

IN THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Larry B. Hyman, Jr.
The Honorable Benjamin H. Culbertson

Appellate Case No.: 2018-001221
Civil Action No.: 2016-CP-26-02377

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SC Court of Appeals

In Re: Venture Engineering, agent for DT LLCRespondent

vs.

Horry County Zoning Board of AppealsAppellant

APPELLANT'S BRIEF

April 24, 2019

Emma Ruth Brittain, SC Bar #5298
Matthew R. Magee, SC Bar #15896
Thomas & Brittain, P.A.
Post Office Box 1290 (zip 29578)
Myrtle Beach, South Carolina
Telephone: 843-692-2628
Fax: 843-692-0928
E-mail: erbrittain@myrlaw.com
*Attorneys for the Appellant Horry County
Zoning Board of Appeals*

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STATEMENT OF ISSUE ON APPEAL

Whether the circuit court erred in consolidating separate appeals from different decisions rendered by local zoning authorities, in considering evidence outside the certified records in those cases, and in failing to properly apply the deferential standard of review.

STATEMENT OF THE CASE

This is an appeal of two decisions made by Horry County zoning authorities. The decisions were made separately and appealed separately to circuit court. They were later consolidated by the circuit court for judicial review even though statutory law mandates that the appeals require separate and different standards of review.

The first appeal (the “Zoning Appeal”) was made on behalf of Dennis Thompkins and concerns the interpretation of the County’s existing zoning ordinance. (R. p. 75). The second appeal (the “Variance Appeal”) was made by Venture Engineering, as Agent for DT LLC, and concerns the Zoning Board’s decision to deny a variance from the zoning ordinance. (R. p. 349).

The County Zoning Administrator entered decisions that were adverse to the applicants in both instances. The County’s Zoning Board of Appeals affirmed those decisions. The applicants separately appealed the Zoning Board’s decisions to circuit court. Those cases were captioned:

(a) *Dennis Thompkins – Bellamy Law firm, agent for DT LLC vs. Horry County Zoning Board of Appeals*, Civil Action No.: 2015-CP-26-3791 (the Zoning Appeal) (R. p. 75); and

(b) *Venture Engineering, Agent for DT LLC v. Horry County Zoning Board of Appeals*, Civil Action No.: 2016-CP-26-2377 (the Variance Appeal) (R. p. 349).

The Zoning Appeal

The Zoning Appeal concerns the Zoning Board’s Order dated May 11, 2015. (R. p. 58). Here, the applicant contended the Zoning Board erred in determining that the Horry County Zoning Code did not allow the applicant to receive and recycle on its property commercial loads of construction and demolition concrete materials from third-party demolition contractors. The Board held the applicant could conduct such a recycling business as an “accessory use only,” meaning it could process its own construction and demolition material, but not outside materials.

The Variance Appeal

The Variance Appeal concerns the Zoning Board's Order dated March 14, 2016. (R. p. 54). Here, the applicant sought a variance from strict application of the County's zoning code. The Board denied the application after finding it did not meet the criteria for a variance.

Brief Summary of Proceedings in Circuit Court

After the Zoning Appeal was initiated in circuit court, the applicant filed a second Notice of Appeal with that court.¹ (R. p. 80). The County moved to strike this filing alleging it was untimely, it contained documents that were not considered by the Zoning Board, and that those documents were accordingly not part of the duly certified copy of the proceedings held before the Board. (R. p. 366; R. p. 369; R. p. 536). The circuit court denied the motion to strike in an order dated October 12, 2016. (R. p. 44).

The County also filed a motion to strike the Variance Appeal because the appeal included allegations pertaining to the Zoning Appeal. (R. p. 398; R. p. 401). The County claimed those allegations were outside the scope of the variance request and the Variance Appeal. The circuit court denied this motion in an order dated October 13, 2016. (R. p. 42).

The circuit court consolidated the two appeals in an order dated October 12, 2016. (R. p. 388; R. p. 51). The appeals were consolidated under Civil Action No.: 2016-CP-26-2377, *Venture Engineering, Agent for DT LLC v. Horry County Zoning Board of Appeals*.²

The circuit court heard the consolidated appeals January 5, 2017, and issued an order April 5, 2018, reversing the Zoning Board of Appeals in both cases. (R. p. 13). A motion for costs was

¹ Both a "First" (R p. 75) and "Second" Notice of Appeal (R. p. 80) were filed under the same caption *Dennis Thompkins – Bellamy Law firm, agent for DT LLC vs. Horry County Zoning Board of Appeals*, Civil Action No.: 2015-CP-26-3791.

