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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J. C. Nicholson, Jr., Judge

Case No. 2011-CP-10-2028

Joseph M. Bettelli, Jr. and Susan B. Bettelli.....Appellants,

v.

Town of Awendaw Board of Zoning Appeals and
Berkeley Electric Cooperative,.....Respondents.

RECORD ON APPEAL

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RECEIVED

DEC 09 2013

SC Court of Appeals

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STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO. 2011-CP-10-2028

Joseph M. Bettelli, Jr. and)
Susan B. Bettelli,)

Plaintiffs,)

vs.)

Town of Awendaw Board of Zoning)
Appeals and Berkeley Electric)
Cooperative,)

Defendants.)

ORDER

FILED
2013 APR -9 AM 9:52
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

This matter came before me originally on a hearing dated March 12, 2012. Attorney Chris McG.Holmes appeared on behalf of the Appellants, attorney Dwayne M. Green appeared on behalf of the Respondent Town of Awendaw. John Williams, Esquire also appeared on behalf of the Respondent Berkeley Electrical Cooperative.

gm
This action is an appeal from a ruling of the Town of Awendaw Board of Zoning and Appeals. At issue is the density and placement of a vegetative buffer to be placed between the Appellants' property in Awendaw and a newly constructed service facility for the Berkeley Electrical Co-op. The Town of Awendaw granted an easement to the Respondent Berkeley Electric, allowing it a variance under S.C. Code Ann. 6-29-800 (A)(2). The variance reduced the buffer required under the Town's ordinance from twenty to five feet, but required that the buffer be comprised of more dense vegetation to allow maximum screening. The reduced buffer also allowed the Town to maintain an easement granted to it by Berkeley Electric, allowing it to place and service a water line which would extend to a well currently located on Berkeley Electric's

property. The pertinent Town of Awendaw ordinance had required twenty (20') feet of vegetative buffer between the Berkeley Electric and Bettellis property.

The Bettellis have alleged that the town's grant of the variance is a conflict of interest and appealed the Town's grant of the variance. They have also requested as a possible solution that Respondent Berkeley Electric construct a 7' wall at its own expense to screen its property from their own. At the last status conference in this matter, the Bettellis were directed to negotiate with the landscape architects for Respondent Berkeley Electric to see if a compromise could be reached as to the placement and type of vegetation which would serve as a buffer between the two properties. The parties have reported that they have reached an impasse and no compromise has been reached.

Based on the foregoing and after reviewing the facts and the records in this matter, I find as follows:

gen
No conflict of interest existed between the Town of Awendaw and Berkeley Electric Co-op when the variance in this matter was originally granted. A municipality has the right, duty and obligation to provide for the general welfare of its citizens and the safe installation and maintenance of a water line reasonably and rationally fits within this duty. If the town receives no financial or pecuniary benefit from the placement of the buffer in this case, I do not find that a conflict of interest existed when it granted the requested variance to the Berkeley Electric Co-op.

As to the variance granted by the town, the minutes reflected that the Board considered four factors in its analysis, pursuant to state law. A variance **may** be granted by the Board of Zoning Appeals if the Board makes the following findings:

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;

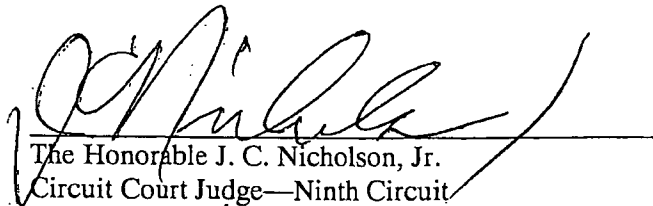
3. because of these conditions, the application of the ordinance to the particular piece of property would effectively prohibit or unreasonably restrict the utilization of the property; and;
4. the authorization of a variance will not be of substantial detriment to adjacent property or the public good, and the character of the district will not be harmed by granting of the variance.

Examining these factors, the BZA found that the proposed change from twenty to five feet of buffer had minimal impacts, due to the proposed use of more dense vegetation. The Board was within its discretion in finding that the Berkeley Electric property had exceptional conditions, those conditions did not apply to other properties in the area (particularly the existence of a water easement), and that the granting of an easement would be of benefit for the public good rather than harming it.

I further find that the approved buffer provides more screening for the Bettellis property based on the density and the proposed plant material to be utilized. Accordingly, I find that the Bettellis are not entitled as a matter of law to have a different or more expensive buffer erected at the expense of any other parties in this matter.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the appeal of the original Town of Awendaw BZA order in the matter be denied and that a vegetative buffer be planted and erected on the Berkeley Electrical Co-op property within the parameters directed by the Town of Awendaw Planning Department and within the type and variety as suggested by the Berkeley Electrical Co-op landscape architect so as to provide maximum density and screening between the Bettelli and Berkeley Electric property. Such vegetative buffer shall be in accordance with the Town of Awendaw planning guidelines and shall be erected at the Berkeley Electrical Co-op's sole expense.

IT IS SO ORDERED.


The Honorable J. C. Nicholson, Jr.
Circuit Court Judge—Ninth Circuit

4/3/13

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO. 2011-CP-10-2028

Joseph M. Bettelli, Jr. And Susan B.)
Bettelli,)

Plaintiffs,)

vs.)

Town of Awendaw Board of Zoning)
Appeals and Berkeley Electric)
Cooperative,)

Defendants.)

**NOTICE OF MOTION AND
MOTION FOR RECONSIDERATION
AND TO ALTER OR AMEND**

FILED
2013 APR 24 PM 1:05
JULIE J. ARMSTRONG
CLERK OF COURT
BY 

TO: THE COURT AND ALL PARTIES

PLEASE TAKE NOTICE that the above named plaintiffs, by and through their undersigned attorney, will move before the Honorable J. C. Nicholson, Jr., Judge, Ninth Judicial Circuit, ten (10) days after service hereof or at such other time and place as designated by the Court, for an Order granting reconsideration and alteration or amendment of the Order issued herein dated April 3, 2013, written notice of which was received by plaintiffs on April 15, 2013. This Motion is made in accordance with Rules 52(b) and 59(e) SCRCF and is based upon the arguments set forth below and other material that may be served upon you or accepted into the record by the presiding judge prior to or at the hearing of this Motion.

ARGUMENT

"On appeal, the findings of fact by the 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(A)

(Supp.2010). '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.' Austin v. Bd. of Zoning Appeals, 362 S.C. 29, 33, 606 S.E.2d 209, 211 (Ct.App.2004). Furthermore, '[a] court will refrain from substituting its judgment for that of the reviewing body, even if it disagrees with the decision.' Restaurant Row Assocs. v. Horry Cnty., 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999). 'However, a decision of a municipal zoning board will be overturned if it is arbitrary, capricious, has no reasonable relation to a lawful purpose, or if the board has abused its discretion.' *Id.* Black v. Lexington County Bd. of Zoning Appeals, 396 S.C. 453, 457-458, 722 S.E.2d 22, 24 (S.C.App.,2012).

Following an initial hearing on this appeal on March 12, 2012, the court ruled the Order on Variance Application issued by BOZA pursuant to S. C. Code Ann. Section 6-29-800(F) failed to contain sufficient information to allow a determination whether the findings were supported by the evidence and, therefore, whether the law had been properly applied. As a result, the court issued a Temporary Order on July 17,2012, remanding the matter to BOZA for the purposes of preparing and submitting to the court a Return which was to include factual findings explaining why the easement granted to Awendaw for the purpose of purchasing water had to be located in the required buffer zone; why the easement could not be routed in another direction; why the authorization of the variance would not be of substantial detriment to plaintiff's property or to the public good, and why the character of the district would not be harmed by the granting of the variance. In addition, BOZA was to include factual findings demonstrating how the granting of the variance is not arbitrary or capricious due to the apparent conflict of interest. The court directed BOZA to sufficiently detail all such findings of fact so as to enable the court to determine whether the findings are actually

supported by the evidence and whether then law has been properly applied to those findings.

The Return filed by BOZA in response to this Temporary Order on November 15, 2012, failed to contain any facts supporting its decision and referenced material outside of the record compiled at the hearing on the variance held on November 1, 2010. The Order signed on April 3, 2013, similarly fails to cite to facts supporting the findings and also references matters outside the record.

The Order incorrectly states “Town of Awendaw granted an easement [sic] to Respondent Berkeley Electric, allowing it a variance under S. C. Code Ann. 6-29-800(A)(2).” The record shows it was Berkeley Electric granting the easement to Awendaw as a condition precedent to approval of BEC’s development of its property. Moreover, the easement was not needed to further BEC’s use of its property other than in the fact it was required by Awendaw in exchange for Awendaw’s approval of BEC’s overall site development plan. Despite this patent *quid pro quo*, the court found “no conflict of interest existed” because Awendaw was fulfilling its “right, duty and obligation to provide for the general welfare” which would be furthered by the “safe installation and maintenance of a water line,” and Awendaw “receives no financial or pecuniary benefit from the placement of the buffer.” The Order fails to explain how the town, by exacting a property interest from an applicant for site plan and architectural approval, is not receiving a benefit. Additionally, fulfillment of general obligations of a municipality are irrelevant to the consideration of the appropriateness of granting a zoning variance. Finally, the record contains admissions by Awendaw that the water line and the well that would supply it will not be used until some unspecified “point in the future” and that currently there is “no funding” for it.

There are four standards an applicant for relief from a zoning ordinance must demonstrate

it meets: (a) there are extraordinary and exceptional conditions pertaining to the particular piece of property; (b) these conditions do not generally apply to other property in the vicinity; (c) 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 (d) 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. S.C. Code Ann. § 6-29-800(A)(2). The applicant must establish all of these factors are present and met. “In order to grant a variance, the Board must make the factual determination that each of the four elements above favor granting the variance. *See Dolive v. J.E.E. Developers, Inc.*, 308 S.C. 380, 418 S.E.2d 319 (Ct.App.1992). Granting a variance is an exceptional power which should be sparingly exercised and can be validly used only where a situation falls fully within the specified conditions.” *Rest. Row Associates v. Horry County*, 335 S.C. 209, 516 S.E.2d 442 (1999), certiorari denied, 528 U.S. 1020, 120 S.Ct. 528, 145 L.Ed. 409 (1999).

The Order cites to no evidence establishing any of these elements are present in this case. The sum total of the Order addressing these elements is as follows: “Examining these factors, the BZA found that the proposed change from twenty to five feet of buffer had minimal impacts, due to the proposed use of more dense vegetation. The Board was within its discretion in finding that Berkeley Electric property had exceptional conditions, those conditions did not apply to other properties in the area (particularly the existence of w water easement), and that grantig [sic] of an easement [sic] would be of benefit for the public good rather than harming it.” Recitation of these conclusory statements without referencing any factual support in the record is insufficient as a matter of law to uphold a zoning variance and is an abandonment of the court’s responsibility in conducting

its review.

“ ‘[T]he decision of the zoning board will not be upheld where it is based on errors of law, or fraud, or where there is no legal evidence to support it, or where the board acts arbitrarily or unreasonably, or in a discriminatory manner or where, in general, the board has abused its discretion.’ 58 Am.Jur., Zoning, Section 231. In exercising its discretion, the board of adjustment is not left free to make any determination whatever that appeals to its sense of justice. It must abide by and comply with the standard prescribed by the local ordinance and zoning statutes.” Hodge v. Pollock, 223 S.C. 342, 348, 75 S.E.2d 752, 754(1953)(emphasis added).

While the burden was not on them, plaintiffs produced evidence that there are no extraordinary and exceptional conditions pertaining to BEC’s property. Specifically, due to its large size (28 acres), there was ample space to site and locate facilities to meet all design requirements and still avoid intruding into the mandated twenty foot buffer area, and the preliminary site plan demonstrated only a small amount of the acreage is needed for the facilities planned. Further, the conditions of this property generally apply to other properties in the vicinity. “It is generally acknowledged that the peculiarity requirement is designed to prevent the grant of variances to remedy a hardship which is general throughout the area zoned. 101A C.J.S. *Zoning and Land Planning* § 243, at 709-10 (1979); 6 Patrick J. Rohan, *Zoning and Land Use Controls* § 43.02(4)(b)(i), at 43-49 (1992),” Bennett v. Sullivan's Island Bd. of Adjustment, 313 S.C. 455, 458, 438 S.E.2d 273, 274-75 (Ct. App. 1993). The Order fails to address the shortcomings of BOZA’s record on these factors.

The plaintiffs and their neighbors objected strenuously to the reduction of the buffer due to concerns over noise, dust and light trespass from BEC’s property onto their own. In the two years

this matter has been pending those fears have been realized. The Order fails to address these concerns in any manner other than to indicate the benefits of the water easement justifies those impacts.

Most egregiously, the Order states the plaintiffs will suffer “minimal impacts, due to the proposed use of more dense vegetation” without addressing the demonstrated fact that the five foot buffer that remains is effectively only one and a half to three feet wide due to the erection by BEC of a fence in the middle of the five foot buffer area along the common property line with plaintiffs. Neither the defendants nor the court have explained how “dense vegetation” can be planted and maintained in such a limited space.

Finally, the Order incorrectly, and improperly, states plaintiffs “requested” that BEC “construct a 7' wall at its own expense to screen its property” from theirs. There is nothing in the record to support that finding. Black, supra.

CONCLUSION

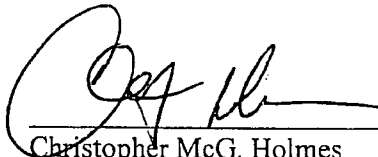
The record in this matter is devoid of any evidence that would support the grant of a variance from the required buffer. There are no extraordinary and exceptional conditions pertaining to BEC's property which do not generally apply to other property in the vicinity, nor would application of the ordinance to the property effectively prohibit or unreasonably restrict the utilization of the site. In fact, requiring a twenty foot buffer would have zero impact on BEC's use of its property. The site has now been developed with all buildings, parking and related facilities in place. The only reason BEC cannot plant the required vegetation in the full twenty feet is because Awendaw wants a water easement and nothing can be planted in that easement area. Reduction of the buffer has nothing to do with the ability of BEC to use its property and everything to do with Awendaw's desire for an

easement for which it presently has no need and no ability to access. This exaction from BEC by Awendaw presents a clear conflict of interest and renders its variance decision arbitrary and capricious.

On the other hand, allowing this variance demonstrably has been, and will continue to be, of substantial detriment to adjacent property, the public good, and the character of the district.

For the foregoing reasons, plaintiffs ask this Court to reconsider its Order filed on April 9, 2013, and alter or amend that decision to conform to the record and reverse the grant of the zoning variance.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'C. McG. Holmes', is written over a horizontal line.

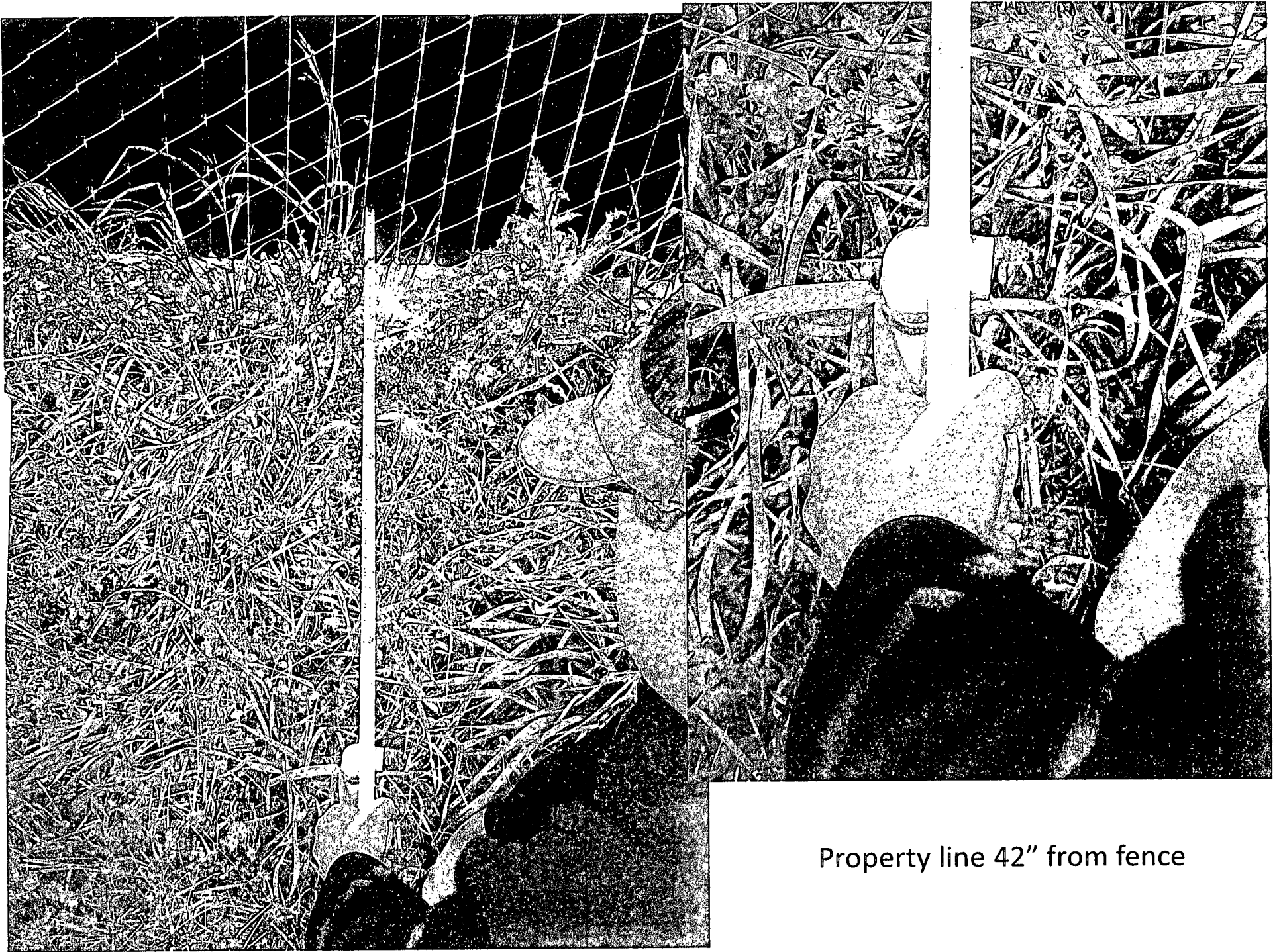
Christopher McG. Holmes
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Attorney for Plaintiffs

