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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
The Honorable Marvin H. Dukes, III

Trial Court Case No.: 2012-CP-07-01394, 2010-CP-07-04844
2008-CP-07-01114
Appellate Case No.: 2016-000687

Grays Hill Baptist Church, Petitioner-Respondent

v.

Beaufort County and The Beaufort County Zoning Board of Appeals, Defendants,

And

The United States of America, Defendant-Intervenor,

Of Which Beaufort County and The United States of America are Respondent-Appellants.

CORRECTED PETITION FOR REHEARING

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Post Office Drawer 507
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Attorneys for the Petitioner-Respondent

ARGUMENTS:

I. IN REVERSING THE DECISION OF THE BEAUFORT COUNTY MASTER IN EQUITY, THE SOUTH CAROLINA COURT OF APPEALS ERRED OR OVERLOOKED OR MISAPPREHENDED THE FACT THAT THE LOWER COURT PROPERLY CONCLUDED THAT THE ORIGINAL DEVELOPMENT PERMIT AND PLAT ENCOMPASSED A SINGLE DEVELOPMENT PROJECT WHICH INCLUDED THE FELLOWSHIP HALL, AS OPPOSED TO A DEVELOPMENT WHICH ENCOMPASSED EVERYTHING EXCEPT FOR THE FELLOWSHIP HALL 1

II. IN REVERSING THE DECISION OF THE BEAUFORT COUNTY MASTER IN EQUITY, THE SOUTH CAROLINA COURT OF APPEALS ERRED OR OVERLOOKED OR MISAPPREHENDED THE FACT THAT THE LOWER COURT PROPERLY CONCLUDED THAT THE APPELLANT BEAUFORT COUNTY ERRED AS A MATTER OF LAW IN CONCLUDING THAT THE FELLOWSHIP HALL WOULD INCREASE THE "OCCUPANT LOAD" OF THE SITE 6

III. IN REVERSING THE DECISION OF THE BEAUFORT COUNTY MASTER IN EQUITY, THE SOUTH CAROLINA COURT OF APPEALS ERRED OR OVERLOOKED OR MISAPPREHENDED THE FACT THAT THE LOWER COURT PROPERLY CONCLUDED THAT THE APPELLANT BEAUFORT COUNTY COMMITTED ERRORS OF LAW IN DENYING THE RESPONDENT CHURCH'S REQUEST FOR A VARIANCE 11

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ORDINANCE:

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ARGUMENT

I. IN REVERSING THE DECISION OF THE BEAUFORT COUNTY MASTER IN EQUITY, THE SOUTH CAROLINA COURT OF APPEALS ERRED OR OVERLOOKED OR MISAPPREHENDED THE FACT THAT THE LOWER COURT PROPERLY CONCLUDED THAT THE ORIGINAL DEVELOPMENT PERMIT AND PLAT ENCOMPASSED A SINGLE DEVELOPMENT PROJECT WHICH INCLUDED THE FELLOWSHIP HALL, AS OPPOSED TO A DEVELOPMENT WHICH ENCOMPASSED EVERYTHING EXCEPT FOR THE FELLOWSHIP HALL.

The Master-In-Equity properly found that the Appellant should not have required the Church to seek a new Development Permit as a prerequisite to the Construction Permit for the Fellowship Hall, as the Fellowship Hall is plainly and clearly shown on the Development Plat and the original Development Permit, under its own terms, had not expired since substantial improvement to the development had occurred within two (2) years from the issuance of the Development Permit.

The Appellant argues that the above finding by the Master-In-Equity was error, inasmuch as the Fellowship Hall was not encompassed by the original Development Permit, but rather, was part of an independent, "Phase II" development for which a permit had never been issued. In so arguing, it is respectfully submitted that the Appellant is confusing the phased construction of the project, with the unified development of the project. Additionally, the Appellant is failing to distinguish between what is contained in the application for the Development Permit, with what was actually granted in the Development Permit itself.

The fundamental facts underling this case are fairly straight forward.

The Church is the owner of a parcel of real property located in Beaufort County, South Carolina consisting of 9.35 acres located at the intersection of U.S. Highway 21 and South Carolina Highway 71. In 1996 the Church applied to Beaufort County for a Development Permit to develop its 9.35 acre parcel of real property.

In conjunction with its application for a Development Permit, the Church prepared and submitted to Beaufort County a plat depicting in detail the proposed development. The primary features of this proposed development are two (2) large buildings, one (1) labeled "Proposed Church" and the other labeled "Proposed Sanctuary." The "Proposed Sanctuary" has generally been referred to in this litigation as the "Fellowship Hall" and is the building which is the subject of this appeal. In addition to the above buildings, the Development Plat also shows asphalt paved roadways encircling the two (2) proposed buildings, as well as paved and unpaved parking surrounding both of the proposed buildings. See Exhibit A to Final Order.

