From:Thomas and Brittain 8436920918 06/28/2018 14:35 #076 P.009/063

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STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2016-CP-26-02377

In re: Venture Engineering,
agent for DT LLC,

Appellant,

v.

Horry County Zoning Board of Appeals,

Respondent.

ORDER REVERSING MAY 11, 2015 AND MARCH 14, 2016 ORDERS OF THE HORRY COUNTY ZONING BOARD OF APPEALS

This case is a consolidation of two appeals filed by Appellants, Dennis Thompkins-Bellamy Law Firm, agent for DT LLC ("Appellant Thompkins-Bellamy"), and Venture Engineering, agent for DT LLC ("Appellant Venture").[1] Both appeals arise out of identical facts regarding the Horry County Zoning Board of Appeals'[2] abrupt disallowance of Appellants' business' right to receive loads of construction and demolition ("C&D") and/or concrete materials from outside sources.

On January 5, 2017, this Court heard both appeals. Present at the January 5, 2017 hearing was counsel for Appellants, Robert S. Shelton, Esquire, and counsel for Respondent, Emma Ruth Brittain, Esquire and Janet Carter, Esquire. After thorough review of the Record, South Carolina case law, and oral arguments made by counsel at the January 5, 2017 hearing, the

[1] Appellant Thompkins-Bellamy filed its appeal of Respondent's May 11, 2015 Order on May 22, 2015 (hereinafter "Appeal I"). Appeal I was identified as Civil Action No. 2015-CP-26-3791. Appellant Venture filed its appeal of Respondent's March 14, 2016 Order on April 14, 2016 (hereinafter, "Appeal II"). Appeal II was identified as Civil Action No. 2016-CP-26-2377. Both appeals are now consolidated under Civil Action No. 2016-CP-26-2377.

[2] Respondent, Horry County Zoning Board of Appeals, will hereinafter be referred to as "Respondent" or "the Board".

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Court hereby **REVERSES** Respondent's May 11, 2015 and March 14, 2016 Orders. The basis for the Court's decision is set forth hereinbelow.

FACTS

The following is a summary of the background and facts in this matter, as shown in the certified record on appeal:

1. Appellants are the owners of real property (hereinafter, "Property") identified by PIN 418-10-02-0022 and 418-11-01-0002, which is located at 310 Piling Road in the Myrtle Beach area of Horry County. See March 14, 2016 Order of the Board, p. 1; ROA p. 00002. Though the property was not zoned when Appellants' family business began operations in 1981, it is currently zoned as Limited Industrial (LI). See December 3, 2014 letter from Horry County Zoning Administrator Rennie Mincey; ROA p. 00063.
2. Appellants own and operate Thompkins & Associates, Inc. (hereinafter, "Thompkins"), which has been located and operated on the Property since 1981. See Application for Annual Business License ID No. 2576; ROA p. 00059. This was six (6) years prior to the enactment of the Horry County Zoning Ordinance. See February 9, 2015 Board Meeting Transcript, p. 14; ROA p. 00078.
3. Thompkins is in a business requiring heavy construction equipment because it has, since 1981, operated a concrete and demolition material recycling (hereinafter "C&D") and concrete transfer business on site. See February 9, 2015 Board Meeting Transcript, pp. 13-15, 19-20; See also March 9, 2015 Board Meeting Transcript, pp. 5-10, 12-16, 34-35, 55, 62; ROA pp. 00077-00079, 00083-00084, 00120-00125, 00127-00131, 00149-00150, 00170, 00177. The heavy equipment required by Appellant's business has historically been employed for the purpose of facilitating Appellant's C&D facility at this property.

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Since Thompkins began operating in 1981, the C&D division of its business has crushed, processed, and/or recycled both: (1) C&D material from Thompkins' own demolition projects; and, (2) C&D material received from outside sources. See Id.

4. In 1987, Horry County enacted its first Zoning Ordinance, and, in 2007, Thompkins was required to apply for a business license in order to continue operating in its new zoning district. See February 9, 2015 Board Meeting Transcript, pp. 14-16; ROA pp. 00078-00080. The Zoning Administrator at that time, Roland Meyer (hereinafter "former Zoning Administrator Meyer") issued business license ID number 2576 to Thompkins for its "Construction Heavy Equipment." See Application for Annual Business License ID No. 2576; ROA p. 00059. Former Zoning Administrator Meyer also approved "C&D Recycling and Transfer Concrete, Recycling and Processing" as an accessory use to Thompkins' "Construction Heavy Equipment" business and issued business license ID number 23387 to Thompkins for its C&D business. See Application for Annual Business License ID No. 23387; ROA p. 00061.

5. At all times from 1981 until the actions of Horry County about which the Thompkins complain in these consolidated appeals, the Thompkins family business has operated its C&D business by crushing, processing, and/or repurposing both: (1) C&D material from its own demolition projects and (2) C&D waste material received from haulers who deliver materials from demolition jobs completed by outside sources. See February 9, 2015 Board Meeting Transcript, pp. 13-15, 19-20; See also March 9, 2015 Board Meeting Transcript, pp. 5-10, 12-16, 34-35, 55, 62; ROA pp. 00077-00079, 00083-00084, 00120-000125, 00127-00131, 00149-00150, 00170, 00177.

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6. These C&D materials, from both internal and external sources have, since 1981, been repurposed by a crushing process by Thompkins as base material which is then sold back into the local construction industry as a base material, rather than burdening the infrastructure and life-span of the landfill on Highway 90 in Conway. See February 9, 2015 Board Meeting Transcript p. 15; ROA p. 00079.

7. On or about late 2014, Appellants considered accepting local businessman John Taylor as an investor in the Thompkins business. Id. at 13, 17; March 9, 2015 Board Meeting Transcript, pp. 34-35; ROA p. 00077, 00081, 00149-00150. As part of his due diligence before making an investment in Thompkins, Mr. Taylor requested a zoning compliance letter from the current Horry County Zoning Administrator, Rennie Mincey (hereinafter, "Zoning Administrator Mincey"), to ensure Thompkins was complying with the county's zoning requirements. See February 9, 2015 Board Meeting Transcript, p. 17; See generally December 3, 2014 letter from Horry County Zoning Administrator Rennie Mincey; ROA p. 00081, 00063.