Mount Pleasant, SC
April 24, 2013



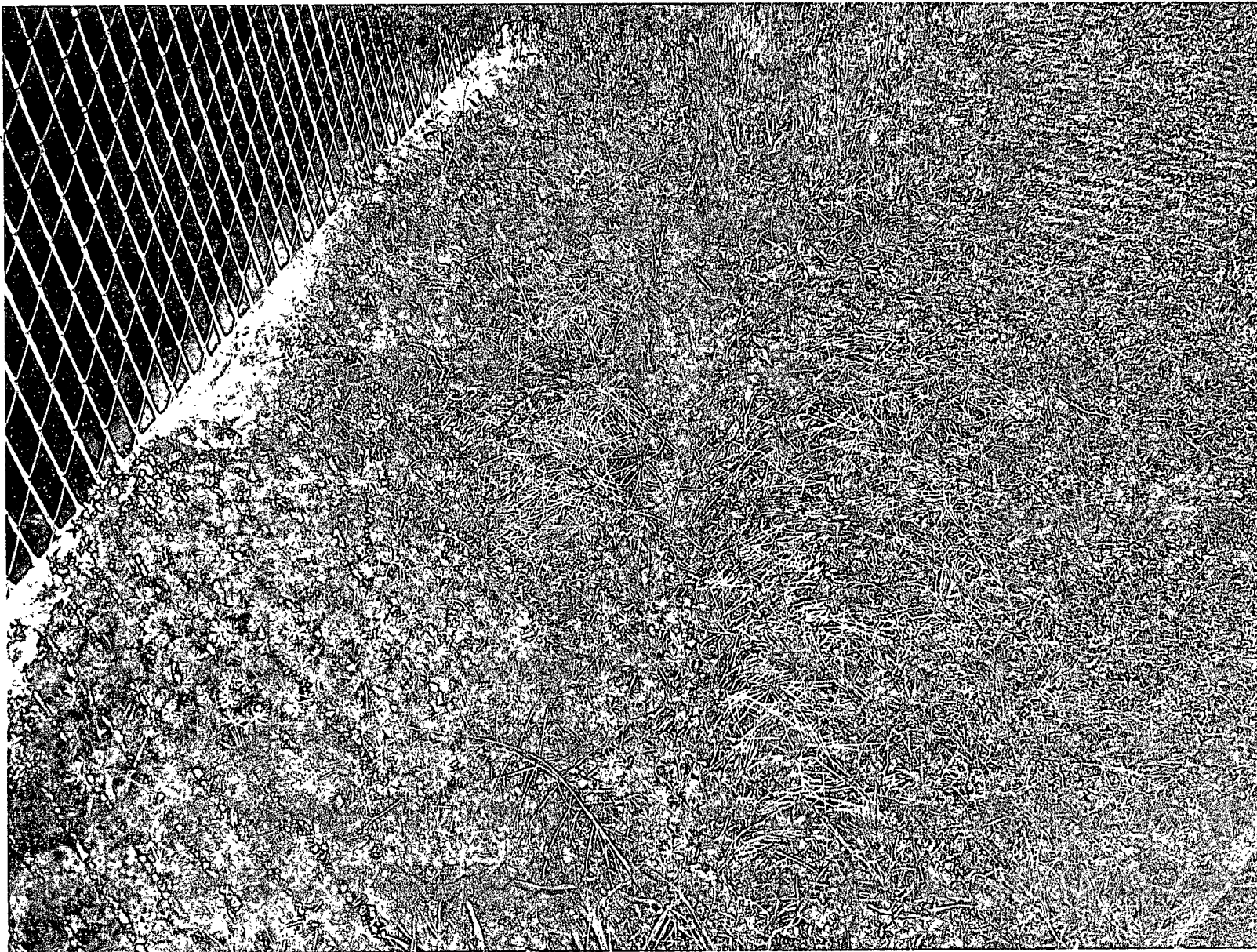
Property line 42" from fence



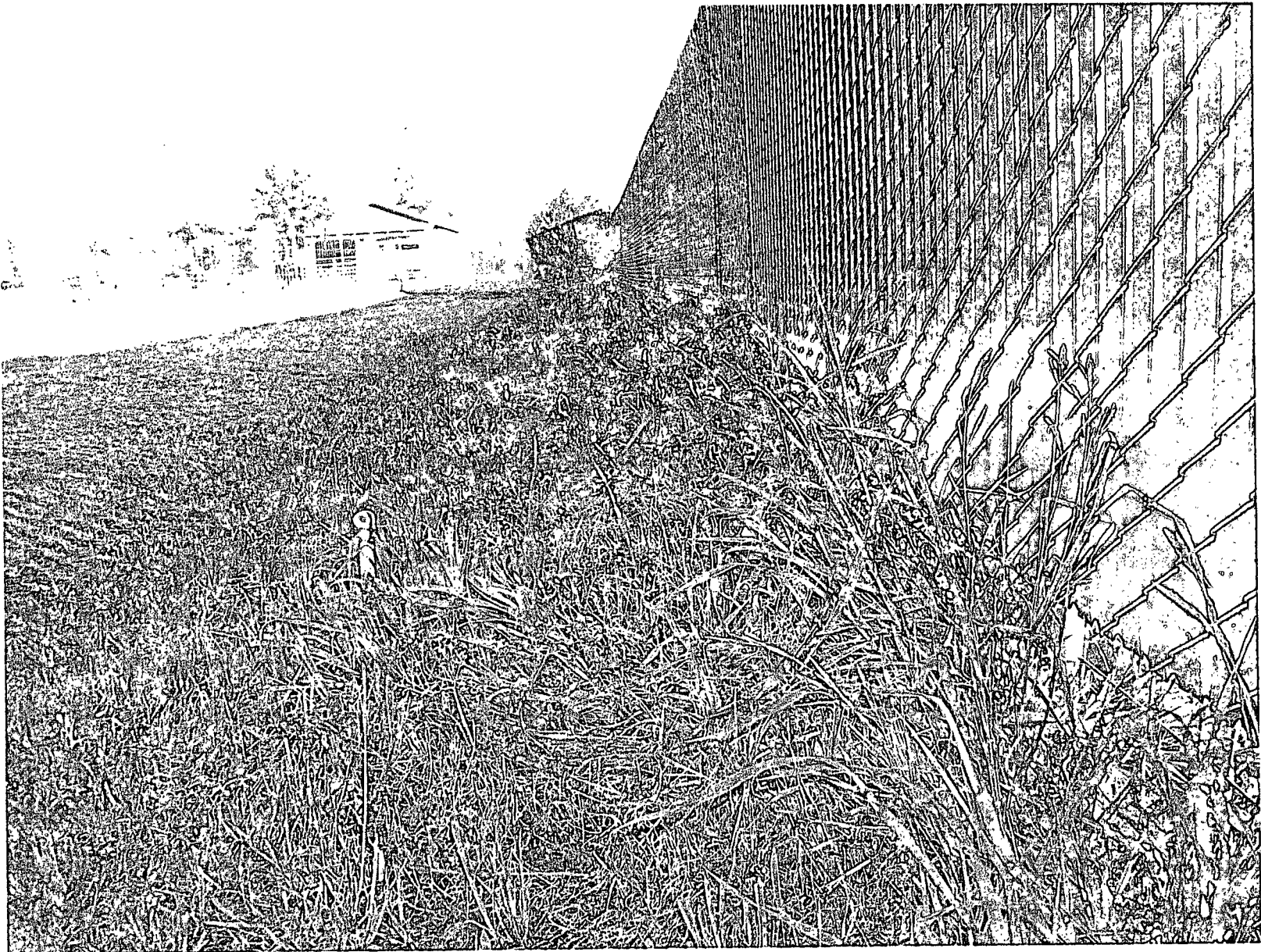
Property line 42" from fence



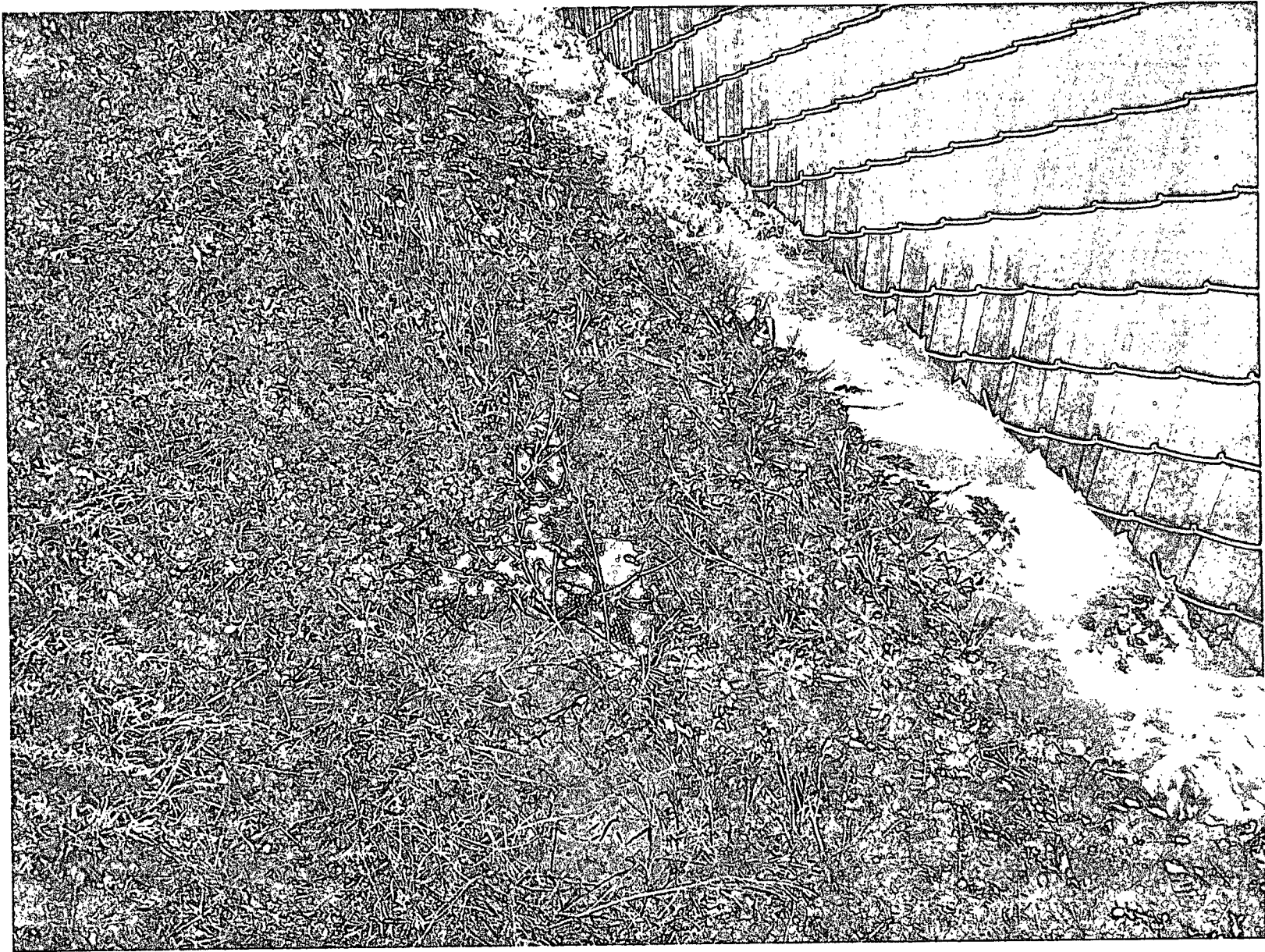
Grass and weeds 24" tall



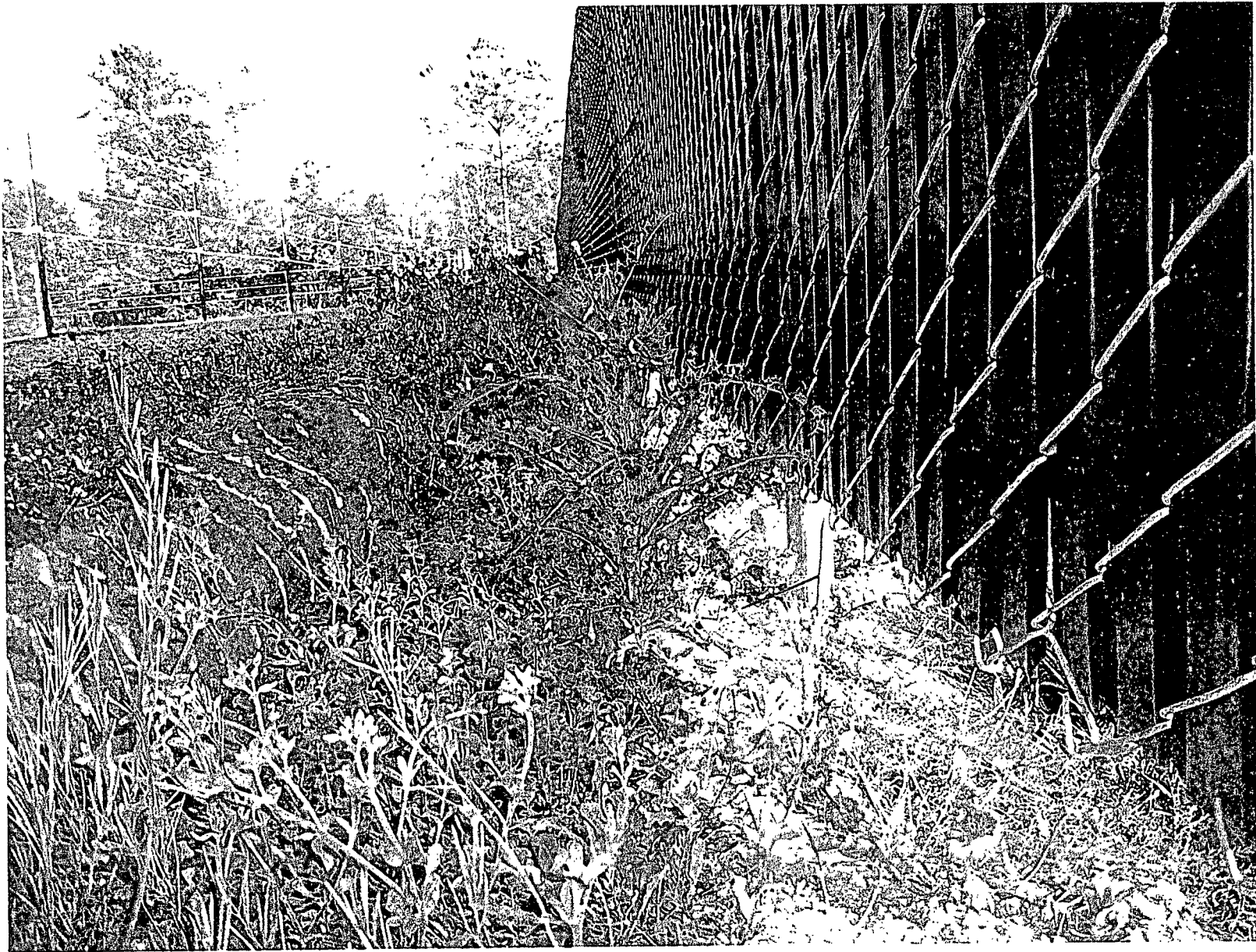
Holes next to fence on Berkeley Electric's property



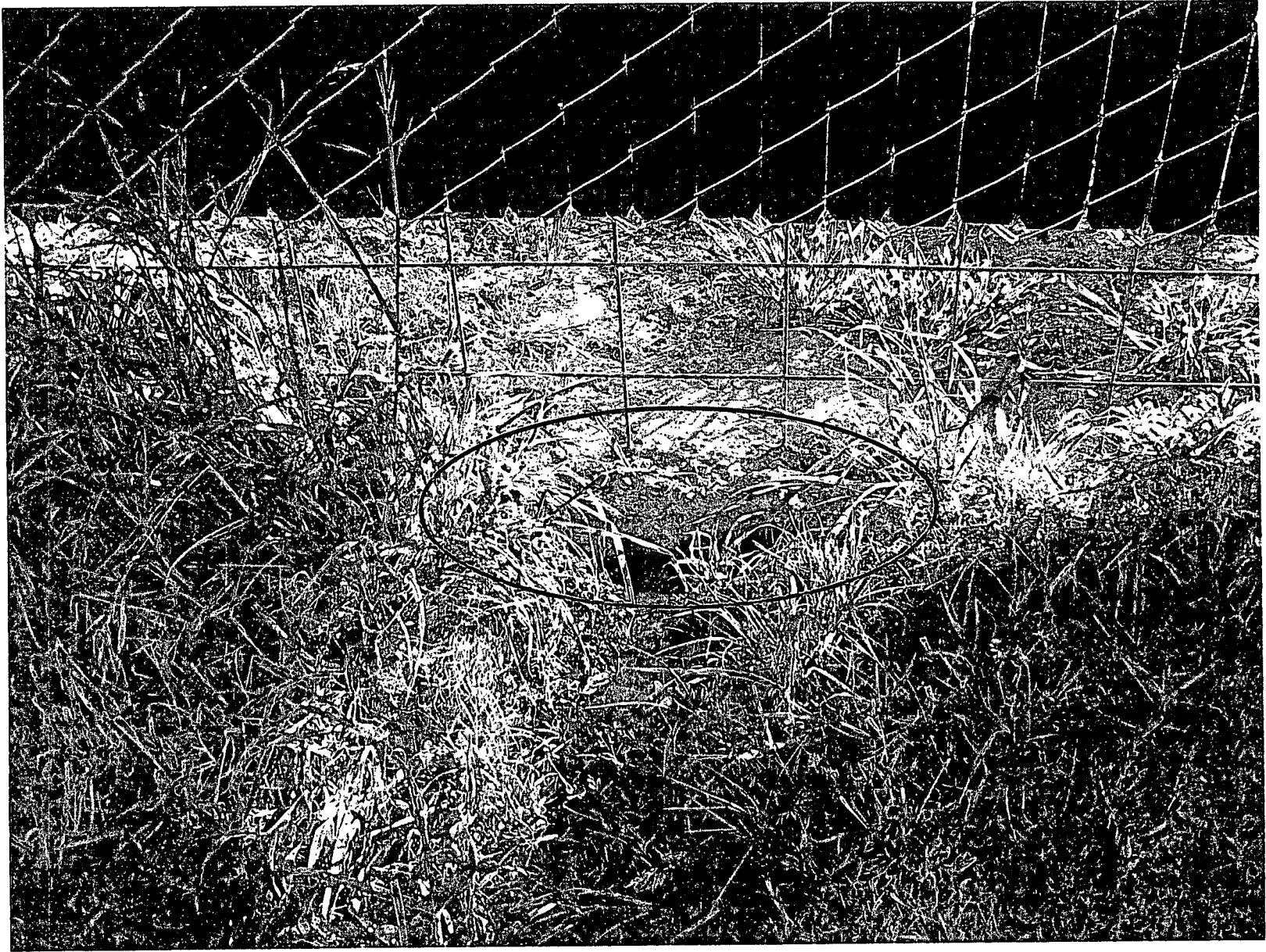
Grass and weeds 24" tall



Grass and weeds and pieces of Silt fencing left



Holes next to fence on Berkeley Electric's property



Drainage swale coming from Bettelli's property blocked by fence and cement under fencing

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO. 11-CP-10-2028

Joseph M. Bettelli, Jr. And Susan B.)
Bettelli,)

Plaintiffs,)

vs.)

Town of Awendaw Board of Zoning)
Appeals and Berkeley Electric)
Cooperative,)

Defendants.)

TEMPORARY ORDER

FILED
2012 JUL 17 AM 8:31
JULIE J. ARMSTRONG
CLERK OF COURT

This matter came before this Court on March 12, 2012, pursuant to a petition filed by Plaintiffs and brought pursuant to S. C. Code Ann. Section 6-29-820 (Supp. 2010) to challenge the decision of the Town of Awendaw Board of Zoning Appeals (BOZA) to grant a variance to Berkeley Electric Cooperative (BEC). Specifically, BEC sought a variance allowing, *inter alia*, the reduction of the buffer zone required by Awendaw's zoning ordinance on that portion of BEC's property abutting that of the Plaintiffs from twenty (20') feet to five (5') feet. BOZA conducted a hearing to consider the request on November 1, 2010, at which time the variance was approved. The decision was reduced to written Findings of Fact and Conclusions of Law, as required by S. C. Code Ann. Section 6-29-800(F), which were approved on March 7, 2011.

On appeal, Plaintiffs contend BEC's property does not fall within the parameters that would qualify it for the variance granted, and they argue the final decision of the BOZA does not properly or sufficiently set forth factual findings to support its legal conclusions. Defendants dispute Plaintiffs' allegations and assert the Final Order of BOZA complies with the law and should be upheld. Upon review of the record submitted and consideration of the arguments and

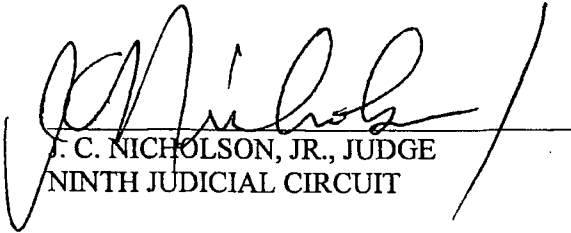
briefs of the parties, this Court concludes the Order on Variance Application issued by BOZA pursuant to S. C. Code Ann. Section 6-29-800(F) does not contain sufficient information to allow a determination whether the findings are supported by the evidence and, therefore, whether the law has been properly applied. See Porter v. S.C. Public Serv. Comm'n, 333 S.C. 12, 507 S.E.2d 328 (1998) (“An administrative body must make findings which are sufficiently detailed to enable this Court to determine whether the findings are supported by the evidence and whether the law has been applied properly to those findings.”); see also Kiawah Prop. Owners Group v. Pub. Serv. Comm'n of S. Carolina, 338 S.C. 92, 525 S.E.2d 863 (1999) (“This Court will not accept an administrative agency's decision at face value without requiring the agency to explain its reasoning.”).

For the foregoing reason, it is the ORDER of this Court:

1. The case is REMANDED to the Awendaw Board of Zoning Appeals for the purpose of making a Return to the Court, which shall include the following:
 - a. Factual findings explaining why the easement, granted to the Town for the purpose of purchasing water, must be located in the required buffer zone; and
 - b. Factual findings explaining why the easement could not be routed in another direction; and
 - c. Factual findings explaining why the authorization of the variance will not be of substantial detriment to adjacent property (in this case, plaintiff's property) or to the public good, and why the character of the district will not be harmed by the granting of the variance (S.C. Code Ann. 6-29-800(A)(2)); and
 - d. Factual findings demonstrating how the granting of the variance is not arbitrary or capricious due to the apparent conflict of interest.

2. All findings of fact shall be sufficiently detailed so as to enable this Court to determine whether the findings are supported by the evidence and whether then law has been properly applied to those findings.
3. This is a temporary Order and this Court retains jurisdiction over the matter and the parties pending submission and consideration of the Return.

AND IT IS SO ORDERED THIS 13 DAY OF JULY, 2012.


J. C. NICHOLSON, JR., JUDGE
NINTH JUDICIAL CIRCUIT

Charleston, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO. 11-CP-10-2028

Joseph M. Bettelli, Jr. And Susan B. Bettelli,)

Plaintiffs,)

vs.)

Town of Awendaw Board of Zoning Appeals and Berkeley Electric Cooperative,)

Defendants.)

**TOWN OF AWENDAW'S
RETURN TO TEMPORARY ORDER
ON APPEAL OF BZA DECISION**

FILED
2012 NOV 15 AM 9:55
JULIE J. ARMSTRONG
CLERK OF COURT
BY [Signature]

PROCEDURAL BACKGROUND

This matter came before this Court on March 12, 2012, pursuant to a petition filed by Plaintiffs to challenge the decision of the Town of Awendaw Board of Zoning Appeals (BOZA) to grant a variance to Berkeley Electric Cooperative (BEC). Specifically, Berkeley Co-op sought a variance allowing the reduction of the buffer zone required by Awendaw's zoning ordinance on that portion of BEC's property abutting that of the plaintiffs from twenty (20') feet to five (5') feet.

To compensate for the reduced footage of the buffer, Berkeley Co-op offered to build a semi-opaque fence along the border between its property and the Appellants, and also to plant more dense shrubbery and vegetation than was originally required by the ordinance. Berkeley Co-op also demonstrated that there was no other alternate route to place a waterline, which was to be placed underground within the portion of the buffer which would otherwise have trees planted upon it.

The Awendaw Board of Zoning Appeals conducted a hearing to consider the request on November 1, 2010, at which time the variance was approved. The decision was reduced to written Findings of Fact and Conclusions of Law, as required by S. C. Code Ann. Section 6-29-800(F), which were approved on March 7, 2011.

On appeal, appellants contended that the Berkeley Co-op property did not fall within the parameters that would qualify it for the variance granted. They also argued that the final decision of the Board of Zoning Appeals did not properly or sufficiently set forth factual findings to support its legal conclusions. After hearing the arguments of both sides, the Court remanded the case to the Awendaw Board of Zoning Appeals for the purpose of making a return to the court. Specifically, the court requested that the return:

- a. include factual findings explaining why the easement, granted to the Town for the purpose of purchasing water, must be located in the required buffer zone; and
- b. include factual findings explaining why the easement could not be routed in another direction; and
- c. include factual findings explaining why the authorization of the variance will not be of substantial detriment to adjacent property (in this case, plaintiff's property) or to the public good, and why the character of the district will not be harmed by the granting of the variance (S.C. Code Ann. 6-29-800(A)(2)); and
- d. include factual findings demonstrating how the granting of the variance is not arbitrary or capricious due to the apparent conflict of interest.

