, which conditioned approval upon removal of the existing tower within a specified period of time, furthered the purpose of Horry County’s

Telecommunications Facilities Ordinance, and clearly obviated any need for a co-location permit. The new relocated tower site meets current Code requirements which the existing tower does not (the Ordinance was enacted after location on the existing site); promotes public safety interests (the fall zone of the existing tower falls within the adjacent highway while the fall zone radius of the relocated tower “lies well within the new property location”); and provides capacity for up to 5 carriers, thereby adding capacity for 2 additional carriers (advancing County Council’s interest in minimizing adverse visual effects and avoiding a proliferation of telecommunications by providing room for the addition of two carriers without increasing the number of cell towers in the area). (Affidavit of David Schwerd, ¶¶ 4, 5, R. p. 254; Application of American Towers, R. p. 109). All of these factors, in addition to the documentary evidence in the record, establish that County Council’s approval of the relocation was made on a rational basis that furthers the Ordinance’s intent and met all applicable requirements.

American Towers, in its application submittal response to §13-73(b)(3), specifically noted that the Code section pertaining to co-location was inapplicable because American Towers was seeking to relocate an existing tower with existing leases, while continuing the same level of service through existing carriers using the tower. (Application of American Towers, R. p. 115). The record before the lower court also includes the County Council Decision Memorandum prepared by Mr. Schwerd and approved by Janet Carter, Director of Planning/I/R, recommending the relocation request of American Towers:

Staff recommended approval of the telecommunications tower permit based on the applicant meeting the required criteria set forth in Article VII, Section 13-73 of the Horry County General Code of Ordinances relating to the granting of a telecommunications tower permit. Staff also

recommends that American Towers remove the existing tower within 120 days of the final on the new tower.

(County Council Decision Memorandum, R. p. 85). Also of record before the lower court and this Court is a transcript of the October 16, 2012, public hearing and approval proceedings before the Horry County Council. (Transcript of Horry County Council October 16, 2012, Hearing, R. pp. 60-82).

Based on the record before it, the lower court applied the proper standard of review in concluding that Horry County Council's action approving American Towers' new tower permit (conditioned upon removal of the old tower) was not arbitrary, unreasonable, an abuse of discretion or in excess of power lawfully vested in it. Accordingly, the lower court properly denied TriStar's requested relief of reversal of R-73-12.

In summary, the governing case law of this State is well settled that Horry County Council's decision to grant the permit application of American Towers is entitled to great deference. The applicable standard of review in this matter is the "any evidence" standard. The decisions of Horry County Council, an elected legislative body, are like those of a zoning board and the appropriate standard of review is that "the findings of fact ...shall be treated in the same manner as findings of fact by a jury, and the court may not take additional evidence." *Austin v. Bd. of Zoning Appeals*, 362 S.C. 29, 32, 606 S.E.2d 209 (Ct. App. 2004) (citing S.C. Code Ann. §6-29-840A (Supp. 2012) and *Heilker v. Zoning Bd. of Appeals for City of Beaufort*, 346 S.C. 401, 405, 552 S.E.2d 42, 44 (Ct. App. 2001)). The Court in *Austin* continued:

In reviewing the questions presented by the appeal, the court shall determine only whether the decision of the Board is correct as a matter of law. *Id.* Furthermore, "[a] court will refrain from substituting its

judgment for that of the reviewing body, even if it disagrees with the decision.”

Id. at 32 (citing *Restaurant Row Assocs. v. Horry County*, 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999)). See also *Rush v. City of Greenville*, 246 S.C. 268, 277, 143 S.E.2d 527 (1965) (a strong presumption exists in favor of the validity of application of local government zoning ordinances). The TriStar Appellants have failed to meet the heavy burden placed on them under the applicable South Carolina case law. Horry County Council’s Relocation Resolution and the lower court’s final order are well reasoned and based on a detailed factual record establishing a rational and reasonable basis for Horry County Council’s approval of Resolution R-73-12 granting the relocation permit. TriStar was afforded full opportunity to appear, and did appear and was heard by Horry County Council. (Transcript, P. 10, l. 25 – P. 16, l. 20, R. pp. 69-75). TriStar’s requested relief is neither supported by the Record evidence nor meets the review standard determined by the Appellate Courts to be applicable to the challenged decision of Horry County Council. Accordingly, the decision of the lower court should be affirmed.