8. In response to Mr. Taylor's request, On December 3, 2014, Zoning Administrator Mincey signed a letter addressed to Mr. Taylor's attorney which summarizes former Zoning Administrator Meyer's approval of Thompkins for "Construction and Heavy Equipment" with an accessory use of "C&D Recycling and Transfer Concrete, Recycling and Processing." See December 3, 2014 letter from Horry County Zoning Administrator Rennie Mincey; ROA p. 00063. In her letter, Zoning Administrator Mincey specified that Thompkins may continue its accessory use of C&D Recycling and Transfer Concrete, Recycling and Processing as long as the approved "Construction Heavy Equipment" business continues operating. Id. The letter made no mention of whether

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Thompkins may accept loads of materials from outside sources for recycling purposes. Id.

9. Shortly after receiving a copy of Zoning Administrator Mincey's December 3, 2014 zoning compliance letter, Appellant Thompkins-Bellamy was verbally informed that pursuant to Ms. Mincey's decision, the receiving of loads of C&D or concrete materials from outside sources was not in compliance with Thompkins' accessory use business license issued in 2007. December 4, 2015 Notice of Appeal by Appellant Thompkins-Bellamy, pp. 4-5; April 14, 2016 Notice of Appeal by Appellant Venture, p. 3. This was the first instance in which Appellant Thompkins-Bellamy had ever been informed Horry County had taken the position receiving outside loads of C&D recycling materials was not in compliance with Appellant's business license and/or zoning. Id.

10. Appellant Thompkins-Bellamy appealed Zoning Administrator Mincey's decision to the Board on or about January 8, 2015. December 4, 2015 Notice of Appeal by Appellant Thompkins-Bellamy, p. 5.

11. On February 9, 2015, the Board first heard Appellant Thompkins-Bellamy's appeal. February 9, 2015 Board Meeting Transcript, pp. 2-3; ROA pp. 00066-00067. In regard to Appellant Thompkins-Bellamy, the sole issue for the Board to determine at the February 9, 2015 Board Meeting was whether to overturn the Zoning Administrator's decision that Thompkins' "C&D waste and concrete transfer business is not approved to accept commercial loads of C&D concrete materials for processing from other contractors." Id. at 2-6; ROA pp. 00066-00070.

12. During the February 9, 2015 Board Meeting, the Board acknowledged Thompkins' C&D waste and concrete transfer business was approved in 2007 as an accessory use to the

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already existing construction heavy equipment business that has been located on the Property since 1981. Id. at 2-3; ROA 00066-00067. The Board, including Zoning Administrator Mincey, also acknowledged that Thompkins' primary business was heavy equipment, and when the decision was made to allow recycling, "it was the product of what Mr. Thompkins was already doing with demolitions and other such things and other business that was approved on that location." Id. at 6; ROA p. 00070.

13. At the February 9, 2015 Board Meeting, the Zoning Administrator acknowledged that to her knowledge there have been no nuisance complaints about Thompkins' business operations. Id. at 7; ROA p. 00071.

14. At the February 9, 2016 Board Meeting, the Board was particularly interested in whether Thompkins' business had been taking in outside materials prior to recycling being approved as an accessory use to its heavy construction equipment business in 2007. Id. at 8; ROA p. 00072.

15. At the February 9, 2016 Hearing, Rob Shelton, Dennis Thompkins, Danny Allen, and Harold Nye spoke on behalf of the Appellant Thompkins-Bellamy and their testimony is included in the Board transcript of record. See Id. at 9-12, 13-21, 26-30, 34-36; ROA pp. 00073-00076, 00077-00085, 00090-00094, 00098-00100.

16. All testimony at the February 9, 2016 Hearing indicated Thompkins had been taking in outside loads of C&D materials for recycling since operations began in 1981. See Id. at 9, 13-20; ROA pp. 00073, 00077-00084. Specifically, Danny Allen testified that he had been hauling materials to Appellant for years and he did not understand why Appellant would not be able to operate in the same manner Appellant had been for years. Id. at 19-20; ROA p. 00083-00084. Mr. Allen also testified that he had been involved in "several,

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several projects all over Myrtle Beach" and listed examples as the AVX Corporation, the Myrtle Square Mall, and several motels. Id. at 19; ROA p. 00083.

17. Despite the aforementioned testimony, the Board chose to defer its decision for thirty (30) days and requested Appellant provide the Board with additional information at its next meeting in order to demonstrate whether Thompkins had been receiving outside loads for C&D Recycling and Transfer Concrete, Recycling and Processing prior to the issuance of its accessory business license in 2007. Id. at 34-35, 37-38; ROA pp. 00098-00099, 00101-00102. To that end, the Board told Appellant Thompkins-Bellamy that what it wanted "[wa]s the assurance that the operation has been ongoing and that the evidence is there [demonstrating that Thompkins had been taking in outside loads prior to the issuance of its business license in 2007.]"[3] Id. at 34-35; ROA p. 00098-00099.

18. On March 9, 2015, Appellant Thompkins-Bellamy's appeal of Ms. Mincey's decision was before the Board for the second time. See March 9, 2015 Board Meeting Transcript, p. 2; ROA p. 00117. Prior to the March 9, 2015 meeting, Appellant Thompkins-Bellamy provided the Board with the documentation it requested, inclusive of One Hundred and Thirty-Eight (138) load tickets from November and December of 2006, all of which were clearly from outside contractors, thus evidencing the fact that Thompkins had been receiving outside loads for many years prior to 2007. Id. at 2, 6-9; ROA pp. 00117, 00121-00124. Each of these load tickets bears a scale stamp from which the weight of

[3] "We need to be comfortable that indeed the facility has been operating just as you say it has since 2007. And those steel tickets and any discourse you've had with its operation would go a long way to just making sure that the process has been transparent and they've had no problems with it." February 9, 2015 Board Meeting Transcript, Bo Ives – Chairman, p. 37; ROA p. 00101.