FACTUAL CONSIDERATIONS ON REMAND

On November 5, 2012, the Awendaw Board of Zoning Appeals held a special meeting to specifically address each one of the questions posed by the court, and to specifically consider evidence as investigated and presented by the Town Planning staff. The report presented by staff for board consideration (summarizing facts already in the record) is attached to this return with supporting exhibits. In summarized form, the staff recommended approval of the variance because:

- 1) The shortest and most direct route for the water line to connect to the well is along the northern boundary of the BEC property line. The Berkeley Co-op well was placed in its existing location following engineering tests to determine the best location. If the well were moved, it would greatly disrupt Berkeley Co-op operations and cause problems for ongoing maintenance.
- 2) The easement cannot be routed in another location because the entire BEC site plan is paved, and the existence of the easement underneath the pavement would cause major operational problems for Berkeley Co-op. It would also dramatically increase the cost of maintenance and increase the possibility of interruption to Berkeley-Co-op activities in the event of a problem.
- 3) The variance is not a detriment to the adjacent property owners because it actually increases the buffer material and screening over what the ordinance requires. The approved site plan requires that the parking lot adjacent to the buffer contain 21 canopy trees, 61 understory trees and 91 shrubs, in addition to a semi-opaque fence. None of this is required in the 20 foot buffer described in the ordinance. The water system is also for the public's benefit, which is why Berkeley Co-op approved the well on its property and has allowed the Town to tap into the well into the future.
- 4) The variance is not arbitrary or capricious and there is no conflict of interest because Berkeley Co-op and the citizens of Awendaw are the primary beneficiaries of the variance. From Berkeley Co-op's standpoint,

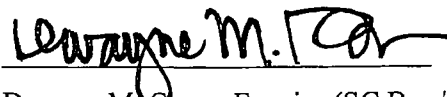
the variance permits maintenance of a necessary water line that will not disrupt its operations or prevent rapid response in the event of an emergency. Berkeley Co-op has an interest in serving the residents of the communities in which it provides electricity, and has determined that the creation of this well and provision to access furthers its organizational goal of serving the Awendaw community. Once it had been determined that the well would be located on BEC property (a decision made well before this variance was granted) it was in Berkeley Co-op's interest to request a easement route that did not disrupt its future operations or create extra maintenance expense and costs.

The Awendaw Planning staff presented its recommendations to the Board of Zoning Appeals (attached in more detail to this return), based on factual considerations provided by engineers, architects and representatives from Berkeley Co-op. This evidence was in accordance with BZA guidelines and the requirements of S.C. Code §6-29-800(A)(2)(ii), which were carefully considered.

The hearing of November 5 did not present new evidence to the board, but restated and articulated the factual information previously in the record for the board to re-affirm and present to the court per the remand order.

For the foregoing reasons, the Town of Awendaw respectfully requests that the Appellants appeal be denied.

GREEN FORD WALLACE, LLC

A handwritten signature in black ink, appearing to read "Dwayne M. Green", is written over a horizontal line.

Dwayne M. Green, Esquire (SC Bar #9559)

602 Rutledge Avenue—P.O. Box 20009

Charleston, South Carolina 29403

Attorney for Town of Awendaw

November 15, 2012

Board of Zoning Appeals

Return to the Court

Bettelli vs. Town of Awendaw and Berkeley Electric Cooperative

The Court of Common Pleas of the Ninth Judicial Circuit in Case NO. 11-CP-10-2028 has asked the Town of Awendaw BZA for additional information about the factual findings related to the BZA decision. The BZA hereby approves the following for submittal to the Court.

1. The Court has asked why the easement must be located in the required buffer zone.

The purpose of the easement is to allow the Town to connect the existing BEC well with the Town's existing water system. The BEC well has been placed in its existing location following testing at the site to determine the best location for water based on engineering features such as depth to the water source, soil conditions and water quality of the source. Based on these and other considerations, the well has been dug and is ready to operate. The well cannot be moved without considerable expense and delay to the BCE construction schedule. As can be seen on the site plan, the well is near the northern boundary of the property. The shortest and most direct route for the water line to connect to the well and extend to Highway 17 is along the northern boundary of the BEC property within the required buffer. This will be the least expensive route and offer the most efficient operating conditions for the Town water system. The previous BZA approval requires that the BEC well be transferred to the Town of Awendaw when the Town is able to connect its water system to the well. If the well were moved, transferring title to the well would disrupt the BEC operations and cause problems with access for maintenance of the Town water line.

2. Why can't the easement be routed in another location?

An examination of the BEC site plan shows that virtually the entire site is paved or used for buildings. Trying to relocate the easement would cause major operational problems for BEC and maintenance problems for the Town. Putting the proposed water line under pavement would prohibit the Town from rapid response to leaks or routine maintenance. It would dramatically increase the cost for maintenance and operation of the Town water system. If the easement was under pavement and a leak occurred, it could cause the pavement to fail and severely limit BEC's ability to operate. This is a BEC regional service facility and any restriction on their operational capability could mean loss of electrical service to homes and businesses and possibly result in a life threatening situation in the event of a major event such as a hurricane. There is no reasonable alternative to route the easement through BEC property.

3. Why is the variance not a detriment to adjacent property owners or public good?

SC Code Ann. 6-29-800(A)(2)(ii) states that in granting a variance, the BZA may attach to it such conditions regarding the location, character, or other features of the proposed building, structure, or use as the board may consider advisable to protect established property values in the surrounding area or to promote the public health, safety or general welfare.

In its original approval, the BZA sought to protect the values of the adjacent property by including some very strong conditions. The BZA required that BEC must have its general site plan, exterior lighting plan and architectural plans approved and that the well be given to the Town. This is all aimed at protecting the adjacent properties. This is the only time the BZA has granted a variance in its existence that such major conditions have been placed on the approval.

These conditions led to the BZA requirements that a chain link fence be placed along the property line and that dark green slats be included to form a virtually opaque fence six feet tall. Behind this fence, understory trees and shrubs that can grow to 20 to 30 feet tall will be planted. All this will be within the reduced 5 foot buffer. This will form a more dense and opaque buffer than is required in the 20 foot buffer by the zoning ordinance. The ordinance only requires a "semi-opaque" buffer with canopy trees and understory trees. No shrubs are required in the 20 foot buffer. In addition, the site plan approved requires that the parking lot adjacent to the buffer contain 21 canopy trees, 61 understory trees and 91 shrubs. None of this is required in the 20 foot buffer described in the ordinance. Therefore, it is the BZA's position that the 5 foot buffer with a slat fence and a greatly increased number of shrubs and the landscaped parking lot will be more protection for the adjacent property than the required 20 foot buffer prescribed by the ordinance.

The above mentioned section of the SC Code also states that the BZA should "promote the public health, safety or general welfare. DHEC has long classified the part of Charleston County including this site to be one of the worst areas of the state in terms of water quality resulting from shallow wells and poorly functioning septic tanks. Many of the Town's residents must purchase water to drink or cook with from grocery stores or other sources. The Town has spent over \$4,000,000 to provide water in over two thirds of its area. This well will help allow the Town to supply its remaining citizens with high quality water. Also, the water line will provide fire protection for residents of this area. In the recent past, a house burned to the ground because the area had no fire hydrants. Granting this variance will greatly improve the public health, safety and general welfare of the residents of the Town of Awendaw.

4. Is variance arbitrary or capricious due to the apparent conflict of interest?

The purpose of the "general welfare" clause in S.C. Code 55-7-30 is to extend the police powers of municipalities beyond those specifically enumerated to those which are necessary to accomplish the purposes of municipal government. Municipalities may adopt any laws

necessary for promotion of health, safety or welfare which are within a general grant of power and not prohibited by the constitution or conflict with state law. The home rule amendments mandate liberal construction of such provisions in favor of local governments. The granting of this variance clearly promotes the health, public safety or welfare of the residents of the Town of Awendaw. The Town is not making money from the granting of the variance. The Town will actually lose money in the near future to extend our water system. The mission of the Town is to provide the highest quality of life for its citizens. Therefore, the public interest is being served by approving this variance as well as Berkeley Co-op's interest in lowering the cost of maintenance and operation. The Town itself does not have a prevailing interest in approving this variance.

The BEC plans showing the location of the well, building features, landscaping features and photos of the site are attached to this submittal.

CHAPTER 8

Article 8.1 Screening and Buffering

§ 8.1.1 Commercial Sites

20 foot semi-opaque buffer (per 100 feet)

5 understory trees	6-8 feet height
4 canopy trees	2 ½" caliper

or

*15 foot semi-opaque buffer (per 100 feet)

5 understory trees	8-10 feet height
4 canopy trees	3 ½" caliper

*15 foot option applies to all property boundaries except along Hwy 17.

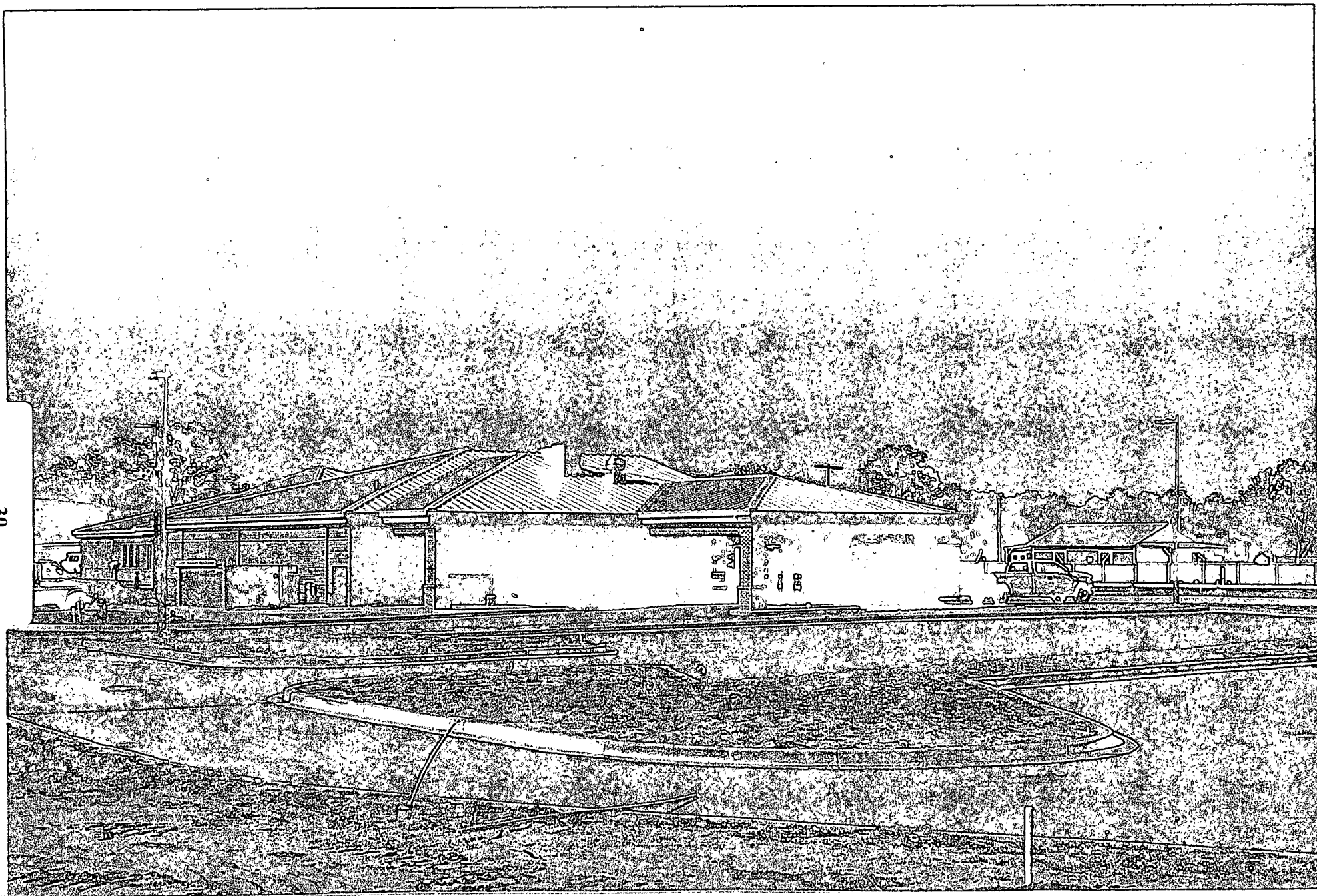
§ 8.1.2 Buffer Standards

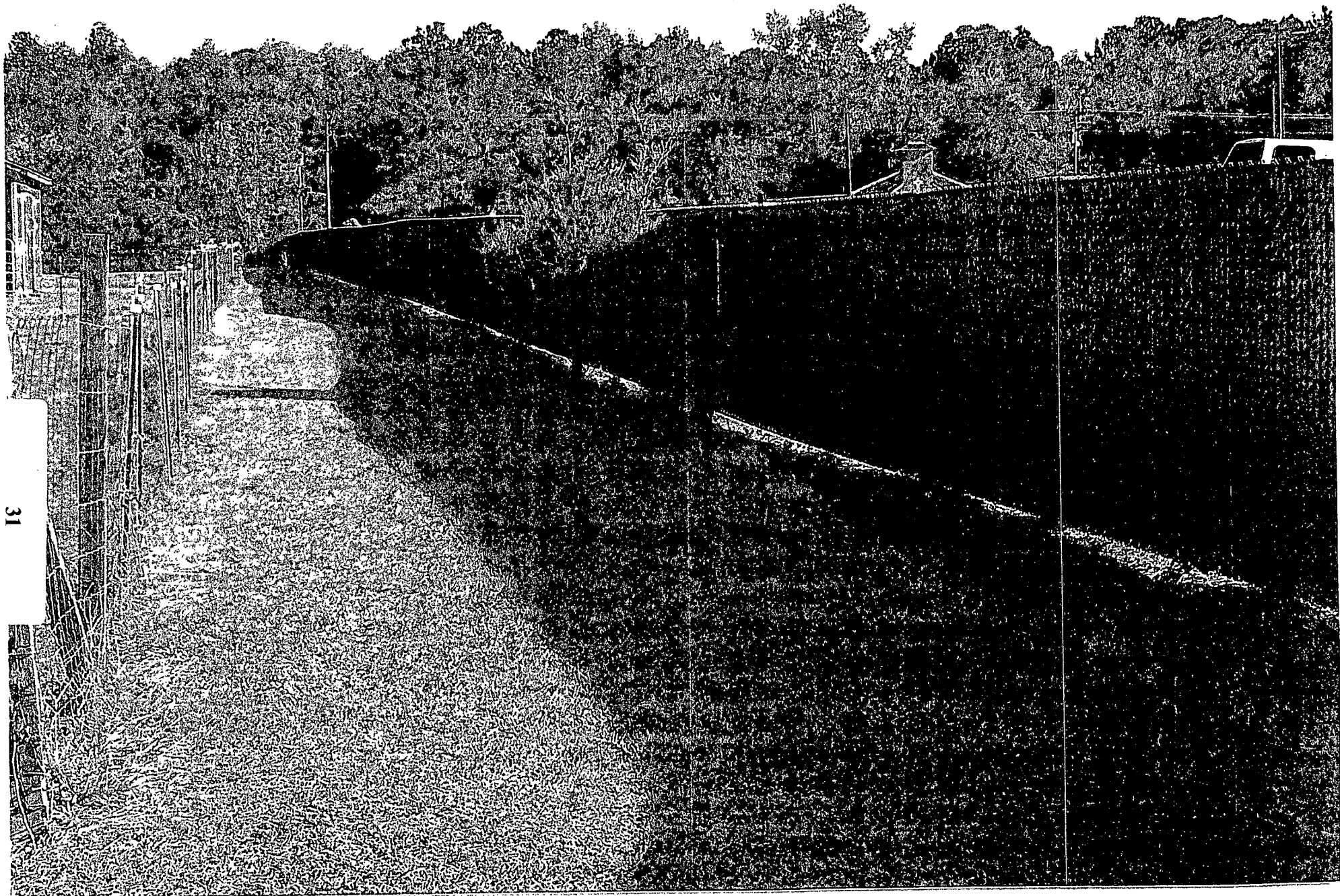
- a. Vegetative buffers should contain indigenous plant material.
- b. Existing trees within a buffer must be retained to help satisfy screening and buffer requirements. New plantings will be required where necessary, to accomplish a visual buffer as stipulated.
- c. Drainage easements, detention areas, parking, storage areas and buildings may not be located within a buffer.
- d. Where a property abuts undeveloped wooded property, the required buffer will apply except that planting will not be required.
- e. Where commercial development abuts commercial development, screening/buffering will not be required along the property line that abuts commercial development.
- f. All dumpsters must be screened on all sides with a six (6) foot high wall or wood fence.
- g. A five (5) foot setback is required from all property lines for any vehicular use areas.

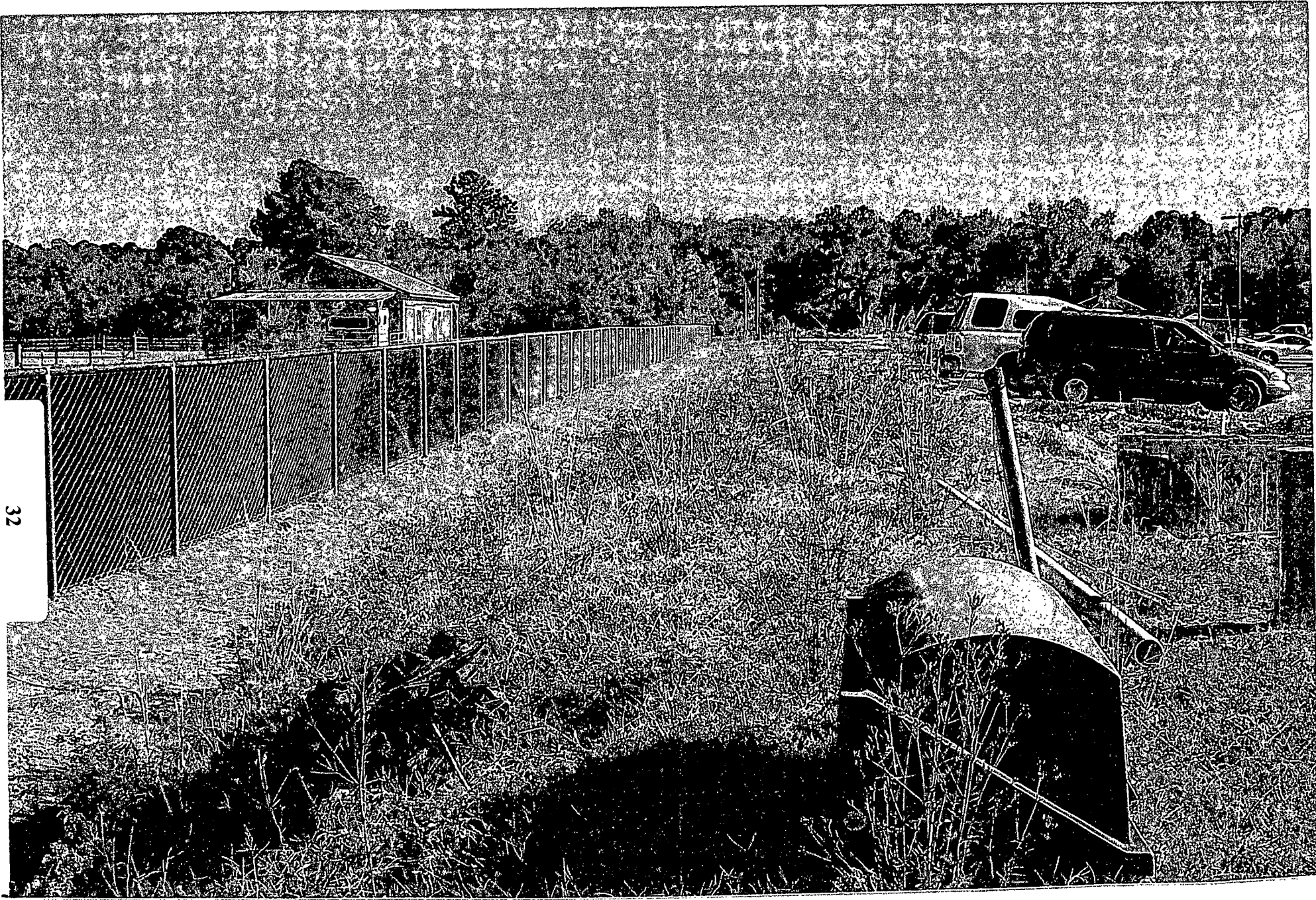
ARTICLE 8.2 Wetlands and Waterways Setbacks