² The County opposed Respondent's Motion to Consolidate the Zoning and Variance appeals, setting forth its objections to consolidation in its Responses to Appellant's Motion to Consolidate Actions dated June 6, 2016. (R. pp. 390 and 410).

filed against the County. (R. p. 420). An order granting the motion was entered May 31, 2018. (R. pp. 11 and 65).

The County filed a motion to reconsider. (R. p. 414). An order denying the motion to reconsider was filed May 31, 2018. (R. pp. 8 and 65).

On June 27, 2018, the County served its notice of appeal. The County has appealed the order denying its motion to reconsider (R. p. 8), the order taxing the County with costs (R. p. 11), the order reversing the Zoning Board's decisions (R. p. 13), the two separate orders denying its motions to strike (R. pp. 42 and 44), and the order consolidating these cases (R. p. 51).

STATEMENT OF FACTS

This case concerns a parcel of property located at 310 Piling Road in the Pine Island Residential District of Myrtle Beach. The property is located in a local historic neighborhood area in Horry County and is zoned Limited Industrial (LI). (R. 493 (p. 44) lines 17-19). "Limited Industrial" allows a wide variety of uses. It forbids, however, light manufacturing that produces "noise, vibration, smoke, gas, fumes, odor, dust, fire, hazards, dangerous radiation or any other conditions which constitute a nuisance[.]" Horry County Code of Ordinances, § 717. (R. p. 597).

Since 1981, and prior to the property's zoning, the property has housed a construction heavy equipment business known as Thompkins and Associates, Inc. (hereinafter "Respondent"). In 2007, the County Zoning Department approved recycling of the construction and demolition debris generated by Respondent's heavy equipment business as an "accessory use" to that business. (R. p. 96, lines 1-4). Pursuant to the Horry County Zoning Code, an "accessory use" is defined as:

a use of land or of a building, or portion thereof, which is customarily incidental and subordinate to the principal use of the land or building.

Horry County Code of Ordinances, No. 67-88, 4-18-89, 20 § 401.5. (R. p. 596). Importantly, the

Zoning Department did not approve handling construction and demolition debris generated by outside or third-party construction and demolition businesses. Consistent with the definition of “accessory use,” approval was limited to recycling construction and demolition materials that were incident to the heavy equipment business on the property.

Before formally initiating any of these appeals with the Zoning Board, Respondent specifically inquired of the Zoning Board Administrator, Rennie Mincey, whether its business could accept commercial loads of concrete materials for processing from other contractors (*i.e.* by third-party companies not owned by Respondent) under the Horry County Zoning Code. (R. p. 110, lines 10-13; R. p. 122, lines 23-25 – p. 123, line 1). Ms. Mincey determined that Respondent’s recycling activity on the property:

is approved as an accessory use to [the] Construction and Heavy Equipment business . . . **and is not permitted to receive and process materials from other contractors.**

(R. p. 96, lines 17-24) (emphasis added).

Pursuant to S.C. Code Ann. § 6-29-800(B), Respondent appealed the Zoning Administrator’s determination, and appeared before the Zoning Board on February 9, 2015.

At the hearing, the Zoning Board deferred the matter for thirty days for further review. (R. p. 131, lines, 5-10). The matter was subsequently brought up for review and at the March 9, 2015 Zoning Board meeting it was again deferred after a lengthy discussion. (R. p. 219, lines 1-9).

The matter was considered by the Board again on April 13, 2015. Respondent’s counsel argued at the hearing that Respondent should be allowed to accept commercial loads from outside contractors, contending Respondent had been “taking loads of outside material all along,” even though no such “use” had at any time been approved by Horry County and such “use” was contrary to the limited and conditional “accessory use” approved by the County. (R. p. 304, lines 8-10).

At this hearing, the Zoning Board voted to overturn the Zoning Administrator's decision, finding:

[a]n acceptable accessory use of the applicant's property may be acceptance of outside commercial loads of recoverable materials as a recovered materials processing facility as defined respectively by SC Code, Subsection 44-96-40(34) and (35).