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each load was determined. Id. at 7-8; ROA pp. 00122-00123. Appellant also explained the scale is regularly inspected by the Department of Agriculture. Id.

19. Similar to the February 9, 2015 Board Meeting, all testimony at the March 9, 2015 Board Meeting, as well as evidence produced by Appellant Thompkins-Bellamy, indicated that Thompkins had been accepting outside loads of C&D materials prior to the issuance of its business license in 2007. See Id. at 5-10, 12-16, 34-35, 55, 62; ROA pp. 00120-00125, 00127-00131, 00149-00150, 00170, 00177.

20. Specifically, Ronald Gilkerson, who explained he had been in the construction on demolition recycling business for over twenty (20) years, spoke on behalf of the Appellant and stated that Thompkins has done C&D for years without any compliance issues or complaints. Id. at 34, 55, 62; ROA pp. 00149, 00170, 00177.

21. However, again, despite overwhelming testimony and/or evidence that answered the Board's question at the previous February 9, 2015 Board Meeting, the Board chose to defer its decision for thirty days in order to consult with its legal representative(s). Id. at 70, 76-77; ROA pp. 00185, 00191-00192.

22. On April 13, 2015, Appellant Thompkins-Bellamy's appeal was before the Board for a third time. See April 13, 2015 Board Meeting Transcript, p. 2; ROA p. 00281. At the April 13, 2015 Board meeting, counsel for Appellant presented the Board an Affidavit from Former Zoning Administrator Meyer stating he would not have felt uncomfortable, in 2007, the time at which he issued the business license, (when he was the Zoning Administrator), in permitting Thompkins to receive outside loads for C&D Recycling and Transfer Concrete, Recycling and Processing purposes. Id. at 3; ROA p. 00282. Specifically, Mr. Meyer's Affidavit states, "[G]iven all the information with regard to the

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history of this particular property, I would have not felt uncomfortable in 2007, as the then Zoning Administrator, in permitting C&D Recyling under the zoning ordinance requirements for this particular zoning district at that time, by Thompkins and Associates, whose principle use is C&D Recycling, to accept C&D materials from outside companies, had I been asked to do so." Affidavit of Roland Meyer; ROA p. 00297.

23. At the April 13, 2015 Board Meeting, the Board overruled Zoning Administrator Mincey's finding that Thompkins could not accept outside loads for C&D recycling by a 5 to 3 vote. See April 13, 2015 Board Meeting Transcript pp. 8-9; ROA pp. 00287-00288. In doing so, the Board found that "[a]n acceptable accessory use of [Thompkins'] property may be acceptance of outside commercial loads of 'Recovered Materials' as a 'Recovered Materials Processing Facility' as defined, respectively, by S.C. Code, Subsections 44-96-40(34) and (35)." Under this Solid Waste Management Act of 1991 (S.C. Code, Subsection 44-96-40). Id. SCDHEC issued Thompkins and Associates a letter of concurrence to continue to operate a C&D Recovered Materials Processing Facility at the subject property. See December 19, 2014 Letter from DHEC to Ronald C. Gilkerson; ROA pp. 00106-00107. In this letter, it specifically defines the operating requirements of this facility and includes a description of acceptable recycled items to be clean dimensional lumber, clean brush pallets, sheetrock, metal, concrete and asphalt, cardboard, shingles and yard waste. Id. In following with this SCDHEC letter of concurrence for the Recovered Materials Processing Facility at the subject property, it is important to note that this type of facility does not require a solid waste permit, and as previous recycling operations extending back to the accessory use approval in 2007, Thompkins and Associates was operating in compliance with this general statute set forth

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in 1991, as stated in the SCDHEC letter dated February 13, 2015. See February 13, 2015 Letter from DHEC to Ronald C. Gilkerson; ROA p. 00274. The Board's Order is dated March 9, 2015, but was not received by Appellant until April 16, 2015. See March 9, 2015 Order of Board of Zoning Appeals; ROA pp. 00293-00295.

24. Shortly after the Board overturned Zoning Administrator Mincey's decision, Appellant Thompkins-Bellamy was informed an individual from the Solid Waste Authority was contacting members of the Board in an effort to persuade the Board members to reconsider their votes. December 4, 2015 Notice of Appeal by Appellant Thompkins-Bellamy, p. 6; April 14, 2016 Notice of Appeal by Appellant Venture, p. 7. Appellant's attorney addressed this concern by way of a letter addressed to counsel for Horry County. See April 22, 2015 Letter from Appellant's agent, Bellamy Law Firm to Horry County Attorney Arrigo Carotti and outside counsel for Horry County Emma Ruth Brittain; ROA pp. 00299-00301. Subsequently, Appellant was informed by Horry County Planning Director Janet Carter, Esq. the Board was going to move to reconsider their vote overturning Zoning Administrator Mincey's decision at their May 11, 2015 Board meeting. December 4, 2015 Notice of Appeal by Appellant Thompkins-Bellamy, p. 6, April 14, 2016 Notice of Appeal by Appellant Venture, pp. 7-8, See May 11, 2015 Board Meeting Transcript, p. 3; ROA p. 00305.

25. At the Board's May 11, 2015 meeting, the Board moved to reconsider its vote. See May 11, 2015 Board Meeting Transcript, pp. 2-3; ROA pp. 00304-00305. Although Appellant Thompkins-Bellamy's appeal of Zoning Administrator Mincey's decision was not

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published on the meeting roster, nor publicized in any way prior to the meeting,[4] numerous persons who claimed to reside nearby the Property were present at the meeting and voiced complaints about Thompkins' business. Id. at 7-8, 10-11, 13-14, 16, 18; ROA pp. 00309-00310, 00312-00313, 00315-00316, 00318, 00320. These persons' complaints were predominantly limited to testimony indicating they were told Thompkins was going to begin taking in and recycling compost/trash, which Thompkins had never done and did not seek to do. Id. No photographic, documentary, or other evidence was provided to the Board at this meeting.