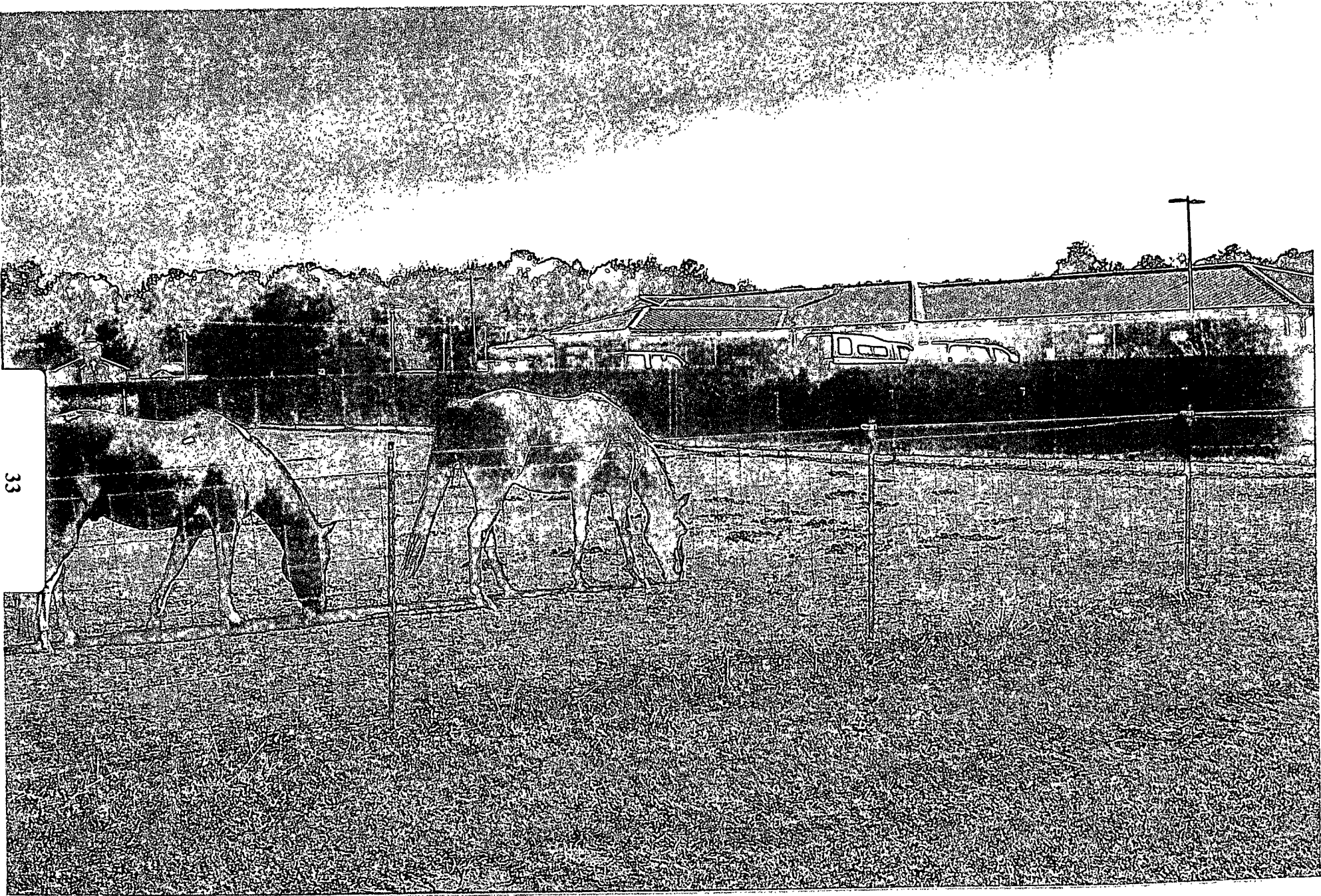
§ 8.2.1 Setbacks

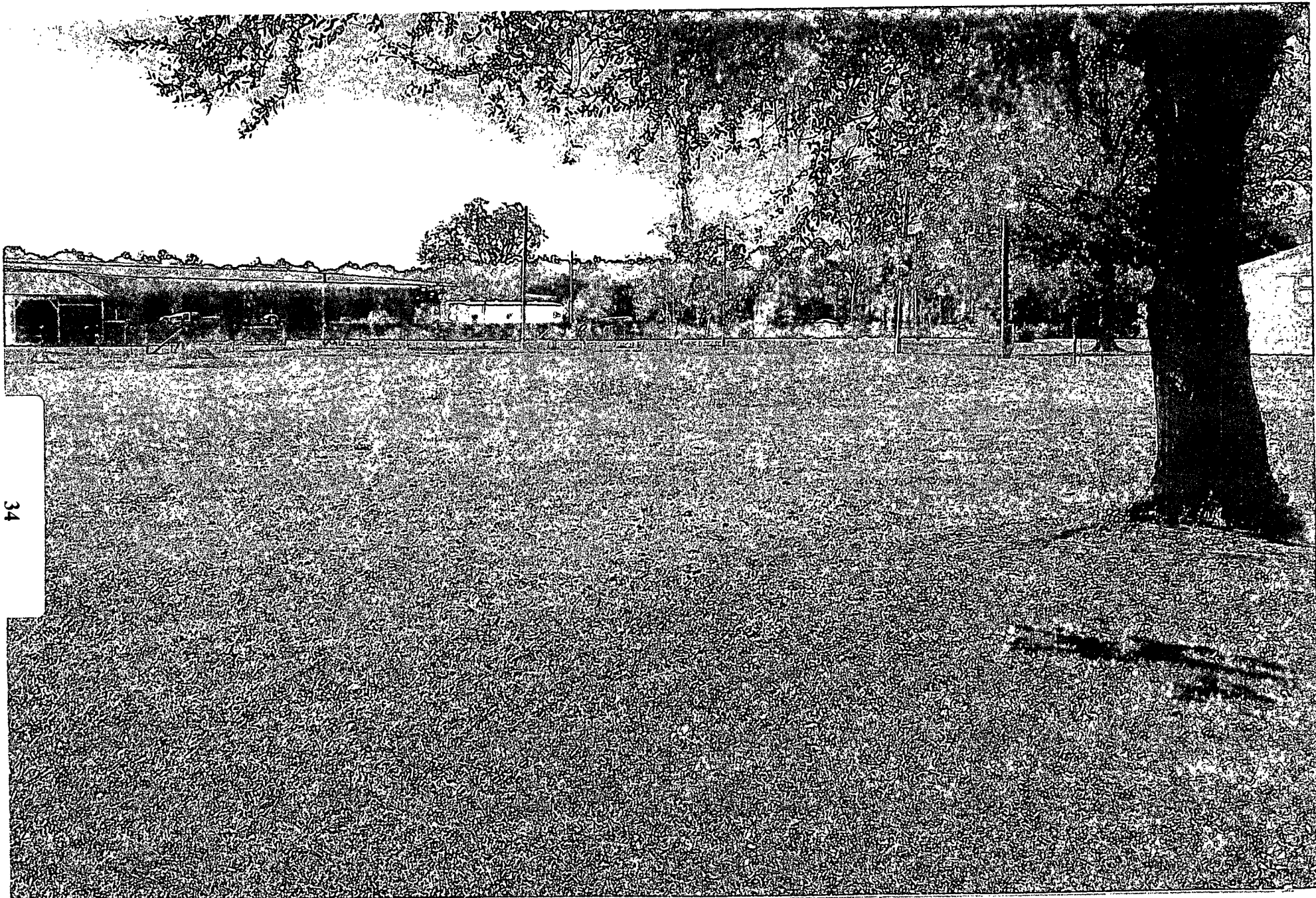
The setback from any waterway or OCRM critical line must provide a vegetated area between any structure and any wetland, waterway or critical line.

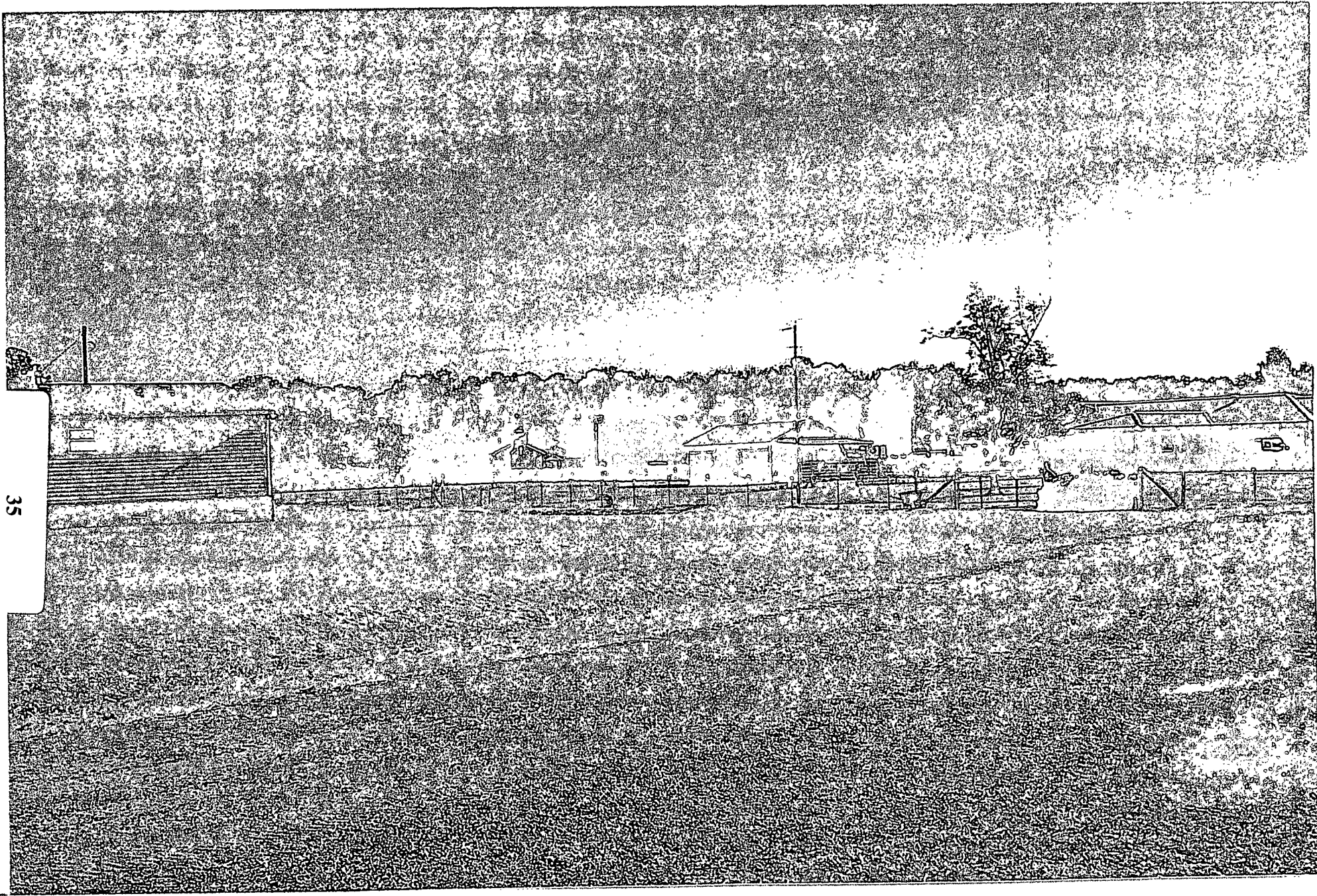


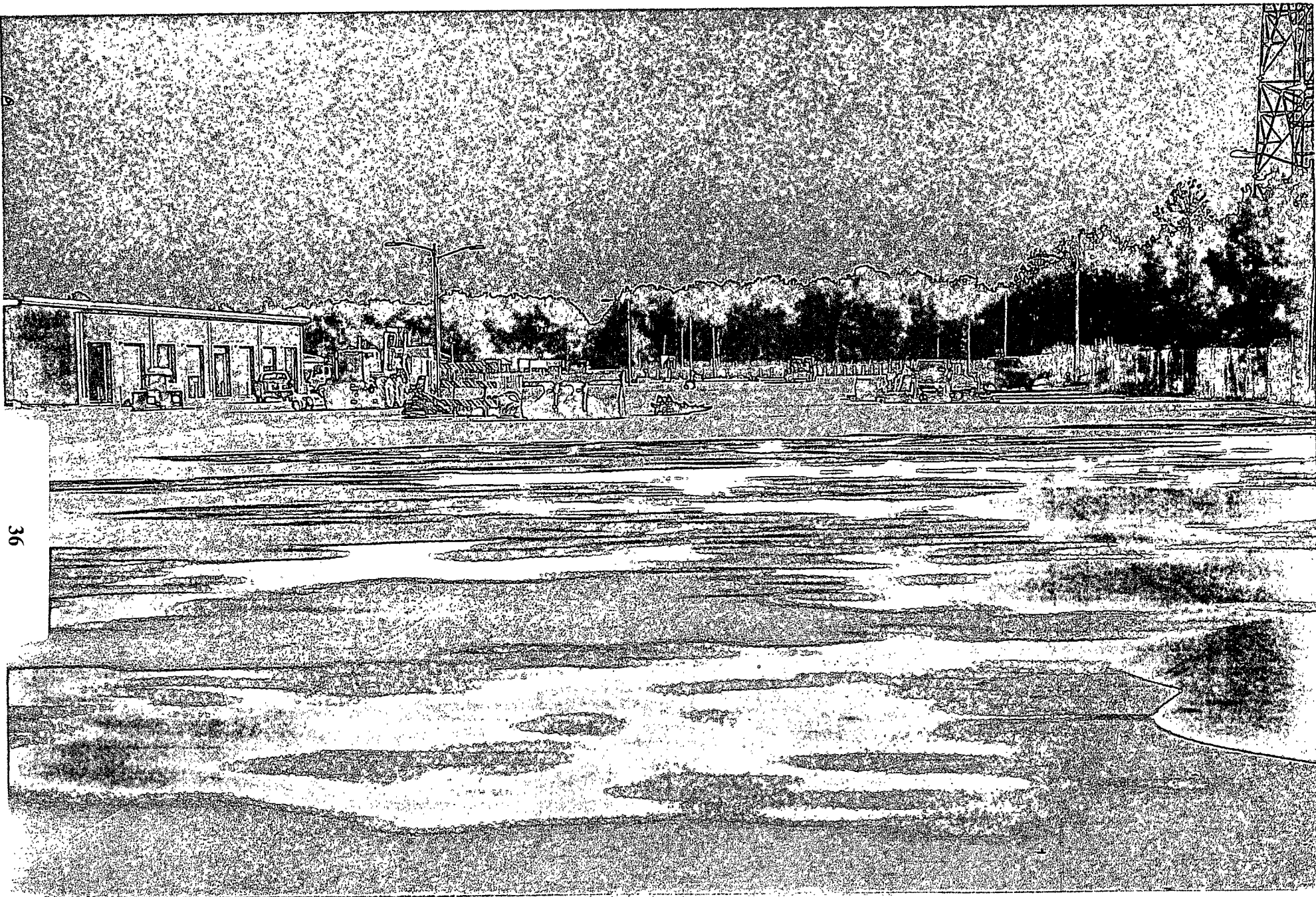






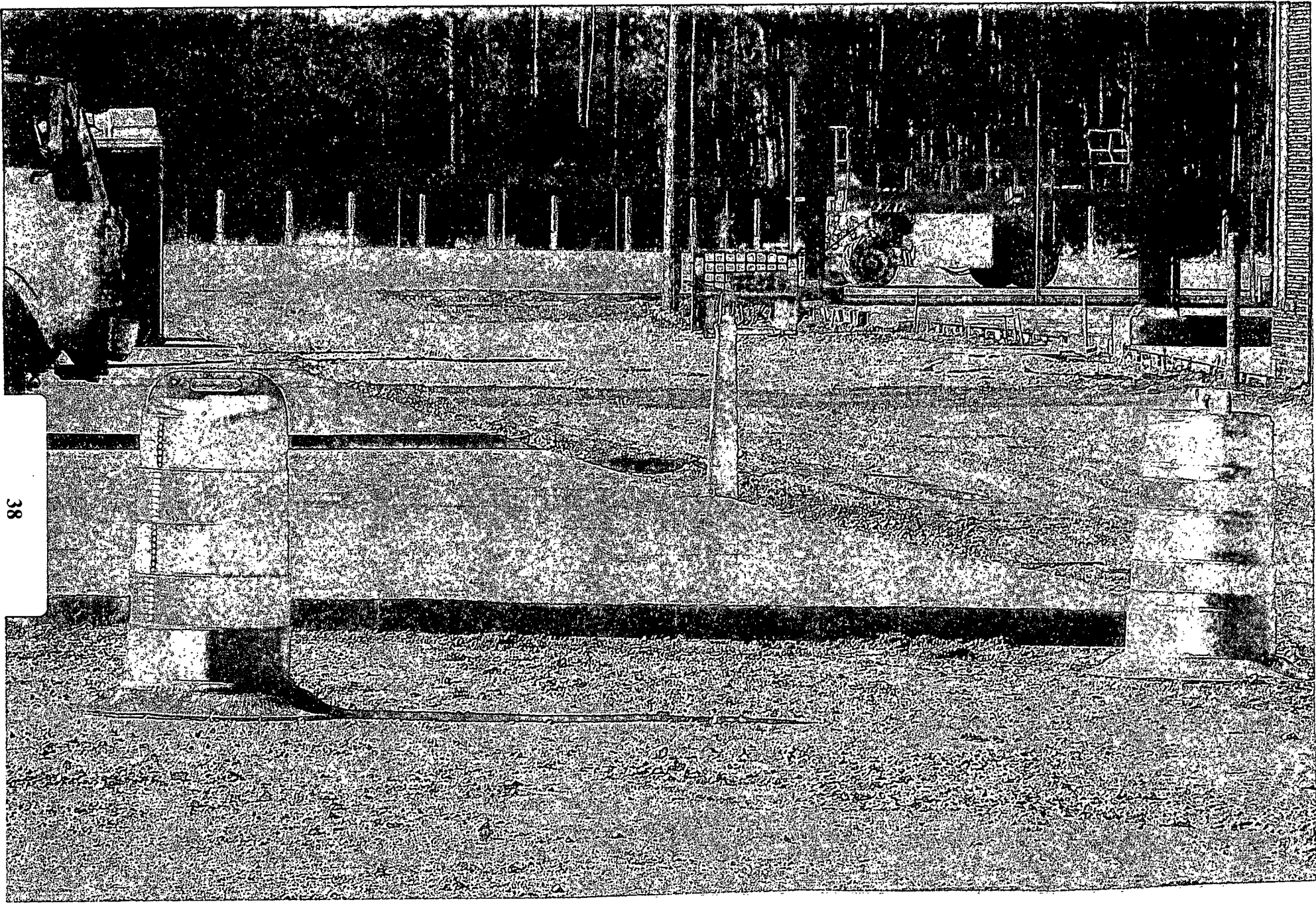


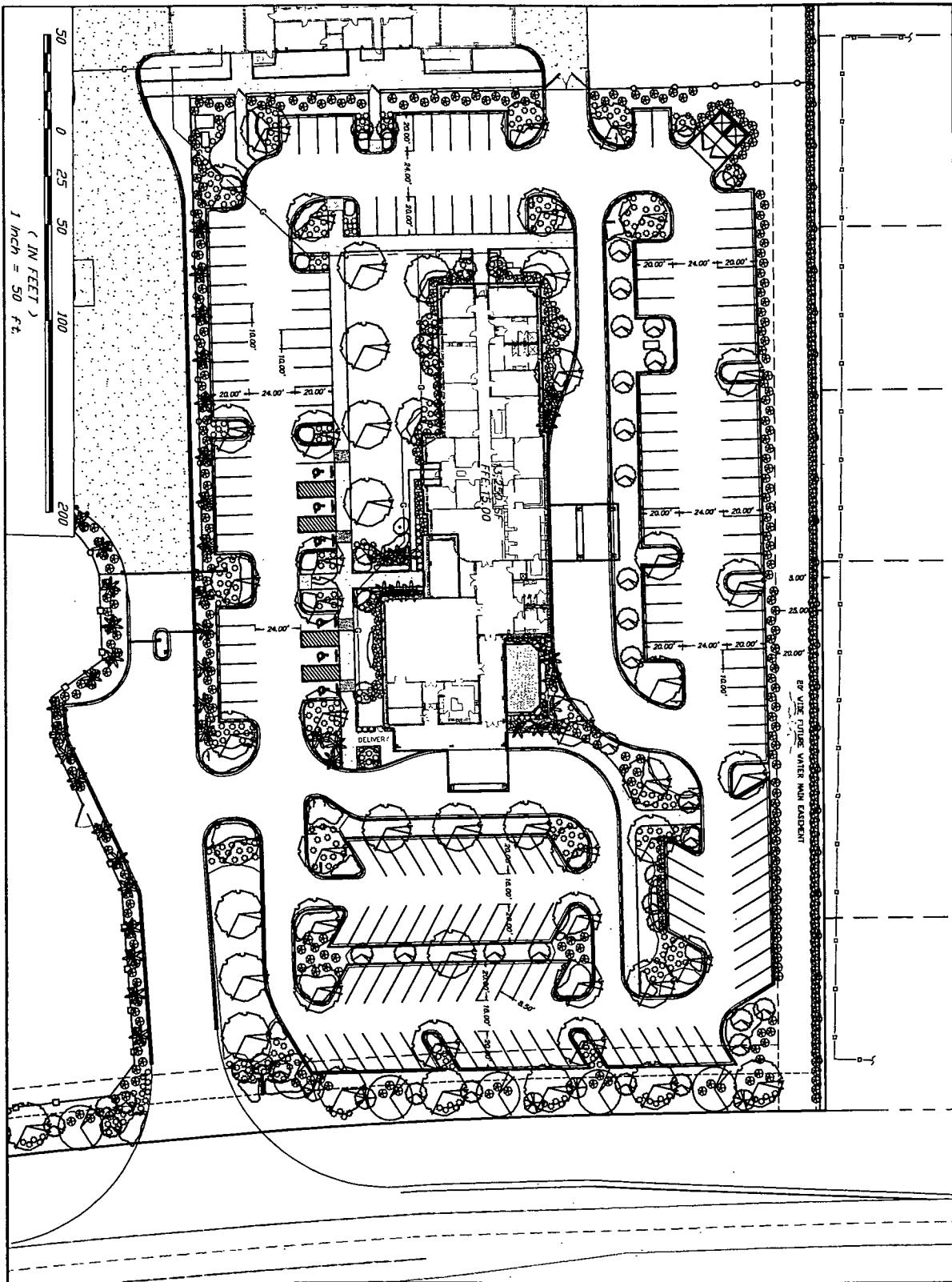




WELL







Standard
 Notes: Dimensions shown on this plan are for information only. The actual construction shall be in accordance with the approved plans and specifications.
 SCALE: 1" = 50'

NO.	DESCRIPTION	DATE	BY	CHECKED
1	PREPARED			
2	REVISION			
3	REVISION			

PROJECT
 A NEW FACILITY FOR
 BERKELEY ELECTRIC COOPERATIVE
 AWENDAW, SOUTH CAROLINA

Carmila C. McLean
 ARCHITECT AIA
 P.O. BOX 2241 • MOUNTAIN VIEW, GEORGIA • (229) 885-6228
 ccm@ccmclan.com

PROJECT NUMBER
 PROJECT NAME
 SHEET TITLE
 SCALE
 DATE
 BY
 CHECKED
 APPROVED

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

COURT OR COMMON PLEAS
2011-CP-10-02028

SUSAN BETTELLI, et al.,
Plaintiffs,
V.
AWENDAW, et al.,
Defendant.