On January 7, 1997, the Church received a Development Permit from Beaufort County to develop its 9.35 acre parcel of property as shown on the aforesaid Development Plat. See Development Permit, Exhibit B to Final Order.

Notably, neither the Development Permit, nor the Development Plat, is broken down into phases. The entire 9.35 acre parcel is encompassed by the Development Permit, and the Development Plat clearly and plainly shows the proposed Fellowship Hall in place and as an integral part of the development, surrounded by parking, sidewalks, and roadways.

The Development Permit contains the following language:

> "All permits expire two (2) years from the date of approval **unless substantial improvement has occurred** or final subdivision plat has been recorded."

See Development Permit (emphasis added).

Shortly after the issuance of the Development Permit, on February 26, 1997, the Appellant issued to the Church a Construction Permit to construct the improvements as shown on the Development Plat. See Exhibit C.

In December of 1997 the Church completed the construction of al! improvements shown on the Development Plat, except for the Fellowship Hall. These completed improvements included the primary sanctuary building, and all of the parking, paving and infrastructure. The Church did not construct the Fellowship Hall at that time solely for financial reasons, and it began saving money to pay for construction of the last remaining item, the Fellowship Hall.

The Construction Permit expired under its express terms 180 days after there was a stoppage in active construction, or in mid-1998. The Development Permit, on the other hand, did not expire since substantial improvement to the development had occurred within two (2) years of the date of issuance.

On December 11, 2006 the Appellant Beaufort County adopted an Ordinance creating the Airport Overlay District. See Exhibit D to Final Order. With the enactment of the Airport Overlay District the Church's property was re-zoned and the Church's development, as a place of "assembly and worship" became a "nonconforming use." See Exhibit D to Final Order, Section 5(a)(2).

Shortly after the enactment of the Airport Overlay District Ordinance, in early 2007, the Church approached the Appellant Beaufort County to obtain a Construction Permit to commence construction of the Fellowship Hall and complete its development. The Appellant refused to issue a Construction Permit to the Church and, instead, instructed the Church to apply for another Development Permit for the Fellowship Hall, despite the fact that the current Development Permit had not expired.

The Appellant argues that the development of the Church's property was broken down into two (2) phases, which the Appellant labels as Phase I and Phase II, and that a Development

Permit was issued only for Phase I. This argument has no basis in fact. The Development Permit plainly and clearly encompasses the entire 9.35 acre parcel, and the Development Plat plainly and clearly shows the Fellowship Hall, not a blank, unimproved parcel of land. Nowhere on the Development Plat do the phrases Phase I and Phase II appear. The Appellant is confusing the Church's development of its property, with the Church's construction. The Development Permit does not require that all construction be accomplished at once, but rather, requires only that "substantial improvement" be made within two (2) years. With its Development Permit in hand for the entire project, the Church properly, and prudently, substantially completed all construction of the development, saving only the Fellowship Hall as its last construction project in order to complete the development. The Appellant is confusing construction in phases with development in phases. The Church had one development project, which encompassed all the improvements on the 9.35 acre parcel, and the Development Permit and Plat plainly and clearly on their face include the Fellowship Hall.

In its argument, the Appellant also confuses the **application** for the Development Permit, with what was actually granted by the Development Permit itself. The application discusses constructing the project in phases. As previously noted, there is nothing in the Development Permit which prohibits construction occurring in phases. Moreover, what may have been applied for is often different from what is actually granted. In this case, irregardless of what is set forth in the application for the Development Permit, the bottom line is that the Development Permit and Plat unambiguously and expressly depict the Fellowship Hall.

In its Brief, the Appellant Beaufort County cites *FBR Investors v. County of Charleston,* 303 S.C. 524,402 S.E.2d 189 (Ct. App. 1991) in support of its position. The facts of that case, however, am easily distinguishable from the case *sub Judice.* In *FBR,* supra, a group of investors

purchased a 15 acre tract of land to build multi-family dwellings. Instead of developing the entire tract as a single project, the investors decided to develop the tract in two (2) phases. Their plan called for the construction of twenty-five (25) duplexes on an eight (8) acre parcel of the tract during Phase I of the project, which would then be followed by the building of additional multi-family dwellings on the remaining parcel as Phase II of the development. As Phase I neared completion, but before any "substantial" expenses had been incurred toward Phase II, the second parcel was rezoned to prohibit multi-family dwellings. The investors claimed they had a "vested right" to complete Phase II due to their expenditures on Phase I. The trial Court agreed because it viewed the development as an aggregate rather than two (2) separate projects. The South Carolina Court of Appeals reversed the trial Court because the investors chose to develop the tract as two (2) separate projects. The investors' focus on Phase I left Phase II "essentially barren land when the zoning change occurred," and therefore, the Court of Appeals held the investors had not expended the necessary effort to establish a vested right to complete Phase II. *FBR Investors v. County of Charleston,* 303 S.C. 524,527,402 S.E.2d 189, 191 (Ct. App. 1991).