26. After allowing testimony from these persons, the Board took another vote as to whether uphold or overturn Zoning Administrator Mincey's findings. Id. at 26-27; ROA pp. 00328-00329. On this vote, and in direct contrast to their decision at the April 13, 2015 Board meeting, the Board unanimously upheld Zoning Administrator Mincey's decision, prohibiting Thompkins from receiving outside loads of materials for C&D Recycling and Transfer Concrete, Recycling and Processing under its business license. Id. The Board provided no basis for its abrupt decision to move to take another vote as to whether to uphold or overturn Zoning Administrator Mincey's findings. See May 11, 2015 Board Meeting Transcript; ROA pp. 00303-00330. Further, the Board never provided any basis for its ultimate decision to uphold Administrator Mincey's decision that Thompkins could not take in outside loads of C&D materials. Id.

27. Prior to the proceedings before the Board, Appellant Thompkins-Bellamy had never received any complaints regarding its business, nor had Appellant ever been instructed

[4] The Chairman of the Board, Bo Ives, admitted that the Board did not advertise that the Thompkins issue would be taken up at the May 11, 2015 meeting. See May 11, 2015 Board Meeting Transcript, p. 14; ROA p. 00316.

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the county was of the opinion Thompkins was not in compliance with its business license. February 9, 2015 Board Meeting Transcript, pp. 13, 16-17; March 9, 2015 Board Meeting Transcript, pp. 34, 55, 62; March 14, 2016 Board Meeting Transcript, pp. 53-54; ROA pp. 00077, 00080-00081, 00149, 00170, 00177.

28. Appellant Thompkins-Bellamy filed his Notice of Appeal regarding the Board's May 11, 2015 Order on May 22, 2015. See May 22, 2015 Notice of Appeal by Appellant Thompkins-Bellamy. Prior to setting forth specific grounds on appeal to this Court, Appellant requested pre-litigation mediation pursuant to S.C. Code § 6-29-820(B)(2) in an attempt to resolve the matter in good faith. Id. Pre-litigation mediation was conducted on November 4, 2015 and resulted in an impasse. See Proof of ADR, Docket No. 2015-CP-26-3791; ROA p. 00053.

29. Following the above-described events, counsel for Appellant Thompkins-Bellamy appeared in court on January 27, 2016 in order to defend against Motions filed by Horry County. April 14, 2016 Notice of Appeal by Appellant Venture, p. 8.

30. At court prior to the January 27, 2016 hearing, counsel for Appellant Thompkins-Bellamy discussed this matter at length with counsel for Horry County, and the two parties agreed to stay the matter to allow Appellant an opportunity to petition the county for a variance. Id.

31. Thereafter, on February 5, 2016 Venture Engineering filed a petition for a variance on behalf of Appellant. Id.

32. The Zoning Board of Appeals heard Appellant Venture's request for a variance on March 14, 2016. Id.

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33. At the hearing of the request for variance, counsel for Appellant Venture introduced as evidence the documents in the Record for Appeal I. Id.

34. The Zoning Board of Appeals ruled against Appellant Venture and did not grant a variance, as indicated in the Board's Order dated March 14, 2016. Id.; See also March 14, 2016 Order of Zoning Board of Appeals; ROA pp. 0002-0005..

35. Thereafter, on April 14, 2016, Appellant Venture filed Appeal II with this Court. April 14, 2016 Notice of Appeal by Appellant Venture.

PROCEDURAL HISTORY

Appellant Thompkins-Bellamy filed its appeal of the Board's May 11, 2015 decision on May 22, 2015 ("Appeal I"), pursuant to South Carolina Code Annotated Section 6-29-820(B)(2). South Carolina Code Annotated Section 6-29-820(B)(2) provides that an appellant may file a notice of appeal with the Circuit Court accompanied by a request for pre-litigation mediation. Therefore, Appellant Thompkins-Bellamy and Respondent sought to resolve Appeal I through pre-litigation mediation on November 4, 2015. This mediation was unsuccessful. Thus, on December 4, 2015, counsel for Appellant Thompkins-Bellamy filed a more detailed Notice of Appeal, pursuant to South Carolina Code Annotated Section 6-29-825(F).

In another attempt to resolve Appeal I, at counsel for Respondent's suggestion, Appellant Venture sought a variance from the Board as described in detail hereinabove. However, the Board denied the variance by Order dated March 14, 2016. Thus, Appellant Venture filed Appeal II on April 14, 2016.

On December 29, 2015, Respondent filed a Motion to Strike Appeal I as being untimely filed, or, in the alternative, to strike several of the exhibits attached by Appellant Thompkins-Bellamy in Appeal I. This Court denied Respondent's Motion to Strike, holding that Appellant

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Thompkins-Bellamy's Notice of Appeal in Appeal I was timely filed pursuant to South Carolina Code Annotated Sections 6-29-820 and 6-29-825, and that the exhibits Respondent sought to exclude were appropriately included by Appellant Thompkins-Bellamy.

On June 7, 2016, Appellants moved this Court for an Order consolidating Appeals I and II, as both appeals are based upon identical facts which affect the same Property. This Court granted Appellants' Motion to Consolidate by Order dated October 13, 2016. Therefore, both appeals were before this Court at the January 5, 2017 hearing.

