

IN THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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APPEAL FROM Horry COUNTY  
Court of Common Pleas

Honorable Benjamin H. Culbertson, Circuit Court Judge

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

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**RECEIVED**

MAY 08 2019

SC Court of Appeals

In Re: Venture Engineering, agent for DT LLC ..... Respondent,

vs.

Horry County Zoning Board of Appeals ..... Appellant.

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**RESPONDENT'S FINAL BRIEF**

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## **STATEMENT OF ISSUE ON APPEAL**

Whether the Circuit Court correctly re-instated the March 9, 2015 Order of the Horry County Zoning Board of Appeals over-ruling the arbitrary decision of the Horry County Zoning Administrator.

## STATEMENT OF THE CASE

Respondent “In Re: Venture Engineering, agent for DT, LLC” (hereinafter, “Thompkins”) is the representative name assigned below to reference Dennis Thompkins, the owner of real property located at 310 Piling Road in the Myrtle Beach area of Horry County. Thompkins owns and operates Thompkins & Associates, Inc., which has been located and operated on his property since 1981. (R. p. 81) This was six (6) years prior to the enactment of the Horry County Zoning Ordinance. (R. p. 81) Though the property was not zoned when Thompkins’ family business began operations in 1981, it has throughout the proceedings described herein been zoned Limited Industrial (LI). (R. p. 81)

Thompkins is in a business requiring heavy construction equipment because it has, since 1981, operated a Construction & Demolition (“C&D”) and Concrete Transfer business on site. (R. p. 81) The heavy equipment required by Thompkins’ business has historically been employed for the purpose of facilitating Thompkins’ C&D facility at this property. (R. p. 81) In 1987, Horry County enacted its first Zoning Ordinance, and, in 2007, Thompkins was required to apply for a business license in order to continue operating in his new zoning district. (R. p. 82) The Zoning Administrator at that time, Roland Meyer (hereinafter “former Zoning Administrator Meyer”) issued business license ID number 2576, to Thompkins for his “Construction Heavy Equipment.” (R. p. 91) Former Zoning Administrator Meyer also approved “C&D Recycling and Transfer Concrete, Recycling and Processing” as an accessory use to Thompkins’ “Construction Heavy Equipment” business and issued business license ID number 23387 to Thompkins for his C&D business. (R. p. 92)

At all times since 1981, the Thompkins family business has operated its C&D business by crushing, processing, and/or repurposing both: (1) C&D material from its own demolition projects

and (2) C&D waste material received from haulers who deliver materials from demolition jobs completed by outside sources. (R. p. 82) These C&D materials, from both internal and external sources have, since 1981, been repurposed through a crushing process by Thompkins as base material which is then sold back into the local construction industry, rather than burdening the infrastructure and life-span of the landfill on Highway 90 in Conway. (R. p. 82)

In or about late 2014, Thompkins considered accepting an investor named John Taylor. (R. p. 82) As part of his due diligence before making an investment in Thompkins, Mr. Taylor requested a zoning compliance letter from the then current Horry County Zoning Administrator, Rennie Mincey (hereinafter, "Zoning Administrator Mincey"), to ensure Thompkins was complying with the county's zoning requirements. (R. pp. 82-83) In response to Mr. Taylor's request, On December 3, 2014, Zoning Administrator Mincey signed a letter addressed to Mr. Taylor's attorney which summarized former Zoning Administrator Meyer's approval of Thompkins for "Construction and Heavy Equipment" with an accessory use of "C&D Recycling and Transfer Concrete, Recycling and Processing." (R. p. 93)

In her letter, Zoning Administrator Mincey specified that Thompkins may continue its accessory use of C&D Recycling and Transfer Concrete, Recycling and Processing as long as the approved "Construction Heavy Equipment" business continues operating. (R. p. 93) The letter made no mention of whether Thompkins' property was properly zoned to accept loads of materials from outside sources for recycling purposes. (R. p. 93)

Shortly after receiving a copy of Zoning Administrator Mincey's zoning compliance letter, Thompkins was verbally informed that pursuant to Ms. Mincey's decision, the receiving of loads of C&D or concrete materials from outside sources was not in compliance with Thompkins' accessory use business license issued in 2007. (R. p. 83) This was the first instance in which

