

Exhibit E

STATE OF SOUTH CAROLINA)
)
 COUNTY OF HORRY)
)
 Dennis Thompkins-Bellamy Law Firm,)
 agent for DT, LLC,)
)
 Appellant,)
)
 v.)
)
 Horry County Zoning Board of Appeals,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 FIFTEENTH JUDICIAL CIRCUIT
 CIVIL ACTION NO. 2015-CP-26-3791

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 SC Court of Appeals

**ORDER DENYING RESPONDENT'S
 MOTION TO STRIKE**

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This matter is before the Court by Motion to Strike from Respondent, filed on December 29, 2015. In its Motion, Respondent alleges that Appellant Thompkins' Notice of Appeal, filed December 4, 2015 ("Notice"), should be stricken, or, in the alternative, several of the exhibits filed therewith should be disallowed. The County first alleges the Notice was untimely filed and secondly that several of the exhibits to the Notice were not included in the clerk's certified record filed with the court and should, thus, be stricken. On January 19, 2016, Appellant filed a Response to Respondent's Motion to Strike, arguing first, that Appellant Thompkins' Notice was timely filed under South Carolina statutory law, and second, that the exhibits Respondent alleges should be excluded from the Record on Appeal were all provided to and/or considered by the Horry County Zoning Board of Appeals (hereinafter, the "Board" or the "County") in administrative proceedings, the result of which Appellant now appeals. After thorough review of the Record, Respondent's Motion to Strike and Appellants' Response in opposition, the Court will now address each of the issues herein below in finding Respondent's Motion is hereby **DENIED.**

Timeliness

With regard to the timeliness of the filing of the Notice, the Local Government Planning Act ("the Act"), S.C. Code Ann. § 6-29-310 *et seq.*, controls. The Act specifically addresses the time-frames required in appeals from zoning boards of appeals. While the County recites only specific sections of the Act in its Motion, several of the sections not cited by the County make clear Appellant's Notice was timely. The Act, in §§ 6-29-820 and 6-29-825, provides as follows:

§ 6-29-820. Appeal from zoning board of appeals to circuit court; pre-litigation mediation; filing requirements.

(A) A person who may have a substantial interest in any decision of the board of appeals or an officer or agent of the appropriate governing authority may appeal from a decision of the board to the circuit court in and for the county, by **filing with the clerk of the court a petition in writing setting forth plainly, fully, and distinctly why the decision is contrary to law.** The appeal must be filed within thirty days after the decision of the board is mailed.

(B) A property owner whose land is the subject of a decision of the board of appeals may appeal **either**:

(1) as provided in subsection (A); **or**

(2) **by filing a notice of appeal with the circuit court accompanied by a request for pre-litigation mediation in accordance with Section 6-29-825.**

Any notice of appeal and request for pre-litigation mediation must be filed within thirty days after the decision of the board is postmarked.

(C) Any filing of an appeal from a particular board of appeals decision pursuant to the provisions of this chapter must be given a single docket number, and the appellant must be assessed only one filing fee pursuant to Section 8-21-310(11)(a).

(Emphasis added.)

§ 6-29-825. Pre-litigation mediation; notice; settlement approval; effect on real property; unsuccessful mediation.

(A) If a property owner files a notice of appeal with a request for pre-litigation mediation, the request for mediation must be granted, and the mediation must be conducted in

accordance with South Carolina Circuit Court Alternative Dispute Resolution Rules and this section. A person who is not the owner of the property may petition to intervene as a party, and this motion must be granted if the person has a substantial interest in the decision of the board of appeals.

(B) The property owner or his representative, any other person claiming an ownership interest in the property or his representative, and any other person who has been granted leave to intervene pursuant to subsection (A) or his representative must be notified and have the opportunity to attend the mediation. The governmental entity must be represented by at least one person for purposes of mediation.

(C) Within five working days of a successful mediation, the mediator must provide the parties with a signed copy of the written mediation agreement.

(D) Before the terms of a mediation settlement may take effect, the mediation settlement must be approved by:

- (1) the local legislative governing body in public session; and
- (2) the circuit court as provided in subsection (G).

(E) Any land use or other change agreed to in mediation which affects existing law is effective only as to the real property which is the subject of the mediation, and a settlement agreement sets no precedent as to other parcels of real property.

(F) If mediation is not successful or if the mediated settlement is not approved by the local legislative governing body, a property owner may appeal by filing a petition in writing setting forth plainly, fully, and distinctly why the decision is contrary to law. The petition must be filed with the circuit court within thirty days of:

(1) the report of an impasse as provided in the South Carolina Circuit Court Alternative Dispute Resolution Rules; or

(2) the failure to approve the settlement by the local governing body.

(G) The circuit court judge must approve the settlement if the settlement has a rational basis in accordance with the standards of this chapter. If the mediated settlement is not approved by the court, the judge must schedule a hearing for the parties to present evidence and must issue a written opinion containing findings of law and fact. A party may appeal from the decision:

(1) in the same manner as provided by law for appeals from other judgments of the circuit court; or

(2) by filing an appeal pursuant to subsection (F).

In the present matter, the County's Order was received by Appellant on May 15, 2015. Thereafter, on May 22, 2015, Appellant filed an appeal as provided in § 6-29-820(B)(2). Pursuant to § 6-29-820 of the Act, an interested party may either file a "petition in writing setting forth plainly, fully, and distinctly why the decision is contrary to law" or, should the party seek pre-litigation mediation, that party may file "a notice of appeal with the circuit court accompanied by a request for pre-litigation mediation."