At the January 5, 2017 hearing counsel for Respondent argued that each appeal should be analyzed under a different standard of review. The Court disagrees. Both appeals concern orders issued by a municipal board. Therefore, the Court is obligated to apply the same standard of review to both appeals, as set forth hereinbelow.[5]

STANDARD OF REVIEW

The standard of review for an appeal of a zoning board's decision is set forth in South Carolina Code 6-29-840 and articulated in South Carolina common law. On appeal, findings of fact of a zoning board shall be treated in the same manner as findings of fact by a jury, and the court may not take additional evidence. S.C. Code Ann. § 6-29-840; See Wyndham Enterprises, LLC v. City of North Augusta, 401 S.C. 144, 148, 735 S.E.2d 659, 661 (Ct. App. 2012). "In determining the questions presented by the appeal, the court must determine only whether the [Board's] decision is correct as a matter of law." Id. However, the Court may overturn a municipal zoning board's decision if it is "arbitrary, capricious, has no reasonable relation to a

[5] While the same standard of review applies to both appeals before this Court, the Court acknowledges that in deciding each matter before it, the Board had to apply an independent legal analysis. Therefore, the Court shall also independently analyze the facts in this matter in light of the relevant law the Board was to consider when issuing each Order that has been appealed by Appellants.

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lawful purpose, or if the board has abused its discretion." Wyndham, 401 S.C. at 148, 735 S.E.2d at 661 citing (Restaurant Row Assocs. V. Horry Cnty., 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999)).[6]

RELEVANT LAW

Appeal I – Accessory Use and Vested Rights

Appeal I concerns the Board's actions in upholding Zoning Administrator Mincey's decision that while Thompkins' C&D recycling business was approved in 2007 as an appropriate "accessory use" to its construction heavy equipment business, Thompkins is not allowed to take in outside loads of C&D recycling materials. Therefore, the Board's review of the Zoning Administrator's decision was limited only to whether the already approved "accessory use" of a C&D recycling business could properly be limited to include only recycling loads of C&D procured by Thompkins, rather than outside sources.

Section 401.5 of the Horry County, South Carolina Code of Ordinances (the "Horry County Code") defines "accessory use" as a "use of land or of a building, or portion thereof, which is customarily incidental and subordinate to the principal use of the land or building." Section 401.5 of the Horry County Code further states that "[a]ccessory uses must be located on the same lot with the principal use." Section 468 of the Horry County Code mirrors this language, providing that a "principal use" of property is the "primary purpose for which a lot is occupied and/or used[;]" whereas, an "accessory use" is a "use customarily incidental, appropriate, and subordinate to the principal use of land and located on the same lot therewith." South Carolina courts have held that an accessory use "must be one 'so necessary or commonly

[6] "Arbitrary" means "depending on individual discretion...rather than fixed rules, procedures, or law[.]" BLACK'S LAW DICTIONARY 100 (7th ed. 1999). "Capricious" means "contrary to the evidence or established rules of law." Id. at 203.

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to be expected that it cannot be supposed that the ordinance was intended to prevent it.'" Whaley v. Dorchester County Zoning Bd. of Appeals, 337 S.C. 568, 579, 524 S.E.2d 404, 410 (S.C. 1999) (quoting Borough of Northvale v. Blundo, 85 N.J.Super. 56, 203 A.2d 721, 723 (1964)).

Nothing in the Horry County Code or South Carolina common law indicates that the taking in of outside loads of C&D materials would not comply with the already approved accessory use of running a C&D recycling business. Noteworthy, however, is South Carolina law regarding a landowner's vested rights in the use of his property. The South Carolina Supreme Court has held that a "landowner acquires a vested right to continue a nonconforming use already in existence at the time of a zoning ordinance absent a showing the continuance of the use constitutes a detriment to the public health, safety, or welfare." Whaley, 337 S.C. at 578-79, 524 S.E.2d at 410-11 (citing Daniels v. City of Goose Creek, 314 S.C. 494, 431 S.E.2d 256 (Ct. App. 1993)).

Appeal II – Variance

Appeal II concerns the Board's denial of a variance to Thompkins, which Thompkins sought as a suggested remedy[7] to the Board's previous actions in upholding Zoning Administrator Mincey's decision that Thompkins was not allowed to take in outside loads of C&D materials as part of its Horry County approved C&D recycling business. Therefore, in its

[7] As previously outlined herein, counsel for the Board suggested to counsel for Appellant Thompkins-Bellamy that Appeal I may be resolved by Appellant seeking and obtaining a variance from the Board.

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February 5, 2016 petition for variance, Thompkins sought a variance from Sections 1202(A)(2),[8] 1202(A)(5),[9] and 1202(A)(7)(c&d)[10] of the Horry County Code.

Section 469 of the Horry County Code defines a "variance" as a "modification of the strict terms of this ordinance granted by the Board of Zoning Appeals where such modification will not be contrary to the public interest, and where, owing to conditions peculiar to the property and not as a result of any action on the part of the property owner, a literal enforcement of this ordinance would result in unnecessary and undue hardship." Pursuant to Section 1404(B) of the Horry County Code, the Board may grant a variance where:

1. There are extraordinary and exceptional conditions pertaining to the particular piece of property;
2. These conditions do not generally apply to other property in the vicinity;
3. Because of these conditions, the application of the ordinance to the particular piece of property would effectively prohibit or unreasonably restrict the utilization of the property; and
4. The authorization of a variance will not be of substantial detriment to adjacent property or to the public good, and the character of the district will not be harmed by the granting of the variance.

See also S.C. Code Ann. § 6-29-800 (setting forth the same standards for granting of a variance).

"Variance applicants are not required to prove that without the variance there exists no feasible conforming use for the property in question in order to show unnecessary hardship." Restaurant Row Assocs. V. Horry Cnty., 335 S.C. 209, 217, 516 S.E.2d 442, 446 (1999). The

[8] Horry County Code, Section 1202(A)(2) requires asphalt, concrete, and aggregate processing facilities to be separated from residential properties by a minimum of 500 feet.

[9] Horry County Code, Section 1202(A)(5) requires that all asphalt and concrete batch plants be located in fully enclosed structures.

[10] Horry County Code, Section 1202(A)(7)(c) requires enhanced landscaping/buffering between asphalt, concrete, and aggregate processing facilities and residential properties. Section 1202(A)(7)(c) has been amended since the variance request such that subsection (d) has been eliminated and subsection (c) now includes the former contents of subsection (d).

