**THE STATE OF SOUTH CAROLINA**
**In The Court Of Appeals**



APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Marvin H. Dukes, III, Master-In-Equity

Civil Action No.: 2012-CP-07-01394
Appellate Case No.: 2016-000687

GRAYS HILL BAPTIST CHURCH.....Respondent,

v.

BEAUFORT COUNTY AND THE UNITED STATES OF AMERICA.....Appellants.

# INITIAL REPLY BRIEF FOR APPELLANT THE UNITED STATES OF AMERICA

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## INTRODUCTION

The decision below poses a troubling threat to land use regulations that were enacted to protect the public from air crashes and shield a military air station from encroaching development. Under firmly established precedents, the applicability of which respondent never disputes, the judgment of expert Beaufort County development officials as to the meaning and application of those regulations is entitled to significant deference. Here, the County determined that under the regulations at issue, respondent is not entitled to build a new 10,000-square-foot hall in an area that has been restrictively zoned based on its potential for air crashes. This determination should be upheld and the County should be allowed to enforce its regulations consistent with their important purposes.

Respondent does not and cannot deny that the Fellowship Hall it seeks to build in a designated Accident Potential Zone could hold hundreds of people.[1]

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[1] Respondent challenges our citation to publicly available government documents that were not generated for litigation. Opp'n to U.S. 1. While these publications are judicially noticeable and were cited to provide the Court with further context regarding the Airport Overlay District regulations, nothing turns on them. The Airport Overlay District regulations themselves already make clear that those regulations are based on "accident potential zones as designated in the most recent Air Installations Compatible Use Zones (AICUZ) Report for [Marine Corps Air Station]-Beaufort," and were adopted by the County Council of Beaufort to "ensure the general safety and welfare" and limit development "determined to be incompatible according to federal standards." [Airport Overlay District Regulations, Sec. 1]. It is also undisputed that respondent's proposed building site is in an "Accident Potential Zone." [Final Order 7].

Respondent insists that it may nonetheless go forward with this project. But respondent errs in relying on a decade-old development permit that covered a different phase of the project and which is, in any case, stale. Respondent similarly errs in challenging the County's decision to interpret its own regulations, consistent with their purposes, in the manner most protective of public safety. And respondent's claim of entitlement to a variance from those regulations rests on an interpretation that would make variances routine, rather than extraordinary. The decision below should be overturned and the County's determinations upheld.

## I. THE 1997 DEVELOPMENT PERMIT DOES NOT PROVIDE RESPONDENT WITH ANY CONTINUING RIGHTS

Respondent's lead argument is that a development permit issued in 1997 authorized construction of Fellowship Hall and that this authorization remained in force when respondent sought to commence construction a decade later in 2007. Respondent acknowledges, as it must, that the application that led to the 1997 Development Permit "discuss[ed] constructing the project in phases." Opp'n to County 7-8. Indeed, respondent's application referred to the structure now known as Fellowship Hall as "Phase II of the development." [Development Permit Application]. Respondent insists that this fact is insignificant. According to respondent, notwithstanding respondent's application for approval of a phased development, the County gave respondent more than it had asked for by approving both phases of the project at the outset, thereby vesting respondent with the right to

construct the second phase of the development (Fellowship Hall) at any indefinite point in the future. Opp'n to County 7-8.

The County does not read its own development permit as expansively as respondent, and respondent fails to show why, on deferential review, the Court should construe the 1997 Development Permit more broadly than the underlying application. The County officials charged with regulating development to promote public safety and the public interest acted reasonably in considering the underlying application in determining the scope of the 1997 Development Permit.

The County's construction is supported by the text of the development permit, which makes clear that it is not intended to convey any indefinite rights, and that the permit will expire within two years unless "substantial improvement" has been completed. [1997 Development Permit]. Respondent assumes that completion of construction of the first phase of development qualified as "substantial improvement" for purposes of the second phase, but respondent never justifies that assumption. Given that the permit is intended to be time-limited, it is unreasonable to construe the permit as authorizing respondent to first begin an entirely new phase of development a full decade after the permit issued.