(R. p. 308, lines 11-19).

At a later meeting on May 11, 2015, however, the Zoning Board voted unanimously to reconsider its April 13, 2015 decision. (R. p. 317, lines 12-25 – p. 318, 1-4). At this meeting, the Zoning Board heard extensive testimony from local residents who lived in the historic neighborhood and adjacent to where Respondent's business was located regarding Respondent's discontinuous use of the property. The local residents vigorously objected to a decision allowing Respondent to commence processing outside commercial construction and demolition debris loads. John Easter, Jr., who has lived less than a mile from Respondent's property since 1980, testified that he had seen no activity on the property for the last four or five years. (R. p. 330, lines 21-25 – p. 331, line 1); Deborah Beecham testified that she attended a cookout at her church near Appellant's property a month prior to the hearing and the lot had been "cleaned off." Ms. Beecham further testified that she recalled "a lot of noise when that other place was over there...the shaking noise, the site dust. That's irritating... we have family over there and the church." (R. p. 323, lines 20-25 – p. 324, lines 1- 14); Another resident, Linda G. Denison testified that when she first moved to the area ten years ago, it was "a nice quiet community" where one could "ride bicycles and enjoy the community." She further testified that "when the cement plant was there, it kept us up all night [be]cause they roll all night, the trucks did" and that three to four years ago "when the cement plant was there before they closed down, they was hauling cement at night." (R. p. 325, lines 6-18; R. p. 326, lines 23-25 – p. 327, lines 1-6). Sybil Anderson testified "I hadn't seen or heard anything for the past couple of years" and that "the dust was an issue and they would

operate at night with loud noises.” (R. p. 332, lines 23-25 – p. 333, lines 1-2). In light of the neighbor’s convincing testimony and the testimony of Ms. Mincey that construction and demolition had been approved as an accessory use only pursuant to the Code provisions, the Zoning Board voted unanimously to uphold the Zoning Administrator’s decision that this activity could only be an “accessory use” to Respondent’s heavy equipment business and that Respondent was not permitted to receive and process materials from outside contractors. (R. p. 342, lines 7-22).

The Zoning Board issued its final order on May 11, 2015. (R. p. 58). Respondent appealed this order on May 21, 2015. (R. p. 75).

In December of 2015 Respondent filed a second Notice of Appeal (R. p. 80) to which it attached numerous documents that were not a part of the Certified Record on Appeal filed June 11, 2015.³ (R. p. 536). Accordingly, the County moved to disallow these documents (R. p. 344), to strike the filing of the second notice of appeal (R. pp. 366 and 369), and requested that the circuit court affirm the Zoning Board’s order.

Respondent filed a variance request with the Horry County Zoning Board of Appeals on April 14, 2016. The Zoning Board of Appeals heard Respondent’s variance request on March 14, 2016, and issued its order denying the request that same day. (R. p. 54). At this meeting, the Zoning Board heard additional testimony from local residents who lived in the historic neighborhood and adjacent to where Respondent’s business was located.

Janice Dowe, who lives diagonally across from Respondent’s business, testified “I feel,

³ One of these documents is the Affidavit of Roland Meyer, which is of no legal significance because Respondent filed no variance for grandfathered use nor was the Affidavit submitted to the Zoning Board and made a part of the Record. (R. p. 312). *See Massey v. Cty. of Greenville Bd. of Zoning Adjustments*, 314 S.C. 193, 532 S.E.2d 885 (Ct. App. 2000) (holding that the circuit court erred in allowing the record on appeal to be supplemented with testimony that was not presented at the zoning board hearing).

first of all, that there has been false about thirty-five years of this going on 'cause we've lived out there that long and we didn't have this crushing when we originally came out there. There wasn't crushing or any kind of thing." Ms. Dowe also testified that "Now, we have a huge community of families with young children, older people and to have this crushing;" "I spent thirty-five years teaching in Horry County to pay for my home and I want to be able to sit down and enjoy it now that I'm retired. I don't want to hear this mess all day long." Ms. Dowe also noted that she had developed asthma and stated "I don't want this dust." (R. p. 492 (p. 39) lines 22-25 – p. 492 (p. 40), lines 1-11; R. p. 493 (p. 42), lines 6-10 and 14-15).