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South Carolina Supreme Court has upheld variances where there were feasible conforming uses of the property. Id. While claims of unnecessary hardship under section three in Section 1404(B) of the Horry County Code cannot be based upon conditions created by the property owner, where property was owned prior to the creation of a zoning ordinance, this rule does not apply. See Id.

Additional Law Relevant to Both Appeals – Takings

In both Appeals, Appellants assert that if the Board's decisions are upheld, such limitation against Thompkins' use of the Property will constitute a taking under the South Carolina Constitution. The Fifth Amendment to the United States Constitution prohibits the taking of private property for public use without just compensation. The Takings Clause is applied to the States through the Fourteenth Amendment and the application of a general zoning law to a particular property "effects a taking if the ordinance does not substantially advance legitimate [governmental] interests or denies and owner economically viable use of his land." Whaley, 337 S.C. at 578, 524 S.E.2d at 409.[11] "Inverse condemnation is a cause of action by a property owner against a governmental entity to recover the value of property that has been effectively 'taken' by the governmental entity, although not through the process of eminent domain." Carolina Chloride v. Richland County, 394 S.C. 154, 170, 714 S.E.2d 869, 877 (2011) (internal citations omitted). Therefore, inverse condemnation may result from "government-imposed limitations on the use of private property." Id. A party must prove a regulatory version of inverse condemnation by demonstrating "an affirmative, aggressive, and positive act by the government entity that caused the alleged damage to the [party's] property." Id.

[11] Article I, Section 13 of the South Carolina Constitution also prohibits the taking of private property without just compensation.

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FINDINGS OF FACT AND CONCLUSIONS OF LAW

After review of the aforementioned facts, South Carolina law, and oral arguments made by counsel at the January 5, 2017 hearing, this Court hereby makes the following findings of fact and conclusions of law:

Appeal I

1. Thompkins began business operations requiring heavy construction equipment, C&D recycling, and concrete transfer in 1981, at which time the Property was not zoned. See February 9, 2015 Board Meeting Transcript, pp. 13-15, 19-20; See also March 9, 2015 Board Meeting Transcript, pp. 5-10, 12-16, 34-35, 55, 62; ROA pp. 00077-00079, 00083-00084, 00120-00125, 00127-00131, 00149-00150, 00170-00177.
2. Since it first began operations, Thompkins' C&D division of its business has crushed, processed, and/or recycled both: (1) C&D material from Thompkins' own demolition projects and (2) C&D material received from outside sources. Id.
3. In 1987, Horry County enacted its first Zoning Ordinance, and, in 2007, Thompkins was required to apply for a business license in order to continue operating in its new zoning district. See February 9, 2015 Board Meeting Transcript, pp. 14-16; ROA pp. 00078-00080.
4. In 2007, Horry County's then Zoning Administrator, Roland Meyer, issued business license ID number 2576 to Thompkins for its "Construction Heavy Equipment" business. Commensurate therewith, former Zoning Administrator Meyer also issued business license ID number 23387 to Thompkins, approving of "C&D Recycling and Transfer Concrete, Recycling and Processing" as an accessory use to Thompkins "Construction

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Heavy Equipment" business. See Applications for Annual Business License ID Nos. 2576 and 23387; ROA pp. 00059, 00061.

5. At no time since 1981 have their been any complaints issued against Thompkins' business by residents, the county, nor any agency with regulatory control over their operation. See February 9, 2015 Board Meeting Transcript, p. 7; March 9, 2015 Board Meeting Transcript, pp. 34, 55, 62; ROA pp. 00071, 00149, 00170, 00177.

6. In 2014, a potential investor in Thompkins' business sought to ensure that the business was in compliance with the Horry County Code. See February 9, 2015 Board Meeting Transcript, pp. 13, 17, March 9, 2015 Board Meeting Transcript, pp. 34-35; ROA pp. 00077, 00081, 00149, 00150. Therefore, Thompkins requested a zoning compliance letter from current Zoning Administrator Mincey. See February 9, 2015 Board Meeting Transcript, p. 17; See generally December 3, 2014 letter from Horry County Zoning Administrator Rennie Mincey; ROA pp. 00081, 00063.

7. On December 3, 2014, Zoning Administrator Mincey signed a letter addressed to the investor's attorney, which contains only a summary of former Zoning Administrator Meyer's approval of Thompkins' business as "Construction Heavy Equipment" with an accessory use of "C&D Recycling and Transfer Concrete, Recycling and Processing." See December 3, 2014 letter from Horry County Zoning Administrator Rennie Mincey; ROA p. 00063. However, shortly after receiving a copy of this letter, Thompkins was verbally informed that Zoning Administrator Mincey had decided that, under its accessory use business license, Thompkins could not take in outside loads of C&D materials for recycling. December 4, 2015 Notice of Appeal by Appellant Thompkins-Bellamy, pp. 4-5; April 14, 2016 Notice of Appeal by Appellant Venture, p. 3.

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8. Prior to this verbal decision from Zoning Administrator Mincey, Thompkins had never been informed of or made aware that accepting outside loads of C&D materials was non-compliant with its accessory use business license. Id.

9. On or about January 8, 2015, Thompkins appealed Zoning Administrator Mincey's decision that Thompkins could not accept outside loads of C&D materials as part of its accessory use business license to the Board. December 4, 2015 Notice of Appeal by Appellant Thompkins-Bellamy p. 5.

10. Thompkins' appeal was before the Board at three consecutive monthly meetings on February 9, 2015, March 9, 2015, and April 13, 2015, respectively. See February 9, 2015, March 9, 2015, and April 13, 2015 Board Meeting Transcripts; ROA pp. 00065-00104, 00116-00193, 00280-00289. At each of these meetings, the sole issue for the Board's determination was whether to overturn the Zoning Administrator's decision that Thompkins' "C&D waste and concrete transfer business is not approved to accept commercial loads of C&D concrete materials for processing from other contractors." See February 9, 2015 Board Meeting Transcript, p. 2; ROA p. 00066.