Finally, the County's construction better accords with background legal principles and public policy. As explained in the United States' opening brief (at 15 & n.5), development law generally treats each phase of a development as a

separate project. Respondent purports to distinguish one of the cases cited by the United States, *F.B.R. Inv'rs v. County of Charleston*, 303 S.C. 524, 527-28, 402 S.E.2d 189, 191 (Ct. App. 1991), but does not challenge the broader principle that separate approvals are generally required for different phases of a development. Likewise, respondent never offers any explanation as to why it accords with common sense or public policy to construe the development permit as waiving the County's authority to regulate land use and prevent development even a century in the future, regardless of any intervening changes in circumstances.

For all these reasons, this Court should defer to the County's reasonable—indeed, correct—interpretation of its own development permit.

## II. THE COUNTY REASONABLY CONSTRUED ITS OWN REGULATIONS IN DENYING THE 2007 APPLICATION

Respondent next argues that the County was required to issue a new development permit in 2007, and that in refusing to do so, the County misconstrued the Airport Overlay District regulations. Respondent does not deny that, unless some exception applies, its proposed new building would not be allowed in an Accident Potential Zone. Respondent also recognizes that no such exception applies if the new structure would increase the "occupant load" of respondent's existing development. Finally, respondent apparently concedes that if "occupant load" refers to the capacity of the proposed new building, as Beaufort's Planning Commission found, the permit application was properly denied. It can

hardly be contested that a new 10,000-square-foot structure would have the capacity to accommodate hundreds of people—and thus put hundreds more people in harm's way.

Respondent asserts that the County was required to construe its regulation to accommodate respondent's representation that, in practice, no additional people would use its premises. But respondent fails to acknowledge, let alone grapple with, the deference owed the Planning Commission in construing development regulations. *See, e.g.*, *Historic Charleston Found. v. Krawcheck*, 313 S.C. 500, 505-06, 443 S.E.2d 401, 405 (Ct. App. 1994) (recognizing the need to "[g]iv[e] deference to the interpretation of the Zoning Ordinance by the Board which is charged with its interpretation"). Moreover, as respondent acknowledges (Opp'n to County 12), the Planning Commission's construction of the term "occupant load" accords with the meaning given to that term in the fire code, which similarly regulates occupancy for a public-safety purpose.

Respondent also misses the mark in criticizing the Planning Commission for allegedly failing to construe the regulation in a manner that "accords with its general purpose." Opp. to County 12. A principal purpose of the Airport Overlay District is to "ensure the general safety and welfare." [Airport Overlay District Regulations, Sec. 1]. The Planning Commission was right to recognize that this

purpose would best be served by construing the regulation so as not to create even the potential for more people to be put in jeopardy.

## III. THE COURT BELOW ERRED IN CONCLUDING THAT RESPONDENT IS ENTITLED TO A VARIANCE

Finally, respondent argues that if the County was not required to issue a development permit, respondent should have been granted a variance. Opp'n to County 14-15. But respondent merely refers the Court to the lower court's analysis, which was erroneous for the reasons explained in our opening brief (at 19-21) and that of the County (at 11-15). Notably, respondent never denies that its position would make variances routine rather than "exceptional and extraordinary," which would undermine the efficacy of the Airport Overlay District, to the detriment of the community. Respondent's argument should be rejected so that variances do not become the norm.

## CONCLUSION

For the reasons stated above and in our opening brief, this Court should reverse the judgment of the Court of Common Pleas.

(Signature Page Only)

Respectfully submitted,

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September 21, 2016

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# CERTIFICATE OF SERVICE

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The undersigned counsel hereby certifies that they have served the Initial Reply Brief of Appellant the United States of America upon all counsel of record by affixing the same with proper postage and placing same with the United States Postal Service on the 22nd day of September, 2016 addressed to the following:

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Very truly yours,

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Enclosures

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