Accordingly, in FBR Investors v. County of Charleston, it was undisputed that FBR Investors decided to develop the property in two (2) phases. Id., 303 S.C. at 526, 402 S.E.2d at 190. In the instant case, it is clear that the Church developed its propelty as one (1) single project and the Fellowship Hall is plainly and clearly shown as part of that development project.

It is accordingly respectfully submitted that the Master-In-Equity properly concluded that the Fellowship Hall was encompassed as part of the original Development Permit, which had not expired at the time Church applied for the Construction Permit.

II. IN REVERSING THE DECISION OF THE BEAUFORT COUNTY MASTER IN EQUITY, THE SOUTH CAROLINA COURT OF APPEALS ERRED OR OVERLOOKED OR MISAPPREHENDED THE FACT THAT THE LOWER COURT PROPERLY CONCLUDED THAT THE APPELLANT BEAUFORT COUNTY ERRED AS A MATTER OF LAW IN CONCLUDING THAT THE FELLOWSHIP HALL WOULD INCREASE THE "OCCUPANT LOAD" OF THE SITE.

As noted, in early 2007 the Church approached Beaufort County to obtain a Construction Permit to commence construction of the Fellowship Hall and complete its development. Beaufort County refused to honor the original Development Permit and accordingly refused to issue a Construction Permit to the Church. Instead, Beaufort County instructed the Church to apply for another Development Permit for the Fellowship Hall, despite the fact that the current Development Permit had not expired. The Appellant eventually denied issuance of the new Development Permit, on the ground that the Fellowship Hall would increase the "occupant load" of the site, in violation of the newly enacted Airport Overlay District Ordinance.

The Master-In-Equity found that the original Development Permit included the construction of the Fellowship Hall and that it was accordingly error for the Appellant to require the Church to apply for a new Development Permit. As an additional sustaining ground, however, the Master-In-Equity also found that even if the original Development Permit did not include the Fellowship Hall, the Appellant errored in refusing to issue to the Church a new Development Permit, inasmuch as construction of the Fellowship Hall would not increase the "occupant load" of the site. The Appellant argues that this was error.

As previously noted, the Appellant passed an Airport Overlay District Ordinance on December 11, 2006 which rezoned the Church's property and prohibited the "use" of "assembly and worship." See Exhibit D to Final Order, Section 5(a)(2). This new Ordinance rendered the Church's development a "nonconforming use."

In early 2007, the Church approached Beaufort County to obtain a Construction Permit to commence construction of the Fellowship Hall, and was instructed by the Appellant to apply for a new Development Permit. As instructed by Beaufort County, the Church applied for the new Development Permit and on March 7, 2007 met with the Appellant's Development Review Team as the initial step in the process. In conjunction with its application for a new Development Permit the Church submitted to the DRT a new plat, nearly identical to the already approved Development Plat from 1997, see Exhibit G to Final Order. The DRT noted that the Church's development, as a result of the enactment of the Airport Overly District, was now a nonconforming use and made a preliminary decision not to issue a Development Permit to the Church. See Exhibit H to Final Order.

On October 10, 2007 the DRT made a final decision on the Church's application, recommending that it be disapproved. The only reason relied upon by the DRT in disapproving the project was its conclusion that allowing the new building "could substantially increase the occupant load of the site." See Exhibit K to Final Order (emphasis added). In so concluding, the DRT relied upon Section 7(a)(6) of the Ordinance which provided that nonconforming places of assembly and worship may be expanded provided the expansion does not increase the "occupant load."

The Church appealed the decision of the DRT to the Beaufort County Planning Commission and the Church's appeal was heard by the Planning Commission on December 3, 2007. At the hearing, members of the Church explained that allowance of the Fellowship Hall would not increase the occupancy load of the site. Members of the Church testified that the Fellowship Hall would not be occupied while Church services were being held in the Church building, and conversely, the Church building would not be occupied while activities were

occurring within the Fellowship Hall. Currently, the sanctuary of the Church building is outfitted with folding chairs and when the Church desires to hold an activity such as a dinner or service function, the members of the Church pick up, fold and store away all of the chairs, and replace them with tables, and once the dinner or social function is concluded, they then have to remove all of the tables and return all the folding chairs, ready for the next church service. Once the Fellowship Hall was constructed, then the folding chairs in the sanctuary would be replaced with permanent pews, and the ancillary fellowship activities, instead of taking place within the sanctuary, would take place in the Fellowship Hall. In other words, the number of people on the development site at any one time would be the same, they would simply be located in the Fellowship Hall as opposed to the sanctuary building.