During the closing of his testimony, Mr. Wesley Finley eloquently expressed his concerns with the requests before the Zoning Board, stating:

There is something that you cannot take away from us and that's our heritage and that's the heritage of this community. When I looked up this community on Wickapedia, it told me that it was started in the 1800's and when I did more research, I knew that to be false because right beside the St. Mary Missionary Baptist Church, behind there's a cemetery with graves dating back to 1700. . . .So, there's a great heritage about that community that I'm talking about. . . . If you don't think they need serenity then go into the City on Carver Street and Dunbar Street. That's where I grew up and to get away from that and to be raised by a loving grandfather in a community like this, you can't take that away. There is not a dollar that you can put on that. I love my community and I will always stand with my community.

(R. p. 494 (p. 45), lines 18-25 – R. p. 494 (p. 46), lines 1-21).

In the hearing, Respondent requested variances from three of the Horry County Zoning Code's requirements. The granting of the requests, in effect, would have reclassified Respondent's property from LI—Limited Industrial zoning to MA3—Heavy/Intense Manufacturing and Industrial, even though the property is located in Pine Island, a local historic neighborhood area. The requested variances were: (1) a variance from the required set-back for the Pine Island Residential District from 500 feet (minimum) to 0 feet; (2) a variance from the required set-back

zone relating to landscaping/buffering from “Enhanced” to the use of the existing landscaping/buffering (again, adjacent to the Pine Island neighborhood); and (3) a variance from Zoning Code Section 1202(A)(5) which requires aggregate processing plants to be located in fully enclosed structures (to capture the particulates generated by crushing). (R. p. 483 (p. 2), lines 16-25 – R. p. 483 (p. 4), lines 1-5). Granting a complete waiver from the “enclose structure” requirement would allow concrete “crushing” to occur in the open air, releasing particulates into the surrounding area of the neighborhood.

Again, the Zoning Board denied all three requested variances. Respondent filed an appeal on April 14, 2016. (R. p. 349). The County filed its Return on June 1, 2016. (R. p. 359). Respondent then moved to consolidate the two appeals. (R. p. 388).

As noted above, the County filed motions to strike in both actions and opposed Respondent’s motion to consolidate the two cases. (R. pp. 366 and 398; R. pp. 390 and 410).

ARGUMENT

In its review of the Zoning and Variance Appeals, the circuit court failed to give the requisite statutory deference to the Zoning Board’s factual determinations and reviewed evidence outside the official records of those appeals. In so doing, the court impermissibly substituted its own judgment for that of the Board, failing to adhere to the scope of review mandated by statute.

A. The circuit court failed to limit its review to the certified record.

Pursuant to S.C. Code Ann. § 6-29-840 a reviewing court must consider the appeal based on the record before it and “may not take additional evidence.” If a reviewing court determines the certified record in a Zoning Appeal is insufficient for review, it may remand the matter to the Zoning Board of Appeals for rehearing. South Carolina Code Ann. § 6-29-840(A) (Supp. 2015). This, the circuit court did not do. South Carolina Code Ann. § 6-29-840(A) contains

straightforward instructions that “in determining the questions presented by the appeal, the circuit court must determine only whether the decision of the Board is correct as a matter of law.” As this Court has previously recognized:

It is a well settled proposition of zoning law that a court will not substitute its judgment for the judgment of the board. The court may not feel that the decision of the board was the best that could have been rendered under the circumstances. It may thoroughly disagree with the reasoning by which the board reached its decision. It may feel that the decision of the board was a substandard piece of logic and thinking. None the less, the court will not set aside the board’s view of the matter just to inject its own ideas into the picture of things.

Furr v. Horry County Zoning Bd. of Appeals, 411 S.C. 178, 183, 767 S.E.2d 221, 224 (Ct. App. 2014) (quoting *Restaurant Row Assocs. v. Horry County*, 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999)).

Here, Respondent’s notice of appeal for the Variance Appeal referred to the Zoning Board’s findings *in the Zoning Appeal*. It also referred to additional materials which were not a part of the Certified Record in the Variance Appeal. (R. p. 498). The County moved to strike these portions of appeal and the additional materials in accordance with South Carolina Code § 6-29-840(A) (Supp 2015), yet, this motion was denied. (R. pp. 398 and p. 401). That decision was clear error, as the statute explains the circuit court’s review is limited to the certified record, that the circuit court may not take additional evidence, and that a remand is required if the record is not sufficient for review.