Thompkins had ever been informed Horry County was of the opinion receiving outside loads of C&D recycling materials was not in compliance with Respondent's business license and/or zoning. (R. pp. 83-84) Thompkins appealed Zoning Administrator Mincey's decision to the Horry County Zoning Board of Appeals (the "ZBA") on or about January 8, 2015. (R. p. 84)

On February 9, 2015, the ZBA first heard Thompkins' appeal. At this meeting, Mr. Thompkins, Danny Allen, and Harold Blye gave sworn testimony. Specifically, Danny Allen testified he had been hauling materials from outside sources to Thompkins for years and he did not understand why Thompkins would not be able to operate in the same manner he had been for years. (R. p. 112, lines 3-18) However, the ZBA chose to defer its decision for thirty (30) days and requested Thompkins provide the ZBA with additional information at its next meeting in order to demonstrate whether Thompkins had been receiving outside loads for C&D recycling and transfer concrete, recycling and processing prior to the issuance of its accessory business license in 2007. (R. pp. 127-132)

On March 9, 2015, Thompkins' appeal of Ms. Mincey's decision was before the ZBA for the second time. At this meeting, Ronald Gilkerson spoke on behalf of Thompkins. (R. pp. 175-183) Also at the March 9, 2015 meeting, Thompkins provided the ZBA with the documentation it requested, evidencing the fact that Thompkins had been receiving outside loads for many years prior to 2007. (R. p. 144, lines 20-22; R. pp. 221-265; R. pp. 266-297) Again, the ZBA chose to defer its decision for thirty (30) days in order to consult with its legal representative(s). (R. pp. 218-219)

On April 13, 2015, Thompkins' appeal was before the ZBA for a third time. At that meeting, counsel for Thompkins presented the ZBA an affidavit from Former Zoning Administrator Meyer (who had issued the Thompkins business license) stating he would not have

felt uncomfortable, in 2007 (when he was the Zoning Administrator), in permitting Thompkins to receive outside loads for C&D recycling and transfer concrete, recycling and processing purposes. (R. p. 302, lines 9-18; R. p. 311) At this meeting, the ZBA overruled Zoning Administrator Mincey's finding that Thompkins could not accept outside loads for C&D recycling by a 5 to 3 vote. (R. pp. 308-309) In doing so, the ZBA found that **“[a]n acceptable accessory use of [Thompkins'] property may be acceptance of outside commercial loads of 'Recovered Materials' as a 'Recovered Materials Processing Facility' as defined, respectively, by S.C. Code, Subsections 44-96-40(34) and (35).”** (R. p. 308, lines 11-17)

Shortly after the Board overturned Zoning Administrator Mincey's decision, Thompkins was informed an individual from the Horry County Solid Waste Authority was contacting members of the ZBA in an effort to persuade the ZBA members to reconsider their votes. Thompkins' attorney addressed this concern by way of a letter addressed to counsel for Horry County. (R. pp. 313-315) Subsequently, Thompkins was informed the ZBA was going to entertain a motion to reconsider its earlier vote overturning Zoning Administrator Mincey's decision at their May 11, 2015 ZBA meeting. (R. pp. 86-87)

At the ZBA's May 11, 2015 meeting, the board moved to reconsider its vote. (R. p. 317, lines 9-11) Although Thompkins' appeal of Zoning Administrator Mincey's decision was not published on the meeting agenda, nor publicized in any way prior to the meeting, numerous persons who claimed to reside near the Thompkins property were present at the meeting and voiced unfounded complaints about Thompkins' business. (R. pp. 322-336) After allowing testimony by these persons, the ZBA took another vote as to whether uphold or overturn Zoning Administrator Mincey's findings. On this vote, and in direct contrast to their decision at the April 13, 2015 ZBA meeting, the board unanimously upheld Zoning Administrator Mincey's decision, prohibiting

Thompkins from receiving outside loads of materials for C&D recycling and transfer concrete, recycling and processing under its business license. (R. p. 342, lines 2-22)

**Prior to the proceedings before the ZBA, Thompkins had never received any complaints regarding its business, nor had he ever been instructed the County was of the opinion Thompkins was not in compliance with its business license.** (R. p. 87)