Additionally, the Church noted that the occupancy load of the site was restricted by the number of parking spaces on the site, and the number of parking spaces was already set. No new parking spaces were being created.

On June 24, 2008 the Planning Commission affirmed the decision of the DRT not to issue a permit. The Planning Commission explained that it was denying the application because "the number of persons that could be on the site at any one time could be increased" if the Fellowship Hall were allowed. See Exhibit M to Final Order (emphasis added).

On April 3, 2008 the Church appealed the decision of the Beaufort County Planning Commission to the Beaufort County Master-In-Equity, who heard the appeal on March 15, 2010. The Master-In-Equity properly concluded that the Planning Commission abused its discretion in refusing to issue a new Development Permit to the Church based on the conclusion that "the number of persons that could be on this site at any one time could be increased" if the Fellowship Hall were allowed. The Master-In-Equity properly found that this is a factual finding which is

not supported by the evidence. The uncontroverted evidence in this case is that the Fellowship Hall would only be occupied during a social function which, in the absence of the Fellowship Hall, would be occurring within the sanctuary building itself. In other words, the uncontroverted evidence is that the same number of people would be on the site whether or not the Fellowship Hall existed, the only difference being that in the absence of the Fellowship Hall those people would be located within the sanctuary building, and if the Fellowship Hall were constructed, those same people would be located within the Fellowship Hall itself.

As the Appellant notes, the term "occupant load," is not defined in the ordinance. The Appellant seeks to give this term a strange definition by relying upon the testimony of a fireman that, for his purposes in fighting fires, occupant load means how many people can possibly be squeezed into a space, regardless of its use. This definition may make some sense in the context of fighting a fire, but it is nonsensical when applied to a zoning ordinance.

The language of an Ordinance must be read in a sense which harmonizes with its subject matter and accords with its general purpose. *Municipal Association of South Carolina v. AT&T,* 361 S.C. 576, 580, 606 S.E.2d 468, 470 (2004). A statute should be given a reasonable and practical construction consistent with the purpose and policy expressed in the statute. *Georgia-Carolina Bail Bonds v. County of Aiken,* 354 S.C. 18, 22,579 S.E.2d 334,336 (Ct. App. 2003). A statute as a whole, must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers. *Liberty Mutual Insurance Co. v. South Carolina Second Injury Fund,* 363 S.C. 612, 621, 611 S.E.2d 297, 301 (Ct. App. 2005). See also, *State v. Sweat,* 379 S.C. 367, 374-376; 665 S.E.2d 645, 649-652 (Ct.App. 2008). With respect to the Airport Overlay District Ordinance, the fundamental focus of the Ordinance is on "uses." The Ordinance prohibits certain "uses" within certain zones, and one of the prohibited uses is

"assembly and worship." It is only because the Church's "use" of its property falls within the category "assembly and worship" that the Church's development became a "nonconforming **use."** Accordingly, it is axiomatic that the determinative inquiry, when ascertaining if a proposed development will increase the "occupant load" of a site, that "occupant load" must be evaluated in light of the proposed "use." There is absolutely no evidence in this case that the Church's proposed "use" of its Fellowship Hall will increase the "occupant load" of the site. To the contrary, the undisputed evidence is that it will not.

It is accordingly respectfully submitted that the Master-In-Equity properly concluded that, even under the new Airport Overlay District Ordinance, a Development Permit should have been given to the Church for the Fellowship Hall because the Church's "use" of the Fellowship Hall would not increase the "occupant load" of the site.

III. IN REVERSING THE DECISION OF THE BEAUFORT COUNTY MASTER IN EQUITY, THE SOUTH CAROLINA COURT OF APPEALS ERRED OR OVERLOOKED OR MISAPPREHENDED THE FACT THAT THE LOWER COURT PROPERLY CONCLUDED THAT THE APPELLANT BEAUFORT COUNTY COMMITTED ERRORS OF LAW IN DENYING THE RESPONDENT CHURCH'S REQUEST FOR A VARIANCE.

As a further additional sustaining ground, the Master-In-Equity concluded that the Appellant erred in failing to grant a variance to the Church for the construction of its Fellowship Hall. The Appellant argues that this was error.