TRANSCRIPT OF RECORD

March 15, 2012
Charleston, South Carolina

B E F O R E:

THE HONORABLE J. C. NICHOLSON, JUDGE

A P P E A R A N C E S:

Mr. Christopher Holmes, Esquire
Representing the Plaintiffs

Mr. Dwayne Green, Esquire
Representing the Defendant Town of Awendaw

Mr. Jack Williams, Esquire
Representing the Defendant Berkeley Electric

Anne Bouley Meyer, RPR
Circuit Court Reporter

1 THE COURT: What is the status of the motion to
2 dismiss because of lack of service? Does that need to
3 be heard.

4 MR. GREEN: Yes, sir. I believe that Berkeley
5 Electric would like to make some arguments on that, but
6 no decision has been made on that.

7 THE COURT: Okay. All right.

8 MR. HOLMES: Your Honor, it is my understanding
9 that motion was withdrawn by Mr. Green.

10 THE COURT: That's why I was asking. Has it
11 been withdrawn?

12 MR. GREEN: We have withdrawn ours. Berkeley
13 Electric wants to make that motion

14 THE COURT: Was that in writing yet?

15 MR. WILLIAMS: No, sir, Your Honor. We were not
16 -- I guess we were under the impression that the motion
17 was going forward. Obviously it's not.

18 Mr. Green filed the original motion.

19 THE COURT: Right. He has withdrawn it. Do you
20 want to move forward on this?

21 MR. WILLIAMS: Yes, sir, I would.

22 THE COURT: All right. Let me read -- let me
23 see what the defense reads, okay?

24 MR. WILLIAMS: Okay, thank you, Judge.

25 THE COURT: For the record everybody state their

1 name and who they represent. I appreciate starting
2 with the plaintiff.

3 MR. HOLMES: Yes, Your Honor. Chris Holmes, I
4 represent Joseph and Susan Bettelli, plaintiffs.

5 THE COURT: Thank you very much.

6 MR. GREEN: Good morning, Your Honor. My name
7 is Duane Green and I represent the Town of Awendaw.

8 THE COURT: Okay.

9 MR. WILLIAMS: Your Honor, I'm Jack Williams and
10 I represent Berkeley Electric Cooperative, Inc.

11 THE COURT: All right. Since the motion to set
12 for lack of personal jurisdiction on the Town of
13 Awendaw has been withdrawn, I understand Mr. Williams
14 would like to make an oral motion to that effect on
15 behalf of Berkeley Electric Cooperative.

16 I guess we need to hear that first. Do you
17 agree with that, Mr. Holmes?

18 MR. HOLMES: Well, if he's moving now I've had
19 no notice of this motion or that it was going to be
20 made. I'm aware that -- I know he can make a motion in
21 court, but we have had no opportunity to respond. I'm
22 not sure the basis of the motion.

23 THE COURT: Well, why don't we hear the basis of
24 the motion. And if you need time to research and
25 submit some memorandum of law, I'll be glad to give

1 that to you, okay?

2 MR. HOLMES: That would be fine, Your Honor.

3 THE COURT: Rather than trying to delay it and
4 come back at a later time, okay?

5 MR. HOLMES: Absolutely.

6 THE COURT: If you need some additional time,
7 affidavits or whatever, I'd be happy to give that to
8 you.

9 MR. HOLMES: Thank you, Judge.

10 THE COURT: All right, Mr. Williams.

11 MR. WILLIAMS: Thank you, Your Honor, if it
12 please the Court. This is an appeal of course from a
13 decision of the board of zoning appeal for the Town of
14 Awendaw.

15 The board made its decision on November 1st,
16 2010. The petitioners in this matter, the Bettellis,
17 were with -- were at the hearing. The board made its
18 decision known at that time, at the hearing on November
19 the 1st.

20 So therefore the petitioners had actual notice,
21 actual notice of course being defined as someone having
22 seen an event occur or having witnessed the event.
23 They were there, they heard the decision of the board.

24 The appeal itself was not filed until March 17,
25 2011, some three-and-a-half months later. There is a

1 30-day time period in which to file the appeal that's
2 -- those time limits are strictly construed if my
3 understanding is correct, Your Honor.

4 Therefore the appeal being filed
5 three-and-a-half months later would have been untimely
6 and should be dismissed. That would be our position.

7 And the code section is section 6-29-800, powers
8 of the board of appeal.

9 THE COURT: All right.

10 MR. WILLIAMS: And further, Your Honor, it's
11 section (2)(b) of 6-29-800.

12 MR. GREEN: And, Your Honor, I've pulled that
13 for Your Honor's benefit if Your Honor needs a copy.
14 Or I can read it into the record what that is.

15 THE COURT: If you've got a copy, I'd be happy
16 for you to hand it up.

17 MR. GREEN: Yes, sir.

18 THE COURT: When was something handed down
19 writing? Was anything in writing from the board, the
20 zoning board?

21 MR. WILLIAMS: Yes, sir. That was done in, my
22 understanding, in February.

23 THE COURT: When in February?

24 MR. WILLIAMS: The letter is dated February 15th
25 of 2011 when the -- apparently the written notice was

1 sent out. But the oral decision was announced at the
2 board meeting on November 1.

3 THE COURT: So as far as the written notice,
4 would it have been timely? It would have been timely
5 for the written notice; is that correct?

6 MR. WILLIAMS: February 15th, and they appealed
7 on March 17th. So given a couple of days' notice it
8 would be a day or two within there, Your Honor. It
9 would be close.

10 THE COURT: Okay. You can have your iPad back.

11 MR. GREEN: Thank you, Your Honor.

12 THE COURT: All right. Mr. Holmes, anything you
13 would like to add to that argument?

14 MR. HOLMES: Your Honor, it is my understanding
15 that while the decision, the minutes of the meeting
16 indicate that the hearing was held on November 1st and
17 was voted on at that time, the statute I have requires
18 that it be reduced to writing with the findings of fact
19 and conclusions of law.

20 The minutes approving the minutes of that
21 November 1st meeting were not approved until March 7th,
22 2011. The written findings of fact, it is signed --
23 the findings of fact and conclusions of law are signed
24 but not dated.

25 It is my understanding they were mailed some

1 time in March. And I don't have the letter in front of
2 me right now.

3 THE COURT: You said the statute requires what
4 now? The decision be reduced to writing?

5 MR. HOLMES: That's correct. They have to put
6 it in writing.

7 THE COURT: The section I was handed, that
8 section said actual notice. I'm not sure oral, oral
9 vote at a board meeting would be actual notice even
10 though they were present. Because the next section
11 says all the documents have to be reduced to writing if
12 there is an appeal.

13 MR. HOLMES: That's correct.

14 THE COURT: I don't know how they're going to
15 reduce it to writing until it has been reduced to
16 writing.

17 Mr. Williams, you want to address that? I
18 understand what you are saying, one sentence that says
19 actual notice now. I guess the question is -- I assume
20 they were there as members of the public. Why were
21 they there?

22 MR. WILLIAMS: The Bettellis?

23 THE COURT: Yeah, the Bettellis.

24 MR. WILLIAMS: They own the adjoining property.
25 The same reason they are here, Your Honor. They were

1 objecting to the variance I assume. I was not there at
2 that time.

3 THE COURT: I mean just because they were there
4 and saw the vote, I mean I don't know that -- I'm not
5 sure you are correct when you say the fact that they
6 were at the meeting when the vote was taken, even
7 though it was not reduced to writing until some time in
8 February or March.

9 MR. WILLIAMS: Yes, sir, I understand. And we
10 are going on of course the actual notice of them being
11 aware of that. But that's --

12 THE COURT: That's sort of like the Court today
13 announcing a decision, but I still have the liberty to
14 change my mind until a written order has been signed
15 and the appeal is from the written order not my oral
16 decision today.

17 MR. WILLIAMS: Yes, sir.

18 THE COURT: And I think that's the same concept.
19 I'm not sure I agree with your argument.

20 MR. WILLIAMS: Yes, sir.

21 THE COURT: Okay?

22 MR. WILLIAMS: Yes, sir.

23 THE COURT: Anything else you want to add?

24 MR. HOLMES: No, Your Honor.

25 THE COURT: All right. I'm going to deny your

1 motion to dismiss based upon lack of personal
2 jurisdiction over Berkeley Electric.

3 All right. Now, Mr. Holmes, I believe you've
4 got an amended appeal request for pre-litigation
5 mediation; is that correct?

6 MR. HOLMES: Yes, Your Honor. I was late coming
7 to this case. The Bettellis had another lawyer who
8 actually filed the initial appeal and served it and
9 then I was substituted as counsel.

10 THE COURT: Right.

11 MR. HOLMES: And reviewing it I just wanted to
12 make sure that it was stated with a little more
13 specificity.

14 What the basis of objecting to the granting of
15 the variance was Mr. Green and Mr. Williams both
16 advised me that they were not -- or their clients were
17 not interested in doing any mediation, which is what we
18 hoped to accomplish.

19 But by barring that then we want to go forward
20 with the appeal.

21 THE COURT: Okay. Do you want to do mediation?
22 Do you not want to do mediation?

23 MR. HOLMES: Well, we wanted to but they
24 declined it. And it's not mandatory as I understand
25 it.

1 THE COURT: Right. It's all just sort of
2 voluntary unless the Court directs it.

3 MR. HOLMES: Right, exactly.

4 THE COURT: Do you think mediation would do any
5 good?

6 MR. WILLIAMS: Your Honor, just for your
7 information, we have met with the petitioners on this
8 matter.

9 THE COURT: What is the argument? What is going
10 on?

11 MR. WILLIAMS: The coop has built an office
12 building out there. The town granted a side setback
13 variance.

14 THE COURT: A side setback variance.

15 MR. WILLIAMS: Right.

16 THE COURT: Okay.

17 MR. WILLIAMS: On that, so that the property
18 could be used to build the building.

19 THE COURT: How much was the setback originally?

20 MR. WILLIAMS: Twenty feet is my understanding.
21 It was adjusted to five feet.

22 THE COURT: Five foot variance. So that's still
23 15 foot long?

24 MR. WILLIAMS: No, it was the reverse. It was
25 adjusted from 20 feet to 5 feet.

1 THE COURT: Okay. All right.

2 MR. WILLIAMS: And there is, beyond the 5 feet
3 is a huge ditch that goes through there too. The
4 Bettellis' property is adjoining that, but it is open
5 fields. They have a fence there that is set back.

6 Anyhow, that is what it was about. And we have
7 met trying to determine if planting certain plants
8 would help, putting a fence up there would help. You
9 know, anything that we could do to avoid being here
10 today. And we have just not been able to make any
11 headway there, Your Honor.

12 Everybody, I guess, assumes they're being
13 reasonable. But Mr. Green has been involved in this
14 too for the town --

15 THE COURT: Has the building been built?

16 MR. WILLIAMS: Yes, sir.

17 THE COURT: And it's completed?

18 MR. GREEN: It's not completed, Your Honor. And
19 just to follow up on what Mr. Williams says. This
20 property was the subject of litigation back in 2003.
21 The parties had a consent order at that time.

22 Not a question at all about the use of the
23 property. What I was handing Your Honor is just a map
24 to give Your Honor an idea.

25 The whole issue as we now found out today, or

1 very recently, was the reduction of this buffer from 20
2 feet to 5 feet.

3 To compensate for the reduction of the buffer,
4 the agreement was made to increase the density of
5 shrubbery and the types of vegetation that would create
6 the buffer so there is no disturbance on the Bettellis'
7 property.

8 There is a litany of factors that the board of
9 zoning and appeals --

10 THE COURT: Well, what is on the Bettelli
11 property?

12 MR. GREEN: Horses.

13 THE COURT: A house or?

14 MR. GREEN: A house. They live there.

15 THE COURT: Their residence is next door.

16 MR. WILLIAMS: Yes. On the far side of the
17 property. It's a couple hundred feet away, Your Honor.

18 MR. GREEN: May we approach, Your Honor?

19 THE COURT: Not right now. So that's the issue;
20 is that correct?

21 MR. GREEN: All about the buffer as we now
22 understand it.

23 THE COURT: All right.

24 All right, Mr. Holmes. As far as the mediation,
25 I'm not going to order mediation. We will just

1 basically hear your appeal today and hear from the
2 defense and make a decision.

3 MR. HOLMES: Thank you, Your Honor. May I
4 approach?

5 THE COURT: Yes, sir.

6 MR. HOLMES: I have prepared a brief which I
7 have shared with Mr. Green and Mr. Williams.

8 THE COURT: Okay.

9 MR. HOLMES: It's got three exhibits attached to
10 it, Your Honor. You might turn to Exhibit A, the first
11 one. It might answer some of your questions.

12 THE COURT: First of all, let me ask you all a
13 question. What is the standard -- what is the standard
14 for the appellate court on zoning briefings, on zoning
15 appeals?

16 MR. HOLMES: Well, it's a pretty --

17 THE COURT: It's standard as most appeals?

18 MR. HOLMES: Most appeals, administrative court
19 decision and so forth. Findings of fact and
20 conclusions of law generally supported in the record.

21 THE COURT: All right. I will be glad to hear
22 you.

23 MR. HOLMES: Thank you, Your Honor.

24 Exhibit A, which you have and everybody has a
25 copy of this, shows you the Berkeley Electric property

1 and the Bettellis' property next door. And the red
2 line drawn there indicates the location of the buffer;
3 where the buffer would be and its reduction.

4 And as you asked what the standards are, when
5 the board actually hears the Bettellis, who were
6 present at the rezoning hearing or the variance hearing
7 and testified as to their objections, the board can
8 grant the variance but it has to make certain findings.

9 That there are extraordinary exceptional
10 conditions pertaining to the property; that the
11 conditions do not apply generally to other property in
12 the area; that because of those conditions the
13 application of the ordinance would effectively prohibit
14 or unreasonably restrict the use of the property; and
15 the authorization of the variance will not be a
16 substantial detriment to adjacent property or to the
17 public good.

18 And the courts have said that they have got to
19 make findings in each of those. They have to find all
20 of those present. And that it has resulted in an
21 unnecessary hardship.

22 And also that section provides that it has to be
23 reduced to writing and contain findings of fact and
24 conclusions of law.

25 The other exhibits attached to my brief, Your

1 Honor, after the site map are photographs, are the
2 minutes of the meeting in which they addressed this
3 issue. And then the second one, Exhibit C, is their
4 written findings of fact and conclusions of law.

5 And we would submit to the Court that the board
6 of zoning appeals failed to make a specific finding its
7 required to make. And that in fact the evidence does
8 not support a finding that there is an unnecessary
9 hardship; that there are extraordinary exceptional
10 conditions that don't apply generally. We believe they
11 do apply generally.

12 That there is nothing in requiring a 20-foot
13 buffer between Berkeley's property and the Bettellis'
14 property that would prevent the use of this property as
15 the way they want to use it.

16 In fact, the building is not in the buffer area.
17 This parking designated, and I believe I have a site
18 plan that was proposed at one time, not as an exhibit,
19 which I can hand up to the Court.

20 But here is our position generally. This is
21 going to be used, it's going to be a meeting facility,
22 a lot of parking, some lighting, there is going to be
23 traffic, there is going to be apparently a gas fueling
24 station for their vehicles.

25 This is all going to create noise, light, dust,

1 all of which can be mediated or mitigated by enforcing
2 the buffer, which is a minimum is 20 feet.

3 Comparably in Charleston County a minimum buffer
4 between commercial and residential property is 60 feet.
5 The Town of Mount Pleasant I believe is 50 feet plus
6 walls and vegetation.

7 So it's pretty minimum to begin with to put a
8 20-foot buffer between Berkeley's property and that of
9 the Bettellis.

10 THE COURT: What is within the 50 feet? And
11 what specifically -- because this is just -- it doesn't
12 show anything.

13 MR. HOLMES: That's correct.

14 THE COURT: Shows some trees and looks like
15 some --

16 MR. HOLMES: There is nothing there but the
17 ordinance would require them to plant that once they
18 begin using the property commercially as I understand
19 it. The buffer not only is the depth of, but it's also
20 a requirement that it be planted.

21 THE COURT: The 5 feet?

22 MR. HOLMES: No, the 20 feet is supposed to be
23 planted. But they have reduced it to 5 feet.

24 THE COURT: Okay.

25 MR. HOLMES: And they haven't planted anything

1 even in the 5 feet area. But we think it ought to be
2 the whole 20 feet, and all that should be planted with
3 enough vegetation that would grow high enough that
4 would screen what is going on with Berkeley's property,
5 screen that from my clients' property so that it does
6 not negatively impact their values, which they
7 testified to.

8 And when you read the Town of Awendaw's findings
9 of fact and conclusions of law --

10 THE COURT: Where are you reading from on the
11 minutes? I assume that's what you are referring to.

12 MR. HOLMES: The minutes are Exhibit B to the
13 belief I handed up, Your Honor.

14 THE COURT: I understand. Where are you reading
15 from?

16 MR. HOLMES: I'm sorry. I wasn't reading from
17 it, I was just --

18 THE COURT: Oh, I'm sorry.

19 MR. HOLMES: This indicates there was a request
20 to reduce the buffer. And the number of members of the
21 public who were adjacent to this area or in the
22 vicinity testified of light trespass, I guess it means
23 lights shining in the facility.

24 Another one about lights and concerns Ms.
25 Bettelli talked about plants that needed to be put in

1 there. And their concerns about the use of the
2 property and how that would affect them pretty
3 extensively. And a couple of other people that talked
4 about these concerns.

5 But if you look at Exhibit C, which is the
6 finding of fact and conclusions of law, they just state
7 conclusively under their factual findings granting of
8 this variance will not be a substantial detriment to
9 the adjacent property or the public good and the
10 character of the district will not be harmed by the
11 granting of this variance. Without any supporting
12 facts as to how they determined that.

13 It's just their reciting of the law instead of
14 reciting the facts that support it.

15 The court have held, Your Honor, again in these
16 kinds of cases, I cited toward the end of the brief,
17 the administrative body must make findings which are
18 sufficiently detailed to enable an appellate court to
19 determine whether the findings are supported by the
20 evidence in which the law has been applied properly to
21 those findings.

22 The court will not accept an administrative
23 agency's decision at face value without requiring the
24 agency to explain its reasoning.

25 And, Your Honor, we would submit that Exhibit C,

1 which is their findings of fact and conclusions of law
2 is woefully inadequate in accomplishing those purposes.

3 And again they have to -- Berkeley would have
4 demonstrate that it was entitled to this variance to
5 begin with. And all of the reasons given for granting
6 a variance is because they requested a variance, I
7 believe, regarding cutting some trees, or relocating
8 and removing some trees as well, the site plan
9 approval, a lot of things.

10 None of the reasons they gave for granting the
11 variance have anything to do with the buffer except one
12 thing. Apparently the town was able to extract from
13 Berkeley County an agreement to get a 20-foot easement
14 to put a water line from a well that Berkeley has or is
15 going to place on the property that would run along
16 that line of the property line with the Bettellis out
17 to Highway 17 as a water supply. And 15 feet of that
18 easement would be in the buffer area.

19 So they said we need to keep that area open.
20 And that's why they gave the reducing the buffer. But,
21 Your Honor, they have got no plans, they have got no
22 money to put the water line in.

23 They have no funding in place. They admitted at
24 the hearing that, you know, we'd like to do this
25 sometime in the future. But the question whether or

1 not the Town of Awendaw is going get a municipal water
2 supply or when, or when it's ever going to have any
3 need for this particular easement is so conjectural as
4 to be insufficient to support a granting of the
5 variance. Nor is there any demonstration that that's
6 where the water line has to go, why it couldn't be
7 placed elsewhere in the property.

8 So that's an insufficient basis for granting the
9 variance for the buffer. And for that and the numerous
10 reasons set forth in my brief, Your Honor, where I
11 address each of these four conditions. It's also a
12 requirement when they're granting a zoning variance
13 that -- excuse me one second-- that there has to be
14 hardship.

15 And the courts have said, you can't claim a
16 hardship if the property was zoned that way after --
17 you know, when you purchased it or if you purchase
18 property after the zoning restriction is in place you
19 can't say that's a hardship because you bought it
20 knowing that was in place.

21 I'm not exactly sure when the zoning of this
22 property was changed to commercial use; whether it was
23 before Berkeley purchased it or after it. But if it
24 was after then they requested rezoning. So they
25 requested a zoning that would require a 20-foot buffer,

1 or they purchased it knowing that it was in place.

2 None of those circumstances can rise to the
3 level of demonstrating a hardship under the cases that
4 were cited. I won't go through them on the record, but
5 they are cited throughout the brief.

6 The things that the board of zoning appeals
7 placing its findings of fact and conclusions of law, to
8 the extent they could even be interpreted as findings
9 of fact rather than just conclusory statement, none of
10 those support the buffer reduction.

11 They may support approval of the site plan.
12 They may support relocating a ditch. They may support
13 allowing removal of certain trees. But none of them
14 support a reduction of this minimal buffer to begin
15 with.

16 And for that basis it should not be upheld. And
17 at a minimum it should be remanded to the board to make
18 these very specific findings as to why it's needed,
19 particularly when, as I say, the easement, which is one
20 of the reasons given for leaving this area unvegetated
21 is not -- there is no plans to use it for that purpose.