The certified record was filed in accordance with South Carolina Code Ann. §§ 6-29-820(A) and 6-29-830(A) (Supp. 2015) with the Horry County Clerk of Court’s office on June 11, 2015. (R. p. 536). The legislature specifically defined the contents of and the method of filing a record on appeal involving the appeal of decisions of a zoning board of appeals. Section 6-29-830(A) provides:

Upon the filing of an appeal with a petition as provided in Section 6-29-820(A) or Section 6-29-825(F), the clerk of the circuit court must give immediate notice of the appeal to the secretary of the board and **within thirty days from the time of the notice, the board must file with the clerk a duly certified copy of the proceedings held before the board of appeals, including a transcript of the evidence heard before the board, if any, and the decision of the board including its findings of fact and conclusions.**

Section 6-29-820(A) provides:

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

Finally, section 6-29-840(A) provides:

At the next term of the circuit court or in chambers, upon ten days' notice to the parties, the presiding judge of the circuit court of the county must proceed to hear and pass upon the appeal on the certified record of the board proceedings. **The findings of fact by the board of appeals must be treated in the same manner as a finding of fact by a jury, and the court may not take additional evidence. In the event the judge determines that the certified record is insufficient for review, the matter may be remanded to the zoning board of appeals for rehearing.** In determining the questions presented by the appeal, the court must determine only whether the decision of the board is correct as a matter of law.

These statutes forbid giving the circuit court documents or other material beyond what is contained in the "duly certified copy of the proceedings held before the Board of Appeals." Thus, the circuit court should have stricken these items and disallowed them from consideration. The governing statutory provisions explicitly state that a remand is the appropriate action to be taken by the circuit court if it determines the Certified Record is insufficient for review. South Carolina Code Ann. § 6-29-840(A) (Supp. 2015).

South Carolina's appellate courts have consistently disallowed similar attempts to supplement the record in zoning appeals. In *Massey v. Cty. of Greenville Bd. of Zoning Adjustments*, 341 S.C. 193, 532 S.E.2d 885 (Ct. App. 2000), this Court held the circuit court erred

in allowing the record on appeal to be supplemented with testimony that was not presented at the zoning board hearing. This Court also held in *Austin v. Board of Zoning Appeals* that the circuit court did not abuse its discretion in refusing to supplement the record on appeal, explaining,

[w]hen reviewing a [b]oard decision, the circuit court sits as an appellate court. Its review is strictly limited to the facts and arguments raised to the [b]oard below.

362 S.C. 29, 38, 606 S.E.2d 209, 214 (Ct. App. 2004). There, the plaintiff sought to supplement the record with an additional plat, contending the plat was admitted into evidence at the zoning board hearing but had not been included in the certified record by mistake. *Id.* The plaintiff pointed to the transcript of the hearing where a board member “asked a member of the Town’s Planning Staff whether she provided the Board a copy of a plat she had just referenced” *Id.* The Court, however, could not discern from the reference in the transcript that the additional plat was introduced into the record or relied on by the zoning board. *Id.* Accordingly, the Court upheld the circuit court’s order denying the plaintiff’s motion to supplement the record. *Id.* at 40.

Thus, Exhibits A-L attached to Appellant’s April 14, 2016, notice of appeal in the Variance Appeal were not an appropriate part of the official record on appeal. (R. pp. 58, 61, 90-316). Additionally, Respondent attempts to circumvent the statutory scope of review for variances by including paragraphs 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22 and 23 in this appeal, which relate solely to the Zoning Appeal. The controlling statutes and case law limit the scope of review to the evidence presented to the Zoning Board at the hearings. Respondent’s “exhibits” which were not considered by the Zoning Board should not have been included in the record or considered.

B. The circuit court erred in consolidating the cases and failed to properly apply the separate standards of review.

The circuit court also erred in granting the Respondent’s motion to consolidate the Zoning

and Variance Appeals because the appeals involved separate zoning actions, are governed by different legal standards, and require different factual analyses.

In the Variance Appeal, Respondent requested variances from the requirements of the Horry County Zoning Ordinance. Variance appeals are governed by South Carolina Code Ann. §6-29-800(A)(2) (Supp. 2016) which authorizes the Zoning Board to grant a variance request when the application of the zoning ordinance would cause a substantial hardship and when the board makes and explains in writing that:

- (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 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.