11. Testimony and evidence in the record indicate both the Board and Zoning Administrator Mincey were aware that when the accessory use business license was issued in 2007, which allowed C&D recycling, "it was the product of what Mr. Thompkins was already doing with demolitions and other such things and other business that was approved on that location." Id. at 6; ROA p. 00070.

12. The Record in this matter indicates all testimony at the February 9, 2015 hearing demonstrated Thompkins had been taking in outside loads of C&D materials prior to the issuance of its business licenses in 2007. Id. at 9, 13-20; ROA pp. 00073, 00077-00084.

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Despite this testimony and the Board's own acknowledgements, the Board indicated they would feel more comfortable in overturning Zoning Administrator Mincey's decision if they had evidence, such as load tickets, demonstrating Thompkins had been taking in outside loads of material prior to the issuance of the business licenses in 2007. Id. at 37; ROA p. 00101. For that reason, the Board delayed their decision for thirty (30) days. Id. at 37-38; ROA pp. 00101-00102.

13. Prior to the March 9, 2015 Board Meeting, Thompkins produced to the Board the exact evidence it requested, in the form of 138 load tickets from November and December of 2006, all of which were clearly from outside contractors, demonstrating that Thompkins had been receiving outside loads prior to 2007. See March 9, 2015 Board Meeting Transcript, pp. 2, 6-9; ROA pp. 00117, 00121-00124. The Court finds this evidence to be credible, as each of the load tickets bears a scale stamp from which the weight of each load was determined. Id. at 7-8; ROA 00122-0123. Further, Appellant explained to the Board that the scale is regularly inspected by the Department of Agriculture. Id.

14. At the March 9, 2015 Board Meeting, similar to the February 9, 2015 Board Meeting, all testimony supported the fact that Thompkins had been accepting outside loads of C&D materials since it began its operations in 1981 and had never received a complaint regarding their operations. March 9, 2015 Board Meeting Transcript, pp. 5-10, 12-16, 34-35, 55, 62; ROA pp. 00120-00125, 00127-00131, 00149-00150, 00170, 00177. However, the Board against deferred its decision for thirty (30) days. Id. at 70, 76-77; ROA pp. 00185, 00191-00192.

15. At the April 13, 2015 Board Meeting, Thompkins, in an effort to further assure the Board that taking in outside loads of C&D was compliant with its accessory use business license

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provided the Board with an Affidavit from former Zoning Administrator Meyer, who had issued the license. April 13, 2015 Board Meeting Transcript, p. 3; ROA p. 00282. In Meyer's Affidavit, Meyer states he would not have been uncomfortable approving of Thompkins taking in outside loads of C&D materials for recycling as part of its accessory use business license when he issued the license in 2007. Affidavit of Roland Meyer; ROA p. 00297.

16. At the April 13, 2015 Board Meeting, the Board voted to overturn Zoning Administrator Mincey's decision that Thompkins could not accept outside loads for C&D recycling and found that "[a]n acceptable accessory use of [Thompkins'] property may be acceptance of outside commercial loads of 'Recovered Materials' as a 'Recovered Materials Processing Facility." April 13, 2015 Board Meeting Transcript pp. 8-9; ROA pp. 00287-00288.

17. However, between April and May of 2015, Thompkins was informed an individual from Solid Waste Authority was contacting members of the Board in an effort to persuade the Board members to reconsider their votes. December 4, 2015 Notice of Appeal by Appellant Thompkins-Bellamy, p. 6; April 14, 2016 Notice of Appeal by Appellant Venture, p. 7. Appellant Thompkins-Bellamy's attorney addressed this concern in a letter to counsel for Horry County. See April 22, 2015 Letter from Appellant's Agent, Bellamy Law Firm to Horry County Attorney Arrigo Carotti and outside counsel for Horry County Emma Ruth Brittain; ROA pp. 00299-00301. Subsequently, Appellant was informed by Horry County Planning Director, Janet Carter, Esq. the Board was going to move to reconsider its vote overturning Zoning Administrator Mincey's decision at their May 11, 2015 Board Meeting. December 4, 2015 Notice of Appeal by Appellant Thompkins-Bellamy, p. 6; April 14, 2016 Notice of Appeal by Appellant Venture, pp. 7-8.

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18. At the Board's May 11, 2015 meeting, the Board moved to reconsider its vote. See May 11, 2015 Board Meeting Transcript, pp. 2-3; ROA pp. 00304-00305. Although Appellant Thompkins-Bellamy's appeal of Zoning Administrator Mincey's decision was admittedly not published on the meeting roster, nor publicized in any way prior to the meeting, numerous persons who claimed to reside nearby the Property were present at the meeting and voiced unsubstantiated complaints about Thompkins' business. Id. at 7-8, 10-11, 13-14, 16, 18 ROA pp. 00309-00310, 00312-00313, 00315-00316, 00318, 00320. These persons' complaints strongly suggest to the Court that, between April and May 2015, someone told residents near the Property that Thompkins was going to begin taking in and recycling compost/trash, which Thompkins had never done and did not seek to do. Id.
19. After allowing testimony from these persons, the Board took another vote as to whether uphold or overturn Zoning Administrator Mincey's findings. Id. 26-27; ROA pp. 00328-00329. On this vote, and in direct contrast to their decision at the April 13, 2015 Board meeting, the Board unanimously upheld Zoning Administrator Mincey's decision, prohibiting Thompkins from receiving outside loads of materials for C&D Recycling and Transfer Concrete, Recycling and Processing under its business license. Id. The Board issued a written decision confirming its re-vote on May 11, 2015. See May 11, 2015 Order; ROA pp. 00055-00057.
20. The Court hereby finds that Board's May 11, 2015 Order was incorrect as a matter of law and **REVERSES** the Board's May 11, 2015 Order based upon the following grounds:
    a. There is no legal basis for Zoning Administrator Mincey's decision, and the Board's subsequent upholding of such decision, that the acceptance of outside