22 So for those reasons and the other reasons
23 appearing throughout this brief which I have argued I
24 would submit supports our position, we would ask that
25 you reverse the decision to grant the variance as to

1 the buffer on this property and require the Town to
2 make Berkeley put in vegetation for the full length and
3 depth of 20 feet as required by the ordinance.

4 THE COURT: Thank you very much.

5 MR. HOLMES: Thank you, Your Honor.

6 THE COURT: Who wants to go first, Town or
7 Berkeley?

8 MR. GREEN: Town will, Your Honor.

9 THE COURT: Mr. Green, I was just trying to read
10 the order on the variance. And at the bottom of the
11 page it says, of course, the buffer reduction appellate
12 has provided a 20-foot easement at the Town's request
13 for a waterline so that the Town can purchase water
14 from Berkeley's well.

15 This waterline will be a part of the Town's
16 phase 3 water system. The 20-foot easement must
17 connect the well to Highway 17. These easement must be
18 clear of any obstructions.

19 Is that reason for reducing from 20 to 5?

20 MR. GREEN: That was part of the reason.

21 THE COURT: Why would the waterline interfere
22 with that? I mean, I assume that's going to be
23 underground. Why would that interfere with a 20-foot
24 setback?

25 MR. GREEN: Well, Your Honor, we have the

1 finding of fact, and we also have the town planner here
2 also. But the usable area was part of what was going
3 to be reduced at the 20-foot buffer where required. So
4 that was number one.

5 THE COURT. What now? I mean I was just reading
6 what was reduced to writing in the minutes.

7 MR. GREEN: Your Honor, we have the town
8 planner. I will just let him address that very
9 briefly.

10 THE COURT: You've got who?

11 MR. GREEN: The town planner.

12 MR. WALLACE: I'm the town administrator for the
13 Town of Awendaw. The reason that the buffer and the
14 easement cannot exist in the same space is that the
15 location of the waterline has to be in a place where it
16 can be maintained.

17 You have to get vehicles in there. You have to
18 be able to dig up the dirt that's there. You have to
19 be able inspect the waterline. So if the waterline was
20 underneath the planting, if something happened to the
21 waterline you'd have to dig up all the plants, remove
22 them to get down to where the waterline was.

23 That's also the reason that the waterline could
24 not be built through their site because then the
25 waterline would be under pavement, under parking areas

1 which would mean that if something happened you have to
2 dig up all the parking or the driveway facilities.

3 So the easement for the waterline must be open
4 and available for maintenance for trucks, cranes and
5 other equipment that needs to get in there to work on
6 the waterline.

7 THE COURT: If work needs to be done that's true
8 of any water easement. You can plant grass and it can
9 be beautified to a certain extent. If you have to come
10 in and tear it up, you have to come in and tear and up.

11 But what's the odds, how often does that happen
12 on a waterline? You probably know better than I do.
13 You tell me.

14 MR. WALLACE: It's like 100 year flood. It
15 could happen tomorrow, it could happen 100 years from
16 now. We don't know, you know, when that's going to
17 happen.

18 THE COURT: You are acting like you are telling
19 me they're going to be in there all the time with
20 trucks and doing maintenance, and that's not correct.

21 Once the waterline is put down you can plant
22 grass and shrubbery. And if you have a problem, you're
23 going to have to take it up.

24 MR. WALLACE: Well, but what we are talking
25 about here is a buffer which is supposed to be in place

1 as a permanent buffer. If we have a buffer, even if it
2 was say 10 years from now, trees grow to be 12 feet
3 tall. When you tear the buffer out, you don't
4 come back and plant a 12-foot tall tree.

5 THE COURT: I understand, but you can still
6 plant grass.

7 MR. WALLACE: But grass is not a buffer.

8 THE COURT: I understand.

9 MR. WALLACE: Yeah, it will be planted. There
10 will be --

11 THE COURT: How close -- you can plant the
12 buffer in the 5 foot area next to the property line,
13 can't you?

14 MR. WALLACE: Excuse me?

15 THE COURT: Where is the waterline in relation
16 to the adjoining property?

17 A voice: Can I show you on the area --

18 THE COURT: Just tell me, I will look.

19 MR. WALLACE: The property line between the
20 Bettellis' property and Berkeley Electric, the first 5
21 feet of that property line is where the buffer will be
22 going.

23 Then from the end of that 5 feet, the next 20
24 feet is an easement for the waterline to exist. At the
25 end of that easement begins Berkeley Electric's parking

1 lot for their facility

2 THE COURT: Right. So the easement could be
3 planted in grasses and the trees can be planted along
4 the 5 feet, couldn't it?

5 MR. WALLACE: Trees will be planted at the 5
6 feet. In fact, the requirement that the board of zoning
7 appeals had was that there is two components to a
8 buffer; one is the distance, the width of the buffer,
9 the other is the amount of trees or vegetation that
10 goes in the buffer.

11 THE COURT: Okay. I guess we need to take this
12 as sworn testimony.

13 MR. GREEN: Yes, Your Honor, we can do that.

14 THE COURT: All right. Raise your right hand.

15 MR. WALLACE: Yes, sir.

16 THE COURT: Do you swear to tell the truth and
17 nothing but the truth so help you God?

18 MR. WALLACE: Yes, I do.

19 THE COURT: What is your full name?

20 MR. WALLACE: Bill -- D. William Wallace, town
21 administrator.

22 THE COURT: You have offered some explanation as
23 to the reason for the waterline and the variance. And
24 what you have told the Court so far has been truthful;
25 is that correct?

1 MR. WALLACE: Yes, that's correct.

2 THE COURT: Mr. Green, anything else you want to
3 offer?

4 MR. GREEN: Yes.

5 Can you give just -- can you give the Court a
6 very brief overview of the factors that the board of
7 zoning appeals considered in reduction of the buffer
8 and the reasons those were given?

9 MR. HOLMES: Your Honor, may I be heard just
10 briefly?

11 THE COURT: I'm going to let you cross-examine.

12 MR. HOLMES: That's the problem. Under the
13 statute the Court is not to take evidence and
14 testimony.

15 THE COURT: I understand, but he sitting there
16 talking and I want it to be under oath, okay?

17 MR. HOLMES: I understand that and I agree with
18 that and I appreciate the opportunity to cross-examine.

19 THE COURT: I will let you ask him any
20 questions. I don't think I can consider it in the
21 appeal, I got to be by the record made on the appeal.
22 And it's being offered as purpose of explication to the
23 Court so I understand what's going on between these
24 parties, okay?

25 MR. HOLMES: That's fine.

1 THE COURT: And I understand I can't -- this
2 can't be a part of my decision making on the appeal,
3 but I just want to put it under oath since he's
4 standing there talking so much, okay?

5 MR. HOLMES: Yes, sir.

6 THE COURT: And I'll be glad to let you ask him
7 any questions, okay?

8 MR. HOLMES: Thank you, Judge.

9 THE COURT: Okay. Go ahead.

10 MR. WALLACE: The question is what is the
11 process that the board goes through; is that correct?

12 MR. GREEN: In considering the buffer, what were
13 the factors they considered? Why did they find that
14 the buffer was appropriate?

15 MR. WALLACE: The request, as has already been
16 mentioned, was to reduce the buffer from 20 feet to 5
17 feet. The board of zoning appeals has to look at this
18 from several different points of view, as Mr. Holmes
19 has pointed out.

20 They have to consider factors such as noise,
21 light, you know, other factors that would cause any
22 type of impairment on --

23 THE COURT: Mr. Green, I don't need you to get
24 into all that. I was just wanting some explanation of
25 what was happening. I'm not going to listen to him.

1 MR. WALLACE: Okay. Well, basically what
2 happened is --

3 THE COURT: Sir, be quiet and quit interrupting
4 me. Okay?

5 MR. WALLACE: Yes, sir.

6 THE COURT: Please don't do that again, okay?
7 I'm trying to talk to Mr. Green not you.

8 MR. WALLACE: Yes, sir.

9 THE COURT: Please have a seat.

10 MR. WALLACE: Thank you.

11 THE COURT: All right. Go ahead, Mr. Green.

12 MR. GREEN: Your Honor, I would like to just
13 correct the standard and review that is used in this
14 case because I think that's important to put into the
15 record.

16 THE COURT: I don't think it's de novo.

17 MR. GREEN: It's not, Your Honor.

18 THE COURT: I can't consider what he just told
19 me in the appeal. I was trying to get a feel for where
20 the waterline was going and where the buffer line was
21 going.

22 Okay, go ahead.

23 MR. GREEN: We think the applicable case, or we
24 know the applicable case is Austin versus Town of
25 Hilton Head Board of Zoning and Appeals. And the cite

1 on that is 362 S.C. 29. It's a 2004 court of appeals
2 case.

3 And what it says is that in reviewing the
4 questions presented by the appeal, the reviewing court
5 only determines whether the board of zoning appeals is
6 correct as a matter of law, and will refrain from
7 substituting its judgment for that even if it disagrees
8 with the decision.

9 Further, the decision of a municipal zoning
10 board will only be overturned if it's arbitrary,
11 capricious, has no reasonable relation to a lawful
12 purpose, or if the board has abused its discretion.

13 And that, interestingly enough, Your Honor, was
14 a case in which a setback was reduced from 20 feet to
15 10 feet, which is somewhat similar at least in this
16 case.

17 Your Honor, the order and the factors that were
18 considered by the board were set forth particularly
19 with regard to the buffer reduction. And the board
20 found that -- they made factual findings that granting
21 the variance wouldn't be a substantial detriment to the
22 adjacent property; that the adjacent property wouldn't
23 be harmed by granting it.

24 The applicant is providing -- the applicant
25 being Berkeley Coop -- is providing a dense buffer of a

1 variety of evergreen shrubs that would allow that
2 buffer.

3 And they also found that because of the
4 maintenance of the Town's water system in the 200-foot
5 easement, the easement had to be clear of any
6 obstructions.

7 So there were several factual reasons that the
8 board considered why that buffer needed to be reduced
9 from 20 to 5 feet. And they compensated for the
10 reduction of the buffer by increasing the density.

11 Your Honor, they also said in this case that
12 courts reviewing the decisions of zoning boards may
13 look to written documents as well as records of the
14 proceedings for formats of for final decisions.

15 And one of the documents that may not have been
16 handed up to you was just the application, and what the
17 board actually considered at the meeting. And if Your
18 Honor will just look, and if we may approach, the last
19 part of this -- this is the proposal for the granting.

20 And if you look at the very last part which was
21 the buffer reduction, that went through the entire
22 factual and legal review by the board at that time.
23 So.

24 So the board clearly went through, and I will
25 let Your Honor just read that buffer reduction part.

1 The final section.

2 THE COURT: This was done by the staff of the
3 planning and development department of the Town of
4 Awendaw?

5 MR. GREEN: Correct.

6 THE COURT: And then they got the hearing?

7 MR. GREEN: Yes, Your Honor. And what they do
8 is they compile the facts, then they make a
9 recommendation to the board which the board then
10 considers.

11 If Your Honor looks at the minutes, Ms. Bettelli
12 was actually at the hearing. And there was a detailed
13 recitation of the concerns she had. I just wanted to
14 read this because, Your Honor, they're asking this
15 court to overturn the board's factual decision which
16 it's empowered to make.

17 And she was actually at the hearing and could
18 have raised any issues or concerns about the buffer.
19 What the minutes say is she asked if larger plants
20 could be installed. Asked if --

21 THE COURT: Where are you reading from?

22 MR. GREEN: This is from the minutes, Your
23 Honor, the Town of Awendaw minutes.

24 THE COURT: I have got them. Whereabouts in the
25 minutes are you reading from?

1 MR. GREEN: This is 2/8. There is a section for
2 public comments. And there were four comments from
3 adjacent property owners. Ms. Bettelli being the third
4 that read.

5 THE COURT: All right. Mrs. Susan Bettelli
6 asked for larger plants to be installed, right?

7 MR. GREEN: In the reduced buffer. Asked that
8 there be limited time of day when the community room
9 could be rented; concerned about the water well drawing
10 down the water.

11 Staff will work with the Berkeley Electric to
12 see if plants could be larger, so they were trying to
13 accommodate her. It takes some time for the plants and
14 the buffer to be established and start growing. If
15 it's more expensive they were willing to do that. Most
16 of the plants are fast-growing.

17 And so Berkeley Electric explained they have had
18 several similar facilities, never had a noise complaint
19 about the rented space. So the issue really is one of
20 noise, I imagine that's what the buffer is supposed to
21 help mitigate.

22 But Ms. Bettelli was there. So her concerns
23 were heard by the board. And what the board looks at
24 is if we reduce this buffer can we compensated with
25 more dense plants to do what we need to do to address

1 those concerns. So they went through that factual
2 determination.

3 So, Your Honor, what we would submit is that
4 based on the record and the standard of approval, there
5 has to be a clear abuse of discretion. And there has
6 to be no evidence whatsoever that really supports the
7 board's finding.

8 They went through the property process. And
9 taken as a whole, the order, the minutes, the proposal
10 itself, the fact that Ms. Bettelli was there, there was
11 no abuse of discretion as the board considered all the
12 factors they were legally obliged to consider.

13 So we would submit, Your Honor, it is very
14 similar actually to the case cited, Austin versus Board
15 of Appeals where an adjacent property owner has
16 hypothetical -- I mean conjectural concerns about the
17 noise that's going to be horrible, and that the reduced
18 setback in this case, or buffer in our case, is going
19 to somehow expose them to some hardship.

20 That has to be counter balanced with the
21 public's benefit, in this case Berkeley Electric needs
22 the space, it's their property, they have applied for a
23 variance, they have gone through the proper process.
24 The town certainly has a public interest --

25 THE COURT: Well, does Berkeley need it or does

1 the town need it? I understand they put an easement
2 there for the town to put a waterline. Why does
3 Berkeley -- Berkeley doesn't need the waterline.

4 MR. GREEN: Berkeley needs the space. That's
5 why --

6 THE COURT: Berkeley needs the space to put the
7 waterline?

8 MR. GREEN: No, they need a space for their
9 property.

10 THE COURT: Well, from the administrator, what I
11 understood him to say was that it's going to be a 15
12 foot easement for a waterline running out to the road
13 for the benefit of the city.

14 So what does Berkeley have to do with that other
15 than grant the easement to them?

16 MR. GREEN: Well, Berkeley is the one that
17 applied for it, Your Honor. The town didn't on its own
18 decide to reduce the buffer.

19 THE COURT: I understand. Let me ask you this
20 question, and I don't know the answer. Is it the
21 town's position that you can not have a waterline
22 easement within the 20-foot buffer?

23 MR. GREEN: I believe that is our position, Your
24 Honor.

25 THE COURT: Mr. Holmes, what is your position on

1 whether you can have an easement within the 20-foot
2 buffer if it's underground and planted in grass?

3 I mean if you've got an easement, you can't
4 impede someone coming in and doing maintenance on the
5 easement. Is it are your position that the town could
6 not have a 15-foot easement within that 20-foot buffer?

7 MR. HOLMES: No, Your Honor. Our position is --

8 THE COURT: I mean, what I don't understand is
9 why they even did the variance anyhow, why they
10 couldn't put the easement down, put the line down and
11 planted the grass and keep the 20-foot variance that
12 would keep the trucks and everything else out of it.

13 MR. HOLMES: The variance -- excuse me, the
14 buffer, Mr. Wallace said was already as well, is not
15 just 20-feet wide, it's 20-feet wide of planted area
16 vegetation meaning trees and shrubberies, but not just
17 grass.

18 THE COURT: With the variance you wouldn't have
19 5-feet of trees and shrubs?

20 MR. HOLMES: That's correct.

21 THE COURT: Okay. All right. But do you think
22 that you could have an easement within the buffer?

23 MR. HOLMES: I would think -- I don't see where
24 the buffer would --

25 THE COURT: Do you think the buffer would impede

1 putting an easement in a 15-foot waterline?

2 MR. HOLMES: And planting it, as Your Honor
3 said, with more than just grass.

4 THE COURT: Fine.

5 MR. GREEN: The only thing we would add, Your
6 Honor is that --

7 THE COURT: My problem, from what I'm hearing is
8 I don't see any need to have done the variance to begin
9 with.

10 MR. GREEN: Right. Well, the easement has to be
11 clear of any obstructions, that's part of --

12 THE COURT: Well, I understand that.

13 MR. GREEN: And that preexisted too --

14 THE COURT: Do you think a shrub is an
15 obstruction of an easement?

16 MR. GREEN: That's how it is defined, yes, Your
17 Honor.

18 THE COURT: Okay. All right.

19 MR. GREEN: Well, I mean vegetation, trees.

20 THE COURT: Berkeley Coop has a lot of easements
21 that have a lot of shrubs and other growth in their
22 easements, but go ahead.

23 MR. GREEN: And so that's basically the
24 condition of the easement --

25 THE COURT: Or the city does, but I guess it's

1 your easement.

2 MR. GREEN: Correct. And that easement, of
3 course, preexisted the Bettellis even having that
4 property.

5 I did show Your Honor, and Your Honor may not
6 have a copy of a consent order where there was a
7 previous --

8 THE COURT: Well, let me ask you this. Why is
9 it on its face arbitrary and capricious for the city to
10 come in and reduce a 20-foot buffer for the purpose of
11 them having a 15-foot right-of-way?

12 MR. GREEN: We don't believe it is arbitrary and
13 capricious. I think they have to --

14 THE COURT: Why not? Why isn't that a conflict
15 of interest?

16 You come in and reduce a 20-foot easement for
17 your sole purpose to put a 20-foot waterline. The city
18 now, not Berkeley, the city. The city is the one
19 that's going to benefit from the waterline. Why isn't
20 that, on its face, arbitrary and capricious?

21 MR. GREEN: There is a compelling government
22 interest to maintaining the line, Your Honor. We
23 believe that --

24 THE COURT: I didn't say maintaining the line.
25 You'd have to put the line in before you have to

1 maintain it.

2 My question to you is, why is it on its face
3 arbitrary and capricious for the city to come in and
4 grant a variance so that they can obtain a waterline,
5 and at the same time reduce the variance? Just on its
6 face?

7 MR. GREEN: why is it arbitrary?

8 THE COURT: why is it not?

9 MR. GREEN: Your Honor, I think --

10 THE COURT: I mean, that's a tremendous conflict
11 of interest for the city.

12 MR. GREEN: Your Honor, the Town of Awendaw did
13 not put in this of their own volition. Berkeley Coop
14 can speak to why this was essential and why they
15 applied --

16 THE COURT: But you are receiving the water from
17 their well for your benefit. It's your easement. It's
18 not Berkeley's easement.

19 MR. GREEN: But, Your Honor, that preexisted.
20 We are talking about the buffer, not the waterline
21 right now.

22 The waterline is a 20-foot ditch. They
23 requested, they had spatial requirements, they had
24 other requirements, they requested reduction of the
25 buffer had nothing to do with the waterline for

1 Berkeley Coop's purposes. So the town had no
2 initial --

3 THE COURT: Well, who's going to be receiving
4 the water from their well?

5 MR. GREEN: I believe that Berkeley Coop will
6 use some water, and I believe that --

7 THE COURT: But who's going to -- the city is
8 not going to be receiving the water from the well? Am
9 I misunderstanding something?

10 MR. GREEN: The city provides water. The town
11 provides water. The town is not receiving water. So
12 this is for the benefit of Berkeley Coop.

13 The water is for the benefit of the residents.
14 So the public good is what we are talking about there.

15 THE COURT: But it's not -- I understand it's
16 not public water there, it's a well. Is that right or
17 wrong?

18 MR. GREEN: There is a well and --

19 THE COURT: Well, clear me up on the facts,
20 okay?

21 MR. GREEN: Okay.

22 THE COURT: If I'm confused on the facts, clear
23 me up.

24 MR. GREEN: Well, Your Honor, we --

25 THE COURT: My understanding from reading very

1 briefly is that you will be drawing water from the well
2 that is on Berkeley's property and running it out to
3 the road.

4 MR. GREEN: Your Honor, we were under the
5 impression that if the board reviewed the facts and
6 Your Honor was looking at whether or not, at the law,
7 whether or not they had the right to do so, we did not
8 think this was de novo in that the Court was going to
9 be --

10 THE COURT: I'm not talking about de novo, I'm
11 just talking about what I read in the thing. Let me
12 read it again, maybe I misread it.

13 MR. GREEN: We think that what the town has
14 proved is that there's a lawful purpose and that the
15 board hasn't abused its discretion. So --

16 THE COURT: Okay, let me just read here. With
17 regard to the buffer reduction the applicant, which
18 would be Berkeley, has provided a 20-foot easement at
19 the town's request for a waterline so that the town can
20 purchase water from Berkeley's well.

21 Did I read that wrong?

22 MR. GREEN: You read that correctly, Your Honor,
23 but that's not the purpose --

24 THE COURT: So my question -- that's not what?

25 MR. GREEN: That wasn't the purpose for the

1 buffer reduction.

2 THE COURT: This waterline will be part of the
3 town's phase two water system. The 20-foot easement
4 must connect the well to the highway. This easement
5 must be clear of any obstructions.

6 So my question to you, Berkeley is not
7 benefiting from it, the town is. So why isn't that a
8 conflict of interest for the town to come in and reduce
9 the 20-foot buffer, and at the same time get an
10 easement from Berkeley for their benefit?

11 That's my question to you.

12 MR. GREEN: And I believe I understand the
13 question, Your Honor.

14 THE COURT: Okay.

15 MR. GREEN: What I would say is that the
16 reduction of the buffer from 20 to 5 feet was not for
17 the town's benefit. It's for Berkeley's benefit.

18 THE COURT: Well, I thought the city
19 administrator said the whole purpose in reducing was so
20 they could have an easement free and clear so that they
21 can perform maintenance on the line. That was my
22 understanding.