Thompkins filed his Notice of Appeal regarding the ZBA's May 11, 2015 Order, on May 22, 2015. (R. p. 75) Prior to setting forth specific grounds on appeal to the Circuit Court, Thompkins requested pre-litigation mediation pursuant to S.C. Code § 6-29-820(B)(2) in an attempt to resolve the matter in good faith. Pre-litigation mediation was conducted on November 4, 2015 and resulted in an impasse. (R. p. 90)

Following the above-described events, counsel for Thompkins appeared in court on January 27, 2016 anticipating defending against motions filed by Horry County. At court, counsel for Thompkins discussed this matter at length with counsel for Horry County, and the two parties agreed to stay the matter to allow Thompkins an opportunity to petition the county for a variance. (R. p. 356) This agreement resulted in a Consent Order of Continuance. (R. p. 356)

Thereafter, on February 5, 2016 Venture Engineering, filed a petition for a variance on behalf of Thompkins. The ZBA heard Thompkins' request for a variance on March 14, 2016 and voted against granting a variance. (R. p. 497) On April 14, 2016, Thompkins appealed the denial of the variance to the Circuit Court. (R. pp. 349-358)

On December 29, 2015, the County filed a Motion to Strike Thompkins' first appeal as being untimely filed, or, in the alternative, to strike several of the exhibits attached by Thompkins in that appeal. (R. pp. 366-375) The Court denied the County's Motion to Strike, holding that Thompkins' Notice of Appeal was timely filed pursuant to South Carolina Code Annotated

Sections 6-29-820 and 6-29-825, and that the exhibits the County sought to exclude were appropriately before the court. (R. p. 44-50)

On June 7, 2016, Thompkins moved for an Order consolidating the two appeals, as both appeals were based upon identical facts. (R. pp. 388-389; R. pp. 51-53) The Circuit Court heard the consolidated appeals January 5, 2017, and issued an order April 5, 2018, reversing the ZBA in both appeals. (R. pp. 13-41) Thompkins filed a motion for costs, and was awarded costs by order dated June 12, 2018. (Order Granting Motion for Costs, R. pp. 11-12) The County filed a motion to reconsider, which was denied by June 12, 2018 order of the Circuit Court. (R. pp. 8-10) On June 27, 2018, the County noticed the present appeal.

## **ARGUMENT**

### **A. The Circuit Court properly limited its review to the certified record.**

The Appellant argues the Circuit Court erroneously considered matters not included in the certified record. Although not specifically denoted in its Brief, at the trial court, the Appellant sought to exclude the following Exhibits from the Zoning Board of Appeals (hereinafter “ZBA”):

1. Exhibit C (application for business license dated 3/25/15);
2. Exhibit D (application for business license dated 11/12/14);
3. Exhibit E (letter from current Zoning Administrator Rennie Mincey regarding zoning conformance of property);
4. Exhibit G-5 (Thompkins & Associates invoice to City of Myrtle Beach);
5. Exhibit H-1 (Affidavit of Roland Meyer);
6. Exhibit J (Affidavit of Roland Meyer);
7. Exhibit K (letter from counsel for Thompkins to counsel for Horry County and the Horry County Solid Waste Authority regarding concerns of inappropriate

communications between Horry County and the Solid Waste Authority staff and board members); and,

8. Exhibit F-1 (aerial photographs and Horry County Zoning App. Comp Certification Inquiry dated 4/24/14).

(R. pp. 366-368; R. pp. 44-50)

In this instance, the Circuit Court found guidance in the South Carolina Local Governance Comprehensive Planning Enabling Act of 1994, which, at § 6-29-800(B), provides:

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

(Emphasis added.)

The Circuit Court held this section of the Act offers valuable guidance as to several of the exhibits to which the County objected below. To wit:

Exhibits C and D are business license application forms printed directly from the County's computer system and provided to Thompkins by the County. They are creations of the County and are clearly in the County's possession, in the County's file on the Thompkins matter, and were, pursuant to § 6-29-800(B) required to have been provided to the Board upon the filing of the appeal from the Zoning Administrator. For the Appellant to claim the Circuit Court should be foreclosed from considering these documents as evidence which the transcript makes clear were considered by the ZBA, is capricious and contrary to the dictates of the Act.