Pursuant to Appellant's notice and request, mediation in this matter was held November 4, 2015 at the offices of Karl A. Folkens in Florence, South Carolina. However, the mediation was not successful. As such, Appellant, on December 4, 2015 filed a Notice of Appeal pursuant to § 6-29-825(F), setting forth, with specificity, the grounds for appeal and reversal of the County's decision. This second Notice was timely pursuant to the clear text of § 6-29-825(F), which provides a thirty (30) day time-frame within which the notice must be filed following the report of impasse by the mediator. It is this Notice which the County seeks to have stricken by the present Motion, despite the clear framework set forth in the Act.

Because the aforementioned dates are not in dispute, and are clearly set forth in the Clerk's file before the court, the Act makes it clear Appellant's Notice was filed in a timely manner. Therefore, the Court hereby **DENIES** Respondent's Motion to Strike Appellant's Notice as untimely filed.

Exhibits

Second, its Motion to Strike, the County seeks the exclusion of certain documents included as exhibits in the Notice, which have been described by Appellant as follows:

1. Exhibit C (application for business license dated 3/25/15);
2. Exhibit D (application for business license dated 11/12/14);

3. Exhibit E (letter from current Zoning Administrator Rennie Mincey regarding zoning conformance of property);
4. Exhibit G-5 (Thompkins & Associates invoice to City of Myrtle Beach);
5. Exhibit H-1 (Affidavit of Roland Meyer);
6. Exhibit J (Affidavit of Roland Meyer);
7. Exhibit K (letter from counsel for Appellant to counsel for Horry County and the Horry County Solid Waste Authority regarding concerns of inappropriate communications between Horry County and the Solid Waste Authority staff and board members); and,
8. Exhibit F-1 (aerial photographs and Horry County Zoning App. Comp Certification Inquiry dated 4/24/14).

Again, much guidance is found in the Act itself, which, at § 6-29-800(B), provides:

(B) Appeals to the board may be taken by any person aggrieved or by any officer, department, board, or bureau of the municipality or county. The appeal must be taken within a reasonable time, as provided by the zoning ordinance or rules of the board, or both, by filing with the officer from whom the appeal is taken and with the board of appeals notice of appeal specifying the grounds for the appeal. If no time limit is provided, the appeal must be taken within thirty days from the date the appealing party has received actual notice of the action from which the appeal is taken. **The officer from whom the appeal is taken immediately must transmit to the board all the papers constituting the record upon which the action appealed from was taken.**

(Emphasis added.)

In its Response to the Respondent's Motion to Strike, Appellant argues that the above-referenced section of the Act offers valuable guidance to the Court as to several of the exhibits to which the County objects. Appellant states the following in regard to the Exhibits that Respondent has objected to:

1. Exhibits C and D are business license application forms printed directly from the County's computer system and provided to Appellant by the County. They are

creations of the County and are clearly in the County's possession, in the County's file on the Thompkins matter, and were, pursuant to § 6-29-800(B) required to have been provided to the Board upon the filing of the appeal from the Zoning Administrator.

2. Exhibit E is a letter regarding the zoning conformance of this property. This letter was written by the current Zoning Administrator for Horry County, Rennie Mincey, and is therefore also a creation of the County, clearly in the County's possession, in the County's file on the Thompkins matter, and was, pursuant to § 6-29-800(B) required to have been provided to the Board upon the filing of the appeal from the Zoning Administrator.
3. The aerial images of the Thompkins property included with Exhibit F-1 were produced by the County and projected at the Board meetings to allow the Board members to familiarize themselves with the Thompkins property. These, too, are creations of the County and are clearly in the County's possession, in the County's file on the Thompkins matter, and were, pursuant to § 6-29-800(B) provided to the Board upon the filing of the appeal from the Zoning Administrator.
4. Exhibits H-1 and J are copies of the affidavit provided by the former Zoning Administrator, Roland Meyer. This affidavit was provided to the County, as is made clear in the transcript of the Board meetings addressing the Thompkins appeal, where counsel for Appellant discussed this affidavit at length on the record and the Board clearly took the affidavit into consideration in making its decision. In point of fact, the current Zoning Administrator addressed the Thompkins perceived disagreement as to hers and Meyers' interpretation of "accessory use" in the transcript. This

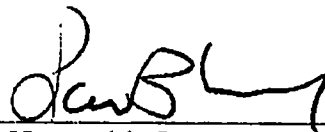
document, too, was in the Board's possession and should have been included in the clerk's certified record filed with the court.

5. Exhibit K is a letter sent by counsel for the Thompkins to Horry County as well as the Solid Waste Authority. This letter outlines concerns regarding allegations of inappropriate communication taking place between these respective agencies and their Boards. The letter was specifically addressed of record at the May 11, 2015 Zoning Board of Appeals meeting.

After review of Respondent's Motion and Appellant's Response, the Court agrees with Appellant's argument that the exhibits which the County seeks to exclude are in the County's possession, were clearly considered by the Board, and should have been included in the clerk's (an employee of the County) certified record to the court, pursuant to the Act. Accordingly, the Court **DENIES** the County's Motion to exclude the aforementioned exhibits from the court's consideration in the present appeal.

THEREFORE, for the foregoing reasons, Respondent's Motion to Strike is **DENIED**.

IT IS SO ORDERED.



The Honorable Larry B. Hyman, Jr.
Fifteenth Judicial Circuit

Conway, South Carolina

August 10, 2016
10-12-16