23 MR. GREEN: Your Honor, Berkeley Coop can --

24 THE COURT: And I just read to you, Berkeley is
25 not benefiting from this easement, the town is.

1 MR. GREEN: Yes, Your Honor, but we are talking
2 about the buffer not the easement. The purpose for the
3 reduction was because it increased the usable space for
4 Berkeley Coop. Now, those planned --

5 THE COURT: But if it's an easement there,
6 Berkeley can't use it, they can't impede the easement.

7 MR. GREEN: I understand what you are asking,
8 Your Honor.

9 THE COURT: Is that correct?

10 MR. GREEN: That's correct, Your Honor.

11 THE COURT: So how does it increase the space
12 that Berkeley can use? I guess they can park trucks on
13 top of the waterline.

14 MR. GREEN: I understand what you are asking,
15 Your Honor. I believe Berkeley can speak specifically
16 to it. I will go back to the minutes.

17 THE COURT: I'm just reading to you, you said
18 what was in your board of zoning appeals order. I just
19 read to you what the order said. I'm not going outside
20 of what has been presented to me.

21 MR. GREEN: Yes, Your Honor. I will read again
22 what Berkeley Coop requested and why.

23 Number three of the buffer reduction, does the
24 application prohibit or unreasonably restrict --

25 THE COURT: I understand what you are talking

1 about as far as the request, I'm just reading what
2 their findings were and that's the basis that I have to
3 sort of make my decision on.

4 What is in this Town of Awendaw Board of Zoning
5 Appeals ordered on application number 1011-01. That's
6 what basically I have to make my decision on.

7 MR. GREEN: And, Your Honor, if you look at the
8 back page, the second paragraph from the top. The
9 basis based on request is the board finds, they made a
10 factual finding, which we understood would not be
11 disturbed unless it's clearly erroneous, that the
12 usable area would be greatly reduced if the 20-foot
13 buffer was required. That's a period and we'll stop.

14 That's the reason, as requested by Berkeley Coop
15 to this board, why they wanted and needed the 20-foot
16 buffer reduced.

17 The usable area would be greatly reduced if the
18 buffer were required. And that was a factual finding
19 that the town is empowered to make.

20 And that is also in the application, that's in
21 the order, that's in the minutes. So if there happens
22 to be some side benefit to the town, that was not the
23 purpose of Berkeley Coop's request. That wasn't the
24 basis of the factual finding of the BZA.

25 THE COURT: Look on the back sheet of your

1 planning department's zone and variance request, okay?
2 Buffer reduction number one, are there any
3 extraordinary or exceptional conditions pertaining to
4 this particular piece of property?

5 At the town's request, the applicant will
6 provide a 20-foot easement for a waterline so that the
7 town can purchase water from Berkeley's well. This
8 waterline will be part of the town's phase three water
9 system.

10 This 20-foot easement must connect the well to
11 Highway 17. This easement must be clear of any
12 obstructions.

13 It doesn't sound like it's benefiting Berkeley
14 other than they are going to get some money from the
15 town for buying the water.

16 MR. GREEN: Your Honor, that was in the
17 proposal. And what we would say is in the findings of
18 fact, that not the finding of fact. They can --

19 THE COURT: I just read you the findings of
20 facts, Mr. Green, at the bottom of the page.

21 MR. GREEN: Okay, that was not the findings of
22 fact in the order. The findings of fact in the order
23 is -- and this order is what is the official thing that
24 was sent, they can consider anything in the proposal,
25 the reason --

1 THE COURT: You want me to read you the findings
2 of facts again at the bottom? With regard to the
3 buffer, the applicant is to provide a 20-foot easement
4 at the town's request for a waterline.

5 MR. GREEN: I see that, Your Honor.

6 THE COURT: It's in the findings. It just
7 expanded upon it, on what you gave me a few minutes
8 ago.

9 MR. GREEN: And what we would like Your Honor to
10 consider is just the next sentence.

11 THE COURT: Well, let me say this, okay? Go
12 ahead, I will listen to you. Anything else?

13 MR. GREEN: Just that the board finds the usable
14 area would be reduced if the 20-foot buffer were
15 required. So that is the basis for the factual finding
16 as to Berkeley County. And that's the very next
17 paragraph.

18 THE COURT: Okay. Anything else, Mr. Green?

19 MR. GREEN: Nothing, Your Honor.

20 THE COURT: All right. Thank you so very much.
21 Mr. Williams.

22 MR. WILLIAMS: Your Honor, I don't want to file
23 the ground again, we'd just like to make a couple of
24 comments.

25 THE COURT: Yes, sir. Don't reinvent the wheel,

1 okay?

2 MR. WILLIAMS: Fine. I often quote a line from
3 Shakespeare where a messenger approaches and he says,
4 speak on but be not over-tedious. In other words get
5 to the point. And that's what I'm going to try to do.

6 You've got a 20-foot strip of land that requires
7 certain plantings, and that's a buffer. That 20 feet
8 is to protect the adjoining landowner. Okay.

9 The 20 feet still exists here. The planting
10 area of it has been reduced from 20 feet to 5 feet.
11 Within that 5 feet it's going to be all of the shrubs
12 that were going to be planted in the 20 feet. They're
13 just consolidating them and making them a solid line
14 across there which gives more protection.

15 In other words, instead of --

16 THE COURT: But the problem is, I understand
17 what you are saying, but the problem is that I guess
18 the 15 feet of the easement, what is going on top of
19 that?

20 You all going to use it for a parking area or
21 what are you going to be using it for? That's the
22 problem that I think concerns the adjoining landowners.

23 MR. WILLIAMS: Yes, sir. And it is my
24 understanding that nothing, and I'm not a design
25 engineer so I don't have it with me because I didn't

1 realize we were going to get into all of that, but the
2 reason that it was reduced is so that the Berkeley
3 could build right up to that 20 feet. And then over on
4 the 5 feet have the extra line over there.

5 There may be a driveway coming in there, Your
6 Honor, on that. Again, I don't have the design people
7 with me.

8 THE COURT: Well, then how is the town going to
9 get all those trucks and cranes in there to do
10 maintenance?

11 MR. WILLIAMS: Well, that's what the driveway is
12 for.

13 THE COURT: Okay.

14 MR. WILLIAMS: And, Your Honor, what I
15 understand is that there are no structures, no
16 buildings from the Coop going in that 20 feet, okay?
17 There is not going to be anybody parking close to Ms.
18 Bettelli's house, which is her house is on the other
19 side of her property.

20 THE COURT: I saw that on the aerial photo.

21 MR. WILLIAMS: Yes, sir. And, you know, it's
22 just been no matter what we do something else. And I
23 understand we are not retrying it here.

24 But what I would like to make clear to the Court
25 is that the 20-foot strip in there, which is designed

1 to protect the adjoining landowner, is still there.

2 THE COURT: Well, that's my -- that was my whole
3 question with Mr. Green. What I don't understand about
4 this whole fiasco is why they even had to reduce the 20
5 foot? Why didn't they just put the easement in and
6 plant the trees on 5 foot so you didn't impede the
7 easement?

8 I don't see any reason to have reduced the
9 20-foot buffer. I don't understand.

10 MR. WILLIAMS: Yes, sir. And in all due respect
11 I think that goes to whether or not you agree with the
12 board's decision on that. But the board had the
13 authority to make that decision on that.

14 And it may have been that, well, we can
15 consolidate all this growth in this 5-foot area here,
16 give them more protection than spreading out. And
17 again I don't know, I was not there.

18 But that's a decision, I would submit, the board
19 has the authority to make. We would submit that they
20 did not abuse their discretion, their power, their
21 authority.

22 THE COURT: Why does Berkeley request a variance
23 and then turn around and give the city a 20-foot
24 easement? Was a deal cut before they even went before
25 the zoning board?

1 MR. WILLIAMS: And I do not know that, Your
2 Honor. I would certainly think that the design people
3 who were there at the board hearing and who made the
4 presentation to the board --

5 THE COURT: I mean there is no benefit for
6 Berkeley at all other than receiving the money for the
7 water every month from the city, on reducing the
8 variance.

9 You still can't impede the easement that is
10 given to the city.

11 MR. WILLIAMS: Right. But it could be used for,
12 as Your Honor was saying, access for trucks to come in
13 and out without trees and things being there.

14 So, you know, with an underground water easement
15 you can still drive across that.

16 THE COURT: Right.

17 MR. WILLIAMS: Okay. Where as if there are
18 trees and plants there, you cannot.

19 THE COURT: Okay. All right.

20 MR. WILLIAMS: And again, Your Honor has heard
21 maybe more than he wants to hear. Thank you.

22 THE COURT: Thank you, Mr. Williams.

23 Mr. Holmes, anything you want to add very
24 briefly?

25 MR. HOLMES: Yes, just very briefly, Your Honor.

1 It is my understanding that there currently is
2 no waterline or easement on that track of land. And I
3 think you hit it right on when you said the conflict of
4 interest, a deal being cut before anything happened.

5 As far as reduction, and then what Mr. Williams
6 was saying about planting in the 5 feet, their lands --
7 Berkeley's landscape professional at that hearing,
8 according to Mr. Bettelli, said in 5 feet you can't
9 plant trees that are required under the buffer
10 ordinance in the 5 feet. You need more area.

11 The only thing you can plant in 5 feet is shrubs
12 which, you know, they're not going to give any
13 protection, any real barrier, visual, dust, light from
14 the activity on that property which is the reason you
15 have buffers between commercial property and
16 residential property.

17 And again, you are correct. I think it's a
18 conflict of interest and therefore arbitrary and
19 capricious. Which we have argued in the brief for them
20 to extract this easement in exchange for a variance to
21 the detriment of my clients.

22 THE COURT: All right.

23 Mr. Green, I'm going to take it under
24 advisement. I want you submit me a short memorandum on
25 why it isn't a conflict of interest for the city to

1 receive an easement, a 20-foot easement for water.

2 MR. GREEN: Yes, sir, Your Honor.

3 THE COURT: And at the same time reduce the
4 variance so they can receive that easement and that
5 water, so they can receive the water.

6 Even though there may have been an easement
7 there before, they weren't receiving anything. Why
8 isn't it a conflict of interest for the city to make a
9 decision on reducing the variance and at the same time
10 receive the benefit of the water.

11 MR. GREEN: Yes, Your Honor.

12 THE COURT: Okay. And therefore if it isn't a
13 conflict, why isn't it capricious and arbitrary?

14 MR. GREEN: Yes, sir.

15 THE COURT: And I want a memorandum on that
16 issue. If you've got to go out of South Carolina to
17 find me some law, please do.

18 MR. GREEN: And within ten days, would that be
19 sufficient?

20 THE COURT: If you want to address it, I would
21 be happy for you to address that specific, that's a
22 very specific narrow issue.

23 MR. WILLIAMS: Yes, Your Honor, but I --

24 THE COURT: Mr. Williams, I don't think you have
25 a dog in that fight, do you? I'd be happy to receive

1 anything you want to give me.

2 MR. WILLIAMS: Okay, I will --

3 THE COURT: I'm not trying to cut you off.

4 MR. WILLIAMS: No, sir, I understand that. We
5 are just trying to move forward with this thing. And
6 it's just been one --

7 THE COURT: Well, if you all get this to me in
8 ten days I will get you a decision very quickly.

9 MR. WILLIAMS: Thank you, Your Honor.

10 THE COURT: Okay? I mean, I'm just saying if
11 you want to submit something, you all want to submit it
12 jointly with Mr. Green I'd be happy to receive it.

13 MR. WILLIAMS: Thank you, sir.

14 THE COURT: Mr. Holmes, you want to send me
15 anything?

16 MR. HOLMES: Your Honor, I think I addressed
17 this in the brief --

18 THE COURT: If you feel like you've already
19 addressed it, that's fine.

20 MR. HOLMES: We've argued that it was arbitrary
21 and capricious. I don't know if I gave you any case
22 law specific to that point.

23 THE COURT: My question is, is it a conflict of
24 interest for the city zoning board to make this
25 decision.

1 understand your question.

2 THE COURT: That's my question. Because of the
3 benefit they received by reducing the buffer line.
4 That's my question.

5 Doesn't have anything to do with what the zoning
6 board did or didn't do. Okay?

7 MR. GREEN: Yes, sir, your Honor.

8 MR. WILLIAMS: Yes, sir. And we will address
9 the benefit to Berkeley in the reduction.

10 THE COURT: That's fine.

11 MR. WILLIAMS: Thank you, sir.

12 THE COURT: Thank you.

13 (Whereupon, the proceedings in this matter
14 before the Court were adjourned.)

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STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE # 11-CP-10- 2028

Joseph M. Battelli, Jr. and Susan B.
Battelli,

Plaintiffs,

vs.

Town of Awendaw Board of Zoning
Appeals and Berkeley Electric Cooperative,

Defendants,

NOTICE OF APPEAL AND
REQUEST FOR PRE-LITIGATION
MEDIATION

FILED
2011 MAR 17 PM 2:46
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

PLEASE TAKE NOTICE that pursuant to S.C. Code Ann. Section 6-29-820, Plaintiffs appeal the decision of the Defendant, Town of Awendaw's Board of Zoning Appeals, dated November 1, 2010, granting the Defendant, Berkeley Electric Cooperative (BEC), a variance to reduce the buffer zone between Plaintiffs and Defendant, BEC, properties. Further, Plaintiffs formally request that this matter be set for pre-litigation mediation in accordance with Section 6-29-825, S.C. Code Ann.



Eben H. Cockley
Attorney for Plaintiff
56 Broad St.
Charleston, SC 29401
843-577-2404

Dated: March 16, 2011

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO. 11-CP-10-2028

Joseph M. Bettelli, Jr. And Susan B. Bettelli,)

Plaintiffs,)

vs.)

Town of Awendaw Board of Zoning Appeals and Berkeley Electric Cooperative,)

Defendants.)

AMENDED NOTICE OF APPEAL
AND REQUEST FOR PRE-LITIGATION
MEDIATION

FILED
2011 JUL 22 PM 12:20
CLERK J. ARMSTRONG

The Plaintiffs above named, by and through their undersigned counsel, hereby amend the Notice of Appeal and Request for Pre-Litigation Mediation filed March 17, 2011, to include the following particulars:

1. This appeal is brought pursuant to S. C. Code Ann. Section 6-29-820 to challenge the decision of the Town of Awendaw Board of Zoning Appeals (BOZA) to grant a variance to Berkeley Electric Cooperative (BEC) reducing the buffer zone between the property of the plaintiffs and BEC from the required twenty (20') feet to five (5') feet.

2. Variances from the zoning ordinances are only to be granted by BOZA when strict application of the provisions of the ordinance would result in unnecessary hardship to the property owner. In such cases BOZA must make findings and explain in writing that: (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) 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.

3. Furthermore, BOZA may not grant a variance the effect of which would be to: (1) allow the establishment of a use not otherwise permitted in a zoning district; (2) extend physically a nonconforming use of land; or (3) change the zoning district boundaries shown on the official zoning map.

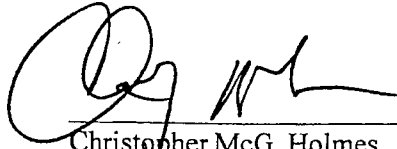
4. The decision of BOZA to grant a variance in this case is erroneous and in violation of the ordinance in the following ways:

a. There are no extraordinary and exceptional conditions pertaining to this particular piece of property because due to its large size there is ample space to site and locate facilities to meet all design requirements and still avoid intruding into the buffer area; and

b. The conditions of this property generally apply to other properties in the vicinity. This property was re-zoned to allow this use, which is the only reason BOZA gave for finding this property was different. BEC could have purchased another property in the town and had it re-zoned just like this one as there are multiple large parcels on highway 17 in Awendaw.

5. Authorization of this variance has substantial detrimental impact to the adjacent properties due to the increase in noise and lighting and the decrease in privacy, all of which would be mitigated by enforcing the buffer requirements of size and planting of appropriate vegetation.

6. For the foregoing reasons, plaintiffs request that this matter be scheduled for pre-litigation mediation as provided in S. C. Code Ann. §6-29-825.



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July 21, 2011

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO. 11-CP-10-2028

Joseph M. Bettelli, Jr. And Susan B.)
Bettelli,)

Plaintiffs,)

vs.)

PLAINTIFFS' TRIAL BRIEF

Town of Awendaw Board of Zoning)
Appeals and Berkeley Electric)
Cooperative,)

Defendants.)

This appeal contests the granting of a variance by the Town of Awendaw's Board of Zoning Appeals (BOZA) to the buffer requirements on a 28-acre parcel of land owned by Berkeley Electric Cooperative (BEC) adjacent to U.S. Highway 17. (Exhibit A). Specifically, the variance allows the reduction of the buffer zone required by Awendaw's zoning ordinance on the portion of BEC's property abutting that of the plaintiffs from twenty (20') feet to five (5') feet. BOZA conducted a hearing to consider the request on November 1, 2010, at which meeting the variance was approved. (Exhibit B). The decision was reduced to written Findings of Fact and Conclusions of Law which were approved on March 7, 2011. (Exhibit C). Plaintiffs thereafter timely filed their appeal pursuant to S. C. Code Ann. §6-29-820.

The powers of the BOZA and the standard to apply in considering requests for variances is set forth as follows:

[T]o hear and decide appeals for variance from the requirements of the zoning ordinance when strict application of the provisions of the ordinance would result in unnecessary hardship. A variance may be granted in an individual case of unnecessary hardship if the

board makes and explains in writing the following findings:

(a) there are extraordinary and exceptional conditions pertaining to the particular piece of property;

(b) these conditions do not generally apply to other property in the vicinity;

(c) 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

(d) 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.

S.C. Code Ann. § 6-29-800(A)(2).

The decision of the board must be reduced to writing and contain findings of fact and conclusions of law separately stated. S.C. Code Ann. § 6-29-800(F).

Plaintiffs argue that BEC's property does not fall within the parameters that would qualify it for the variance granted and that the final decision of the BOZA does not properly or sufficiently set forth factual findings to support its legal conclusions.

A variance allows a board to modify an otherwise legitimate zoning restriction when, because of unusual conditions, the restriction may be more burdensome than intended. It has been held that in order to obtain a variance on the ground of unnecessary hardship, there must at least be proof that a particular property suffers a singular disadvantage by operation of the zoning requirements. Hodge v. Pollock, 223 S.C. 342, 75 S.E.2d 752 (1953); Rest. Row Associates v. Horry County, 335 S.C. 209, 516 S.E.2d 442 (1999), certiorari denied, 528 U.S. 1020, 120 S.Ct. 528, 145 L.Ed. 409 (1999). "In order to grant a variance, the Board must make the factual determination that each of the four elements above favor granting the variance. See Dolive v. J.E.E. Developers, Inc., 308 S.C. 380, 418 S.E.2d 319 (Ct.App.1992). Granting a variance is an exceptional power which should be sparingly exercised and can be validly used only where a situation falls fully within the specified conditions.

Hodge v. Pollock, supra.” Rest. Row Associates v. Horry County, supra.

Furthermore, a claim of hardship cannot be asserted by one who purchases property after enactment of the zoning restriction. Rush v. City of Greenville, 246 S.C. 268, 278, 143 S.E.2d 527, 532 (1965); Georgetown County Bldg. Official v. Lewis, 290 S.C. 513, 351 S.E.2d 584 (Ct. App. 1986); Rest. Row Associates v. Horry County, supra.

While the board has some discretion, it must apply the standards established by the zoning ordinance, and courts will not uphold a decision granting a variance when it is based on errors of law, lack of supporting evidence an action that is arbitrary, unreasonable or reflects an abuse of discretion. Hodge v. Pollock, supra.

Plaintiffs recognize the deference given to decisions of Boards of Zoning Appeals when being reviewed judicially. “The findings of fact by the Board shall be treated in the same manner as findings of fact by a jury,” and “[i]n 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.” Rest. Row Associates supra at 216, 516 SE2d at 446. “However, a decision of a municipal zoning board will be overturned if it is arbitrary, capricious, has no reasonable relation to a lawful purpose, or if the board has abused its discretion. (internal cites omitted)” Id.

Plaintiffs would show that in this instance the BOZA abused its discretion in approving the variance because there are no extraordinary and exceptional conditions pertaining to this BEC’s property. Specifically, due to its large size (28 acres), there is ample space to site and locate facilities to meet all design requirements and still avoid intruding into the buffer area. The preliminary site

plan demonstrates only a small amount of the acreage is needed for the facilities planned. Further, the conditions of this property generally apply to other properties in the vicinity. In fact, this property had been recently re-zoned from residential to commercial to allow this use and was either purchased by BEC after that re-zoning or re-zoned after purchase at the request of BEC. (“[C]laim of hardship cannot be asserted by one who purchases property after enactment of the zoning restriction” *supra*). There are similarly sized parcels along Highway 17 available for purchase by BEC which could have received similar re-zoning and could adequately serve BEC’s purposes. BOZA simply found this was the only parcel zoned for the use BEC wishes to employ because it had just given it that zoning. There is no reason it could not have re-zoned any other property BEC might have acquired. “It is generally acknowledged that the peculiarity requirement is designed to prevent the grant of variances to remedy a hardship which is general throughout the area zoned. 101A C.J.S. *Zoning and Land Planning* § 243, at 709-10 (1979); 6 Patrick J. Rohan, *Zoning and Land Use Controls* § 43.02(4)(b)(i), at 43-49 (1992),” Bennett v. Sullivan's Island Bd. of Adjustment, 313 S.C. 455, 458, 438 S.E.2d 273, 274-75 (Ct. App. 1993).

The BOZA “notes” the existence of a ditch bisecting the property in its final decision (Exhibit C) although there is no evidence of that condition in its minutes (Exhibit B) or visible on Exhibit A. Further more, the ditch and its relocation would have no bearing on the need to reduce the sideline buffer area.

The only other extraordinary or exceptional condition on this property is the water easement BEC is providing the Town of Awendaw. There are two aspects of this condition that warrant reversal. First, it appears that BOZA was trading a variance to obtain an easement, which in itself reflects action that is legally questionable and suggests arbitrariness and abuse of discretion. Second,

and in further support of plaintiffs' position, is the admission by the town that the easement would not be needed in the foreseeable future because there is no funding for the water project and the acknowledgment by BEC that it would not be using the easement for at least ten years. Therefore, BOZA gave a variance reducing the buffer by 75% for a use that may never be needed.