Exhibit E is a letter regarding the zoning conformance of this property. This letter was written by the current Zoning Administrator for Horry County, Rennie Mincey, and is therefore, as with Exhibits C and D, a creation of the County, clearly in the County's possession, in the County's file on the Thompkins matter, and was, pursuant to § 6-29-800(B) required to have been provided to the Board upon the filing of the appeal from the Zoning Administrator. For the Appellant to claim the Circuit Court should be foreclosed from considering this document as evidence which the transcript makes clear was considered by the ZBA, is capricious and contrary to the dictates of the Act.

Likewise, the aerial images of the Thompkins property included with Exhibit F-1 were produced by the County and projected on a large screen at the ZBA meetings to allow the ZBA members to familiarize themselves with the Thompkins property. These, too, are creations of the County and are clearly in the County's possession, in the County's file on the Thompkins matter, and were, pursuant to § 6-29-800(B) provided to the ZBA upon the filing of the appeal from the Zoning Administrator. For the Appellant to claim the Circuit Court should be foreclosed from considering these documents as evidence which the transcript makes clear was considered by the ZBA, is yet another in a series of capricious actions taken by the Appellant in this matter and contrary to the dictates of the Act.

Exhibits H-1 and J are copies of the affidavit provided by the former Zoning Administrator, Roland Meyer. This affidavit was provided to the County. (R. p. 302, lines 9-18; R. p. 311) Moreover, counsel for Thompkins, as is clear in the transcript of the ZBA meetings addressing the Thompkins appeal, discussed this affidavit at length on the record and the ZBA clearly took the affidavit into consideration in making its decision. (R. pp. 301-310) In point of fact, the current Zoning Administrator addressed the Thompkins perceived disagreement as to hers and Meyers'

interpretation of “accessory use” in the transcript. Clearly, this document, too, was in the ZBA’s possession and was required to be included in the clerk’s certified record filed with the court. For the Appellant to claim the Circuit Court should be foreclosed from considering this document as evidence is yet another capricious action taken by the Appellant in this matter and contrary to the dictates of the Act.

Lastly, Exhibit K is a letter sent by counsel for the Thompkins to Horry County as well as the Solid Waste Authority. This letter outlines concerns regarding allegations of inappropriate communication taking place between these respective agencies and their boards. Furthermore, the ZBA in this matter was made specifically aware of this letter, had the opportunity to discuss the letter with its counsel, and this letter was specifically addressed of record at the May 11, 2015 ZBA meeting. For the Appellant to claim the Circuit Court should be foreclosed from considering this document as evidence which the transcript makes clear was considered by the Board, is yet another capricious action taken by the Appellant in this matter and contrary to the dictates of the Act.

Accordingly, the trial court properly denied the Appellant’s Motion to exclude these items from it’s consideration. Moreover, at the Circuit Court, Thompkins moved that, should the court decline to include these exhibits, the court remand the matter to the ZBA for rehearing pursuant to § 6-29-840(A) of the Act, which reads as follows:

(A) 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. In the event that the decision of the board is reversed by the circuit court, the board is charged with the

costs, and the costs must be paid by the governing authority which established the board of appeals.

(Emphasis added.)

Specifically, the Circuit Court held, after extensive individual exhibit analysis, the exhibits which the Appellant sought to exclude were in the Appellant's possession, were clearly considered by the ZBA, and should have been included in the clerk's (an employee of the County) certified record to the court, pursuant to the Act. Thus, the Circuit Court properly denied the Appellant's motion and should be affirmed in the present appeal. (R. pp. 44-50)

**B. The Circuit Court properly consolidated the cases and properly applied appropriate standards of review as to each.**

The basis for Thompkins' Motion to Consolidate the two appeals before the Circuit Court was they involve common questions of law and fact. (R. pp. 388-389) The Appellant filed a response to Thompkins' motion, arguing against consolidation on the basis that the two appeals require separate and distinct legal analysis. (R. pp. 390-393) The Circuit Court heard all parties and correctly determined the matters were appropriate for consolidation. (R. pp. 51-53)

The court has broad discretion to consolidate cases. Keels v. Pierce, 315 S.C. 339, 342, 433 S.E.2d 902, 904 (Ct. App. 1993). South Carolina Rule of Civil Procedure 42(a) states:

When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all matters in issue in the action; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.<sup>1</sup>

(emphasis added).