The Zoning Appeal, by contrast, is an appeal of the Zoning Administrator's decision that the site of Respondent's waste and concrete transfer business is not allowed to accept commercial loads of construction and demolition concrete materials for processing from other contractors because of site's zoning.⁴ As described earlier, the Zoning Administrator determined that the waste and concrete transfer use on property was approved only as an "accessory use" to the construction and heavy equipment business on that site and that the site was not permitted to receive and process materials from other contractors under the provisions of Horry County's zoning ordinance. The factual record established that such uses resulting in hardships and a

⁴ In the Zoning Appeal, Respondent appealed the Zoning Administrator's decision pursuant to South Carolina Code Ann. § 6-29-800(B) (Supp. 2015) which "allows an appeal to the zoning board of any person agreed by decision of any officer, department, board, or bureau of the . . . county."

decreased quality of living to the inhabitants of the neighborhood.

The appeal from the Zoning Administrator's decision to the Board was initiated pursuant to 6-29-800(A)(1), a different statute than the one applicable to variance requests. The circuit court's scope of review of the Zoning Board's decision is supplied by section 6-29-840, which explains:

The findings of fact by the board of appeals must be treated in the same manner as a finding of fact by a jury, and the court may not take additional evidence. In the event the judge determines that the certified record is insufficient for review, the matter may be remanded to the zoning board of appeals for rehearing. In determining the questions presented by the appeal, the court must determine only whether the decision of the board is correct as a matter of law.

Put simply, these two appeals involved the same property, but they were truly two different cases. They had different factual records. The Variance Appeal involves the set of facts set forth in the transcript of the hearing held on March 14, 2016, with different witnesses and different standards. The Variance Appeal also involves the statutory standards for a variance: unreasonable hardship to the owner as well as extraordinary conditions pertaining to the property and the absence of a detriment to surrounding property owners. The Zoning Appeal involves the Zoning Administrator's interpretation of the existing zoning ordinance and was based on different arguments, witnesses, and exhibits. The appeals were of different orders addressing different County Code provisions and different governing statutes. By statute, each appeal was limited to a different certified record.

The Circuit Court's conflating of the zoning case and the variance case, each of which triggered a different statutorily mandated legal analysis for review, resulted in a mishmash application of the record evidence, rather than a methodical analysis of each case pursuant to their separate factual records and applicable legal standards. Moreover, in neither the zoning case nor the variance case has Respondent satisfied its burden of demonstrating reversible error in the

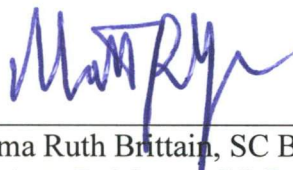
Board's factual findings. Respondent cannot meet that burden. The Zoning Administrator's determination that the waste and concrete transfer use on the property was approved only as an "accessory use" is not clearly erroneous, and the Zoning Board's decision to deny a variance does not suffer from an error of law.

CONCLUSION

The Circuit Court erred in consolidating the Zoning and Variance Appeals. It also failed to properly apply the standard of review, which required heavy deference to the Zoning Board's findings of fact, and it expanded its review of the evidence beyond the certified record, violating the statute limiting review to the certified record. This resulted in hardships to the inhabitants of a historic country neighborhood. This Court should reverse the circuit court and affirm the decisions of the County zoning authorities, and reverse the circuit court's Order dated June 12, 2018, granting Respondent's motion for costs.

Respectfully submitted,

April 24, 2019



Emma Ruth Brittain, SC Bar #5298
Matthew R. Magee, SC Bar #15896
Thomas & Brittain, P.A.
Post Office Box 1290 (zip 29578)
Myrtle Beach, South Carolina
Telephone: 843-692-2628
Fax: 843-692-0928
E-mail: erbrittain@myrlaw.com
Attorneys for the Appellant

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

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Emma Ruth Brittain, SC Bar #5298
Matthew R. Magee, SC Bar #15896
Thomas & Brittain, P.A.
Post Office Box 1290 (zip 29578)
Myrtle Beach, South Carolina
Telephone: 843-692-2628
Fax: 843-692-0928
E-mail: erbrittain@myrlaw.com
*Attorneys for the Appellant Horry County
Zoning Board of Appeals*