Additionally, allowing this variance will result in substantial detrimental impact to the adjacent properties of plaintiffs and others due to the increase in noise and lighting and the decrease in privacy, all of which would be mitigated by enforcing the minimal buffer requirements of depth and planting of appropriate vegetation. It should be reiterated that the buffer is only 20 feet to begin with. By contrast, under similar circumstances the Town of Mount Pleasant would require a fifty foot buffer *and* a wall or berm and Charleston County would require a minimum buffer of 60 feet. Adjacent owners expressed their concerns to BOZA of noise and light impacts both on their present use and enjoyment and for impacts on the long term value of their properties.

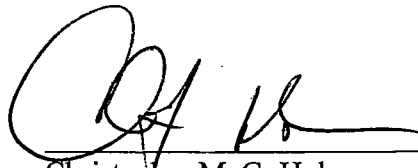
In addition, it appears the plans being approved in support of the variance were only conceptual as the minutes (Exhibit B) reflect that BEC and the Town are continuing to work on lighting and landscaping matters which are essential to a proper evaluation of the impacts of the use on the adjacent properties and the necessity of a buffer. The BOZA merely conclusively stated, "The granting of this variance will not be of substantial detriment to the adjacent property," without any reference to supporting evidence and in complete disregard of the testimony supplied by plaintiffs and others. That simply does not comply with the legal standard.

" 'An administrative body must make findings which are sufficiently detailed to enable this Court to determine whether the findings are supported by the evidence and whether the law has been applied properly to those findings.' Porter v. S.C. Public Serv. Comm'n, 333 S.C. 12, 507 S.E.2d 328

(1998). This Court will not accept an administrative agency's decision at face value without requiring the agency to explain its reasoning. Id.” Kiawah Prop. Owners Group v. Pub. Serv. Comm'n of S. Carolina, 338 S.C. 92, 95-96, 525 S.E.2d 863, 865 (1999). Exhibit C is wholly inadequate and should not be accepted by this Court.

CONCLUSION

Plaintiffs respectfully request that the Court reverse the granting of the variance and require strict compliance with the full twenty feet of buffer, including vegetative plantings that meet the ordinances requirements. At a minimum, the Court should remand this matter to BOZA for a full hearing and discussion of final, as opposed to conceptual, site plans, and for preparation of a decision document that fully addresses the factual bases that support any legal conclusions reached.



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March 14, 2012

EXHIBIT “A”



EXHIBIT “B”

TOWN OF AWENDAW

Board of Zoning Appeals:

Herbert Wilson- Chairperson
Nancy Summersett- Vice Chair
Janie Brown
Martha Steed
John Timmons
Thernell Young
Beatrice Washington



Mayor Samuel N. Robinson

Council Members:
Nell C. Daniels
Miriam Greene
Bryan McNeal, Jr.
Rodney Porcher
Sheila Powell
Bettye Simmons

Board of Zoning Appeals Public Hearing Minutes Monday, November 1, 2010, 6:30 PM, Town Hall

Members present: Herbert Wilson, Nancy Summersett, Martha Steed and John Timmons.
Staff: Bill Wallace and Jody Muldrow. Meeting began at 6:45 PM

1. Minutes from October 4, 2010 meeting. Motion to approve as distributed made by J. Timmons, second by M. Steed, approved unanimously.

2. Highway 17 north, TMS# 683-00-00-081. Zoned Agriculture General. Applicant: Berkeley Electric Cooperative (BEC) represented by Thomas Barnett, Project Manager and Erica Kindl, Civil Engineer with Stantec.

a. Request a variance from Article 8.1.1 to reduce a buffer; b. Request a variance from Article 7.1.1 to remove grand trees, and; c. request general site plan and architecture approvals. Staff and the applicant explained all items. Comments and questions were then taken from the board and the public. Public comments summary: (first four commenting are adjacent property owners) Mr. Alex Dickson—concerned about light trespass.

Mr. Bob Hanlin—concerned about light trespass, asked if the septic had been approved (affirmed) and concerns about the BEC well's impact.

Mrs. Susan Bettelli—asked if larger plants could be installed initially in the reduced buffer; asked if there would be a limited time of day when the community room could be rented/used (noise concerns); concerned about well drawing down water available for her private wells; and concerned about well's pump house making noise. Staff will work with BEC to see if some plants could be larger although there is a trade off when mature plants are transplanted—it takes longer for them to become established and then start growing and of course it is much more expensive. Most of the plants selected are fast growing but the town will work with BEC on this. BEC explained that they have several similar facilities and have never had a noise complaint about the rented space. Alcohol is prohibited in their facility. Mr. Wallace explained that the well will not impact adjacent wells and the pump house will be insulated.

Staff read two letters sent to the town:

Mr. Robert Edmonds—concerned about light trespass and asked that they use evergreen plants, not deciduous.

Dr. Demetrios Papadopoulos—concerned about light trespass and impact on dark sky. Asked for fully shielded, energy efficient, low wattage, non-glare fixtures with motion detectors.

Staff then reviewed their recommendations and votes were taken for each item.

The BZA then closed public comments and discussed and voted on each item:

Variances: Mrs. Summersett asked if the oaks were Live Oaks. Jody explained that the survey did not specify but that probably some of them were. Jody also explained that staff tried to see if the 29" oak near the well could be saved but given the grading for the swale and water line on the

Page 2, Nov. 1, 2010 Minutes

northern side and filling to occur on its southern side the tree would not survive. Mr. Wallace added that BEC would be planting 228 trees on site and also leaving the southern 11 wooded-acres undisturbed. Additionally the zoning ordinance requires 20 trees per acre for commercial sites and this requirement will be met.

Mrs. Summersett asked if it was certain that the town would get water from this site for Phase III. If the board were going to let the buffer be reduced by 3/4ths they need to be positive that that a water main will go there. Also could the easement be reduced; why must it be 20 feet wide? Mr. Wallace explained that the town's engineer was involved in the project and that the town would use this well at some point in the future—there is no funding yet. The Mayor confirmed that an agreement. Staff recommended approval of both variances.

a. Variance for grand tree removals Motion: removing the grand trees is approved with the understanding that the well will be given to the Town. Made by: J. Timmons; second: M. Steed; Vote for: Timmons, Steed, Wilson; Vote against: Summersett; Motion carried

b. Variance for buffer reduction Motion: reducing the northern buffer as presented is approved with the understanding that the well will be given to the Town. Made by: N. Summersett; second: J. Timmons; Vote for: unanimous

c. Architecture and site plan approvals:

1. Architecture of warehouse and office building: Staff recommended approval of the architecture with materials as presented (brick office, metal warehouse, metal roofs etc.) with final colors to be approved by staff working with the architect who has proposed an earth-tone palate.

Motion: approve staff's recommendation. Made by: N. Summersett; second: J. Timmons; Vote for: unanimous

2. Site Plan Details:

Signage—Staff recommended approval of the monument sign with brick matching the building.

Motion: approve staff's recommendation. Made by: N. Summersett; second: M. Steed; Vote for: unanimous

Fencing and gas fueling canopy—Staff recommended approval of chain link fence with slats around storage complex, color either dark green or black (brochure for colors) and metal fence for courtyard and something similar for pond (brochure for sample). Colors for fencing and canopy to be approved by staff.

Motion: approve staff's recommendation; made by: N. Summersett; second: J. Timmons; Vote for: unanimous

Exterior lighting plan—Staff recommended that the town continue to work with BEC on the plan and that a new plan be brought back to the Board for their approval.

Motion: approve staff's recommendation. Made by: N. Summersett; second: M. Steed; Vote for: unanimous

Meeting adjourned at 8:00 PM

Minutes approved on: March 7, 2011

EXHIBIT “C”

**TOWN OF AWENDAW BOARD OF ZONING APPEALS
ORDER ON VARIANCE APPLICATION NO. 1011-01**

Date of Hearing: November 1, 2010

The Board of Zoning Appeals (BZA) held a public hearing on Monday, November 1, 2010 to consider Applicant Berkeley Electric Cooperative's ("Applicant") request for a variance to reduce a buffer, remove grand trees and request general site plans and architectural approvals. The Applicant sought a variance from Article 8.1.1 of the Awendaw Zoning Ordinance to reduce a buffer and from Article 7.1.1 to remove grand trees and request general site plan and architecture approvals.

After the consideration of evidence and arguments present, the BZA makes the following FINDINGS OF FACT:

The BZA finds that the notice of this hearing was published in the *News and Courier*, a widely circulated newspaper in Charleston County, on October 16, 2010.

The Applicant is seeking to remove sixteen grand trees. Grand trees are defined in the ordinance as being eighteen inches or greater in diameter at breast height, excluding pine trees. This request is for nine sweet gum trees, six oaks, and one pecan tree.

The Applicant is also seeking to reduce the depth of the northern buffer at TMS# 683-00-00-081. On the 1,142 foot northern property boundary, the requested buffer reduction is for 900 feet. The applicant is seeking this reduction from the required 20 feet deep to five feet deep along 900 feet of the northern property line because this area also contains a twenty-foot public water easement. The Board finds that with regard to the grand tree removal, the property on which the trees are located is twenty-eight acres. Of that, approximately eleven acres are wetlands. The development is intended to serve the Town of Awendaw's power needs and the development will include a large warehouse with a storage yard, an office building with community meeting space, and associated parking. This is the only parcel of this size in the area on Highway 17 with the zoning to permit this use.

The Board finds that the buildable area on this property would be greatly reduced if the ditch was not relocated or the trees removed. The Board notes that the twenty-eight acres is bisected by a ditch, which will be relocated requiring grading work.

The Applicant is providing buffers on the perimeter of their land and landscaping throughout the parking area. These landscaped areas will include 228 new trees. Additionally, approximately nine acres of wooded wetlands are being preserved. The granting of this variance will not be of substantial detriment to the adjacent property or the public good, and the character of the district will not be harmed by the granting of this variance.

With regard to the buffer reduction, the applicant has provided a twenty-foot easement at the Town's request for a waterline so that the Town can purchase water from Berkeley's well.

This waterline will be part of the Town's Phase III water system. The twenty-foot easement must connect the well to Highway 17. This easement must also be clear of any obstructions.

The Board finds that the usable area would be greatly reduced if the twenty-foot buffer were required. The Applicant is providing a dense buffer of a variety of evergreen shrubs that should grow to ten or twelve feet tall at maturity.

The granting of this variance will not be of substantial detriment to the adjacent property or the public good and the character of the district will not be harmed by the granting of this variance.

Based on the same, the BZA makes the following CONCLUSIONS OF LAW:

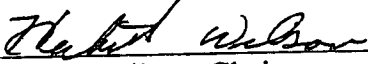
The notice of this hearing complied with §6-29-790 of the *Code of Laws of South Carolina*, 1976, as amended.

Pursuant to §6-29-800 of the *Code of Laws of South Carolina*, 1976, as amended, and §1.3.3(2) of the Town of Awendaw Unified Development Ordinance, the BZA is authorized to hear and decide applications for variances.

The Applicant has met its burden of proof in complying with the Town of Awendaw Unified Development Ordinance.

THEREFORE, IT IS ORDERED the Applicant Berkeley Electric Cooperative, Inc.'s request for a variance to reduce a buffer and to remove grand trees and receive general site plan and architectural approvals at TMS# 683-00-00-081 (28 acres) Highway 17, south of Thames Road is approved with the stipulation that the well is to be given to the town and the site lighting plan is to be revised and approved by the Board of Zoning Appeals.

IT IS SO ORDERED.


Herbert Wilson, Chair
Town of Awendaw Board of Zoning Appeals

**Town of Awendaw
Board of Zoning Appeals
Application**

Town of Awendaw Planning Department
6971 Doar Road
Awendaw, SC 29429
Phone (843) 928-3100

Application Number _____ Date _____ Fee Paid _____

☒ **VARIANCE**

☐ **SPECIAL EXCEPTION**

☐ **APPEAL** - From Zoning Administrator's Decision (must be filed within 15 days of Administrator's decision)

Property Address 7200 N Highway 17

Tax Map Number(s) 683-00-00-081

Present Zoning District AG

Lot Dimensions roughly, 1000' x 1250' Acres 28.00

Deed Recorded: Book S387 Page 001 Date 11/8/01

Plat Recorded: Book EF Page 203 Date 11/28/01 Approved No. 0111-05

Site Plan Submitted?: ☒ yes ☐ no

Applicant Stantec / Erica Kindl

Address 4969 Centre Pointe Dr, Suite 200 Phone # (Home) 843-371-0781

N Charleston, SC 29418 Phone # (Work) 843-740-7700

Owner(s) (if other than applicant) Berkeley Electric Cooperative

Address PO Box 1234 Phone # (Home) -

Moncks Corner, SC 29461 Phone # (Work) 843-719-8519

Designation of Agent (complete only if owner is not applicant):

I (we) hereby appoint the person named as Applicant as my (our) agent to represent me (us) in this request for a zoning permit.

[Signature] Date 10/12/10
Owner Signature (s) Date

I (we) hereby certify that the information in this application and all attached documents is correct and I authorize the subject property to be inspected and posted with a notice of the hearing before the Board.

[Signature] Date 10/12/10
Applicant Signature (s) Date

Information required with application (check information submitted):

☒ Tax map indicating subject property

☒ Approved, recorded plat

☒ Scaled site plan indicating variance request (3 copies)

☒ Check or cash (made payable to Town of Awendaw)

Incomplete applications will be returned to the applicant.
Application Continued on the reverse side

Applicants for Variances must complete the following:

Applicant hereby appeals to the Board of Zoning Appeals for a variance from the strict application of the Unified Development Ordinance (UDO) to the property described on this application so that a zoning permit may be issued to allow use of the property in a manner shown on the attached site plan, described as follows:

see attached

Applicant must explain how strict application of the ordinance will result in an unnecessary hardship, and how the standards for a variance set by the UDO are met by answering the following questions:

1. What are the extraordinary and exceptional conditions pertaining to the particular piece of property?

see attached

2. Explain why these conditions do not generally apply to other property in the vicinity.

see attached

3. Explain how, 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.

see attached

4. Explain why authorization of the variance will not be of substantial detriment to the adjacent property or to the public good, and why the character of the district will not be harmed by the granting of the variance.

see attached

5. The following documents are submitted in support of this application (site plan must be submitted).

see attached

GJ/cell

Applicant Signature (s)

10/12/10
Date

Applicants for Special Exception must complete the following:

1. Applicant hereby appeals to the Board of Zoning Appeals for a special exception for use of the property described on this application as:

which is a permitted special exception under the district regulation in Section _____ of the Unified Development Ordinance (UDO).

2. Applicant will meet the standards in Section _____ of the UDO, which are applicable to the proposed special exception in the following manner.

3. The following documents are submitted in support of this application (site plan must be submitted).

Applicant Signature (s)

Date

Town of Awendaw Variance Application
October 12, 2010
Meeting Date: November 1, 2010
Variance Request: Removal of Grand Trees

Berkeley Electric Cooperative Awendaw Facility. The project includes an office building and warehouse area with warehouse building. The facility will also include a community room that will be available for public use.

Berkeley Electric Cooperative is requesting a variance to remove 17 Grand Trees (18" DBH & up) from the site. The tree species is as follows: 9 Gums, 6 Oaks, 1 Pine, and 1 Pecan.

1. This facility is needed in order for Berkeley Electric Cooperative to serve the Town of Awendaw's power needs. Berkeley Electric Cooperative needs full site utilization of the upland area. While the property is 28 acres, over 11 acres of the property are wetlands. While Berkeley Electric Cooperative needs the full use of the upland area, it is important to note that all trees within the wetland areas are being preserved. Please see the attached exhibit showing the aforementioned preserved area.
2. This project is for a utility provider, and I am not aware of any other utility company facility within the vicinity. Berkeley Electric Cooperative is also preserving a significant portion of its property.
3. If Berkeley Electric Cooperative were to leave the grand trees on site (upland area only), the trees would conflict with the warehouse area and also the vehicular flow of Berkeley Electric Cooperative's trucks. The main cluster of trees specifically conflicts with the location of the warehouse building and is also located in an area that is restricted by grading. All trees will be preserved within the on-site wetlands area (over 9 acres).
4. Berkeley Electric Cooperative is a utility company that works to serve the needs of the local community. The majority of the Grand Trees to be removed from the site are either Gums or Pines. These species of trees are known to create litter with gumballs or pine cones. These species also have evasive root systems which can damage paving and utility lines and cause further damage when fallen by heavy winds or storms. Also, many of the trees are growing along existing ditches which need to be re-graded for proper site drainage.
5. Recorded Plat, Site Plan, Landscape Plan



Charleston County

Copyright 2004

Charleston County GIS

4045 Bridge View Drive

North Charleston, SC 29405-7464

Legend

☐ Selected Features

Streets/Roads

☐ **Parcels**

2009 Color
Photos



BEC
-site

preserved

Applicants for Variances must complete the following:

Applicant hereby appeals to the Board of Zoning Appeals for a variance from the strict application of the Unified Development Ordinance (UDO) to the property described on this application so that a zoning permit may be issued to allow use of the property in a manner shown on the attached site plan, described as follows:

see attached

Applicant must explain how strict application of the ordinance will result in an unnecessary hardship, and how the standards for a variance set by the UDO are met by answering the following questions:

1. What are the extraordinary and exoeptional conditions pertaining to the particular piece of property?

see attached

2. Explain why these conditions do not generally apply to other property in the vicinity.

see attached

3. Explain how, 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.

see attached

4. Explain why authorization of the variance will not be of substantial detriment to the adjacent property or to the public good, and why the character of the district will not be harmed by the granting of the variance.

see attached

5. The following documents are submitted in support of this application (site plan must be submitted).

see attached

GJ/cell 10/12/10
Applicant Signature (s) Date

Applicants for Special Exception must complete the following:

1. Applicant hereby appeals to the Board of Zoning Appeals for a special exception for use of the property described on this application as:

which is a permitted special exception under the district regulation in Section _____ of the Unified Development Ordinance (UDO).

2. Applicant will meet the standards in Section _____ of the UDO, which are applicable to the proposed special exception in the following manner.

3. The following documents are submitted in support of this application (site plan must be submitted).

Applicant Signature (s) Date

Town of Awendaw Variance Application

October 12, 2010

Meeting Date: November 1, 2010

Variance Request: Buffer Reduction

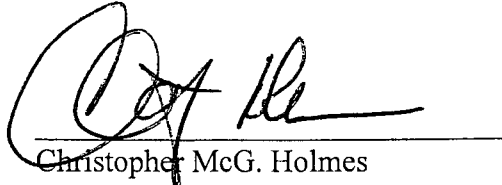
Berkeley Electric Cooperative Awendaw Facility. The project includes an office building and warehouse area with warehouse building. The facility will also include a community room that will be available for public use.

Berkeley Electric Cooperative is requesting a variance on behalf of the Town of Awendaw for a buffer reduction for a future water main that will be installed and operated by the Town of Awendaw. Code requires a 20' buffer and the variance request is to reduce the buffer to 5'. Per Code, the 20' buffer was to have (5) understory trees and (4) canopy trees planted per every 100 linear feet. Because of the Town's future water easement, the 5' is to be planted with (5) different varieties of large evergreen shrubs in lieu of the understory and canopy trees. Once these shrubs are mature, they will create a solid, evergreen wall approximately 10 – 12' tall.

1. This variance request is a result of a meeting with Berkeley Electric Cooperative and the Town of Awendaw on May 18, 2010. At this meeting, the Town and Berkeley Electric Cooperative discussed the Town's water main extension plans and Berkeley Electric Cooperative's site development plans. Berkeley Electric Cooperative is going to permit and drill an 8" well (instead of a 6" which is needed for the Berkeley Electric Facility) so that the Town can utilize the well for the third phase of the Hwy 17 water main extension. In order for the Town to tie a future main line into the well, a 20' clear area must remain between Hwy 17 and the Berkeley Electric Cooperative well for the installation of this water main.
2. This is a unique circumstance that Berkeley Electric Cooperative is assisting the Town with a part of the future water main extension plans and permitting.
3. This is for the benefit of the Town of Awendaw and denial would hinder the Town of Awendaw's future growth and water main extension plans.
4. This variance is for the public good, as it will assist the Town when the plans for Phase 3 of the water main extension commences. Furthermore, the goal of the Buffer requirements in Town's Code is to create an opaque buffer to neighboring properties. The planting of the evergreen shrubs will still meet this goal by producing a dense evergreen screen.
5. Recorded Plat, Site Plan, Landscape Plan.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material.



Christopher McG. Holmes
222 W. Coleman Blvd.
Mt. Pleasant, SC 29464
(843) 388-2966
Attorney for Appellants

December 6, 2013

RECEIVED
DEC 09 2013
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J. C. Nicholson, Jr., Judge

Case No. 2011-CP-10-2028

Joseph M. Bettelli, Jr. and Susan B. Bettelli.....Appellants,

v.

Town of Awendaw Board of Zoning Appeals and
Berkeley Electric Cooperative,.....Respondents.

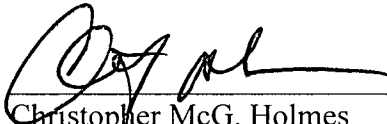
PROOF OF SERVICE

The undersigned hereby certifies that on the 6th day of December, 2013, he served the Record on Appeal via United States mail, first class, postage prepaid, on the following parties and counsel of record as listed below:

Dwayne M. Green, Esq.
602 Rutledge Avenue
Charleston, SC 29403
Attorney for Respondent
Town of Awendaw Board of Zoning Appeals

J. Jay Hulst, Esq.
PO Box 1288
Moncks Corner, SC 29461
Attorney for Respondent
Berkeley Electric Cooperative

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DEC 09 2013
SC Court of Appeals


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