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loads of C&D materials would not comply with Horry County's approved accessory use of the Property as a "C&D Recycling and Transfer Concrete, Recycling and Processing" business. Thompkins business license already allows Thompkins to operate a C&D recycling business. Neither Zoning Administrator Mincey, nor the Board provided any legal basis for making a distinction between C&D recycling of Thompkins' own demolition project materials or those materials received from outside sources. Further, the Court's subsequent review of the Horry County Code and South Carolina law reveals no evidence of any such distinction.

b. The Board indicated that in order for it to feel comfortable overturning Zoning Adminstrator Mincey's decision, it would need evidence that Thompkins had been taking in outside materials for C&D recycling prior to the issuance of its business license in 2007. To that end, Thompkins produced overwhelming, credible evidence and testimony that it had done so. After receiving this evidence and hearing this testimony, the Board voted to overturn Zoning Administrator Mincey's decision during its April 13, 2015 Board Meeting.

c. The evidence in the record strongly indicates that something occurred between April and May 2015 that changed the minds of the Board, as they abruptly decided to reconsider their previous Order reversing Zoning Administrator Mincey's decision, conducted a re-vote, and subsequently upheld Zoning Administrator Mincey's decision during their May 11, 2015 meeting. This re-vote was conducted without providing Thompkins with any basis for the Board's decision to reconsider its previous decision, without publishing that the

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Thompkins matter was before the Board on May 11, 2015, and without providing any legal basis for the Board's ultimate decision to uphold Zoning Administrator Mincey's decision. The existence of this unknown occurrence is further supported by testimony by numerous persons at the May 11, 2015 Board Meeting that they were told Thompkins was going to begin functioning as a trash/compost recycling facility.[12]

d. Therefore, the Court finds that the Board's May 11, 2015 Order upholding Zoning Administrator Mincey's decision is arbitrary, capricious, and had no reasonable relation to a lawful purpose.

e. The Court further finds that irrespective of an accessory use analysis, pursuant to South Carolina law, Thompkins has a vested right to continue to accept outside loads of C&D materials, something which they were doing prior to the enactment of a zoning ordinance. See Whaley, 337 S.C. at 578-79, 524 S.E.2d at 410-11 (citing Daniels v. City of Goose Creek, 314 S.C. 494, 431 S.E.2d 256 (Ct. App. 1993)) (holding that a "landowner acquires a vested right to continue a nonconforming use already in existence at the time of a zoning ordinance absent a showing the continuance of the use constitutes a detriment to the public health, safety, or welfare.").

f. The Court also acknowledges that the May 11, 2015 Order of the Board adversely affects Thompkins' interest in the Property and its ability to operate its business thereon. As such, if the May 11, 2015 Order was upheld, Thompkins may have a

[12] The Court notes the fact that these persons showed up at the May 11, 2015 Board Meeting to testify about Thompkins when the Thompkins matter was not even on the Board's meeting agenda.

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potential claim for regulatory inverse condemnation. See Carolina Chloride, 394 S.C. 154, 170, 714 S.E.2d 869, 877 (holding that inverse condemnation may result from "government-imposed limitations on the use of private property" and a party may prove a regulatory version of inverse condemnation by demonstrating "an affirmative, aggressive, and positive act by the government entity that caused the alleged damage to the [party's] property.").

Appeal II

21. Although, unnecessary in light of the Court's holding regarding Appeal I, pursuant to the aforementioned facts and law, the Court further finds the Board's March 14, 2016 Order was incorrect as a matter of law and **REVERSES** the Board's March 14, 2016 Order based upon the following grounds:

    a. Thompkins has been operating its business, inclusive of the receiving of outside loads of C&D materials, since before Horry County enacted zoning regarding the Property. Thompkins has received no complaints from residential neighboring residents since it began its operations in 1981. As a result, the Board did not comply with the law in denying a variance to Thompkins. Rather, the overwhelming testimony and evidence in record indicates that the Board had strong reason to conclude that there are extraordinary and exceptional conditions pertaining to the Property; that because of these conditions, the application of the zoning ordinance would effectively prohibit or unreasonably restrict the utilization of the property, as it has been used since 1981; and that the authorization of the variance would not be of substantial detriment to the adjacent property or to the public good, and the character of the district would not be

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harmed by the granting of a variance, as is indicated by the complete lack of complaints from neighboring residents during Thompkins operations since 1981.

b. Therefore, the Court finds that the Board's March 14, 2016 Order denying a variance to Thompkins is arbitrary, capricious, and had no reasonable relation to a lawful purpose.

c. The Court further finds that irrespective of Thompkins' request for a variance, pursuant to South Carolina law, Thompkins has a vested right to continue to accept outside loads of C&D materials, something which they were doing prior to the enactment of a zoning ordinance. See Whaley, 337 S.C. at 578-79, 524 S.E.2d at 410-11 (citing Daniels v. City of Goose Creek, 314 S.C. 494, 431 S.E.2d 256 (Ct. App. 1993)) (holding that a "landowner acquires a vested right to continue a nonconforming use already in existence at the time of a zoning ordinance absent a showing the continuance of the use constitutes a detriment to the public health, safety, or welfare.").

d. The Court also acknowledges that the March 14, 2016 Order of the Board adversely affects Thompkins' interest in the Property and its ability to operate its business thereon. As such, if the March 14, 2016 Order was upheld, Thompkins may have a potential claim for regulatory inverse condemnation. See Carolina Chloride, 394 S.C. 154, 170, 714 S.E.2d 869, 877 (holding that inverse condemnation may result from "government-imposed limitations on the use of private property" and a party may prove a regulatory version of inverse condemnation by demonstrating "an affirmative, aggressive, and positive act by the government entity that caused the alleged damage to the [party's] property.").

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Therefore, based upon the foregoing, Respondent's May 11, 2015 Order and March 14, 2016 Order are hereby **REVERSED.**

IT IS SO ORDERED.

Benjamin H Culbertson
The Honorable Benjamin H. Culbertson
Fifteen Judicial Circuit

April 5, 2018
~~Conway~~, South Carolina
Georgetown,