II. Because Appellants as Competitors of American Towers Lack Standing to Challenge County Council’s Action, the Lower Court’s Decision Should be Affirmed.

Pursuant to Rule 208(c), SCACR, Horry County Council joins in and adopts by reference Argument II, contained in pages 18-20 of Respondent American Towers’ Brief.

III. Because Appellants have failed to Preserve the Issues of Whether the Horry County Ordinances allow Issuance of a Relocation Permit, the Lower Court’s Decision Should be Affirmed.

Pursuant to Rule 208(6), SCACR, Horry County Council joins in and adopts by reference Argument III, contained in pages 20-21 of Respondent American Towers’ Brief.

IV. In the event the Court Determines that the Co-location Provisions of the Horry County Ordinance Apply to American Towers' Permit Submittal, the Lower Court's Decision Should be Affirmed on the Additional Sustaining Ground that Horry County Council Waived the Co-location Requirements, as Council is Allowed to do within the Authority Vested in It by the Governing Ordinance Provisions.

Section 13-73 of Horry County Code of Ordinances, Chapt. 13, Art. VII, specifically vests in Horry County Council the authority to approve a waiver of the co-location requirements of §1605 of the Horry County Zoning Ordinance (“co-location waiver”). (R. p. 524). Horry County joins in and adopts by reference the position taken by American Towers in Argument I. B., pages 16-18 of its Brief, pursuant to Rule 208(c), SCACR.

American Towers included sufficient information in its application submitted to Planning and Zoning for Horry County for County Council to waive the co-location requirements under §13-73 (b) and (c), including the fact that American Towers' ground lease was expiring in 2013 and that the property owner was not going to renew the lease, thereby making it impossible to continue the operation of the tower. (R. pp. 525-526). As discussed on page 15 herein, this Court, in *Historic Charleston Foundation v. Krawcheck*, 313 S.C. 500, 505-506, 443 S.E.2d 401 (Ct. App. 1994), has noted with favor the principle that it is appropriate for the courts to apply a “common sense approach” to the interpretation of zoning ordinances. American Towers' submittal contains all required information necessary for the consideration and granting of a co-location waiver by County Council. Under such circumstances, it is submitted that County Council's approval of American Towers' application, based on the record before it, and as an additional sustaining ground, constitutes a waiver of any co-location waiver that may be deemed applicable to County Council's decision in this matter. *See I'On, L.L.C. v. Town*

of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000).

CONCLUSION

Based on the above, Respondent Horry County Council respectfully requests that this Court affirm the lower court's decision in favor of Horry County Council and American Towers Corporation upholding Resolution No. R-73-12.

Respectfully submitted,

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May 22, 2014

Myrtle Beach, South Carolina

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 certified that this Final Brief complies with Rule 211(b), SCACR.

May 22, 2014



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MAY 23 2014

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
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TriStar Investors, Inc., Minerva Realty, LLC, and
Angeline JohnsonAppellant

v.

The Horry County Council and American Towers, LLCRespondents

PROOF OF SERVICE

I, Kimberly W. Nobles, legal assistant for the attorney representing Respondent
The Horry County Council, 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 The Horry County Council

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MAY 23 2014

SC Court of Appeals

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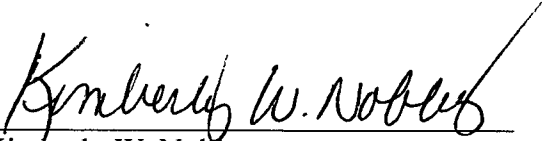
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