South Carolina courts have found that under a consolidation order, "the parties and the pleadings are not merged, and each action retains its own identity." Keels, 315 S.C. at 342, 433

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<sup>1</sup> Similarly, Rule 214 of the South Carolina Appellate Court Rules provides the Appellate Court with discretion to consolidate cases where the same question is involved in two or more appeals in different cases.

S.E.2d at 904. Thus, pursuant to Rule 42, SCRCP, and South Carolina common law, when more than one legal issue arises out of the same set of facts, consolidation allows the Circuit Court to jointly hear those facts, while still providing the court with the ability to analyze each claim separately. See Keels, 315 S.C. at 342, 433 S.E.2d at 904.

The annotation to Rule 42, SCRCP, provides further guidance regarding the reasoning for consolidation by stating, in pertinent part, that “consolidation for trial can save much time and cost, as when all claims arise out of one auto accident, or several claims are based upon identical contracts.” Therefore, consolidation is appropriate where two or more cases share a common question of fact *or* law because it is timelier and less expensive to try the cases together than apart.

The aforementioned South Carolina statutory and common law is directly applicable to the consolidation of the two appeals to the Circuit Court. A review of the pleadings in both cases reveals that they arise from an identical nucleus of fact regarding the ZBA’s abrupt disallowance of Thompkins’ business’ right to receive loads of C&D and/or concrete materials from outside sources. In fact, the first twenty-one (21) paragraphs of Thompkins appeal of the denial of the variance reiterate the same fact pattern as contained in Thompkins appeal of the decision of the Zoning Administrator. While the Appellant correctly explained that Thompkins first appeal involves the appeal of a decision of the ZBA, which disallowed Thompkins’ business from the receipt C&D and/or concrete materials from outside sources and Thompkins second appeal concerns the ZBA’s denial of a variance, the Appellant fails to acknowledge that both of these ZBA decisions concern the identical factual premise and have the identical factual result – that Thompkins’ business can no longer receive outside loads of C&D material, despite the fact that it

had been doing so since its operations began in 1981.<sup>2</sup> Thus, in the interest of judicial economy and efficiency, it is clear that the cases were properly consolidated.

The Appellant argues that the appeals should not have been consolidated because an appeal of a ZBA decision requires a separate legal analysis from an appeal of the ZBA's denial of a variance request. However, under Rule 42(a), SCRCP, following consolidation, the cases did retain their own identity, and the Circuit Court heard the facts of the two appeals jointly, while retaining the ability to analyze each legal issue separately, as needed.

Therefore, because both of Thompkins appeals to Circuit Court arose from the same common nucleus of operative facts and involve legal analyses regarding whether Thompkins' business should be allowed to receive loads of C&D and/or concrete materials from outside sources, Thompkins respectfully requests this Court affirm the Circuit Court consolidation.

### CONCLUSION

As in *Wyndham Enters., LLC v. City of N. Augusta*, 401 S.C. 144 735 S.E.2d 659 (2012), the ZBA's ultimate decision in this matter was not supported by competent, substantial, and material evidence, and was based on opinion and speculation testimony. The Circuit Court did nothing more than enforce the properly supported initial Order of the ZBA and should be affirmed in its decision.

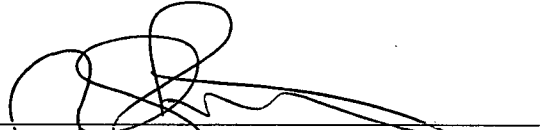
The record is replete with evidence that Thompkins had operated the family business in the same manner since a point in time prior to Horry County adopting a zoning ordinance. Moreover, Thompkins provided ample evidence and testimony to support the reversal of Zoning Administrator Mincey's determination. The Circuit Court did not substitute its judgment for that

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<sup>2</sup> Of note, it was counsel for the ZBA who suggested to Thompkins' counsel that Thompkins pursue a variance with Horry County in order to moot the need for Appeal I and to resolve the matter.

of the ZBA, it merely agreed with the ZBA's initial, well-reasoned Order. As such, Respondent Thompkins respectfully requests this Court affirm the Order below and permit Thompkins to continue the longtime operation of his family business.

Respectfully submitted,



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**CERTIFICATE OF COUNSEL**

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



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