On this issue, the arguments made by the Appellant in its brief are the same arguments which were made to, and rejected by, the Master-In-Equity. In his Final Order of Judgment, the Master-In-Equity addresses each of these arguments in detail. See Final Order of Judgment, pp. 12-19. Quite frankly, the writer of this Brief can think of nothing additional to add and, rather than simply repeat the Master's findings, craves this Court's reference to the Master's Final Order of Judgment.

In addition to the findings and conclusions as set forth by the Master in the Final Order of Judgment, it bears emphasizing that the decision by the Zoning Board of Appeals was controlled by errors of law inasmuch as members of the Board were motivated to vote against the requested variance based upon at least two (2) erroneous legal conclusions.

First, the Board determined that only physical characteristics of the land could be considered in determining if "extraordinary and exceptional conditions pertained to the particular piece of property" existed, and could not consider extraordinary and exceptional conditions pertaining to the piece of property which did not relate the physical characteristics of the property. There is nothing in the Ordinance which requires or even suggests that only physical characteristics of the land could be considered. As the Master-In-Equity found, there are "extraordinary and exceptional conditions pertaining to this particular piece of

property" that go beyond its physical characteristics. The Board erred as a matter of law in limiting itself considering only the physical characteristics of the land where this limitation is not set forth in the Ordinance.

Secondly, the Board erred as a matter of law in finding that subsection (c) of Section 106-522 of the Ordinance applied to this case. Under its express terms, Section 106-522(c) applies to a variance which seeks "the establishment of a use." The Church's variance request, however, does not seek to "establish" a use, but rather, involves a use which was established more than a decade earlier, i.e., the use of a place of "assembly or worship", which was several years prior to the creation of the Ordinance that rendered the Church's property nonconforming.

The Board's decision not to grant the variance, accordingly, in addition to the reasons cited by the Master in his Order, was an abuse of discretion because it was controlled by errors of law.

CONCLUSION

In summary, the Master-In-Equity properly found that the Appellant Beaufort County should not have required the Church to seek a new Development Permit, as a prerequisite to the Construction Permit for the Fellowship Hall, inasmuch as the Fellowship Hall is plainly and clearly depicted on the Development Plat and the original Development Permit, under its own terms, had not expired since substantial improvement to the development had occurred within two (2) years from the issuance of the Development Permit. The Church's development of its property is one unified single comprehensive development and the Fellowship Hall is clearly, boldly and unambiguously depicted as part of that development on the Development Plat. There is simply no "Phase II" to the development. There is nothing in the Development Permit which prohibits construction of the development from being accomplished in phases, so long as substantial improvement to the development occurs within two (2) years of the Permit.

Secondly, the evidence is uncontroverted that the "occupant load" of the site would not be increased by construction of the Fellowship Hall inasmuch as the Fellowship Hall would not be occupied while Church services were being held in the Church building, and conversely, the Church building would not be occupied while activities were occurring within the Fellowship Hall. This finding by the Master-In-Equity is emphasized by the fact that the Respondent Church, as a condition to granting the new Development Permit, offered to agree that such alternative use would be an enforceable condition to granting the new Development Permit. See Final Order of Judgment.

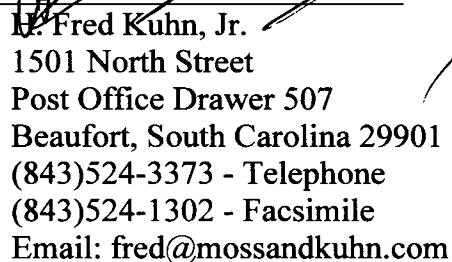
Finally, the decision to deny the variance request was controlled by two (2) errors of law, to-wit: That only physical characteristics of the land could be considered in

determining if "extraordinary and exceptional conditions pertained to the particular piece of property" existed, and that subsection c of 106-522 of the Ordinance applied to this case where this case did not seek to establish a use, rather involved an existing use.

It is accordingly respectfully requested that the South Carolina Court of Appeals rehear and reconsider its Decision and Affirm the Order of the Beaufort County Master in Equity.

Respectfully submitted,

MOSS, KUHN & FLEMING, P.A.



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Attorneys for the Petitioner

Beaufort, South Carolina
May 24, 2019

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM BEAUFORT COUNTY
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Appellate Case No.: 2016-000687

Grays Hill Baptist Church, Respondent

v.

Beaufort County and The Beaufort County Zoning Board of Appeals, Defendants,

And

The United States of America, Defendant-Intervenor,

Of Which Beaufort County and The United States of America are Appellants.

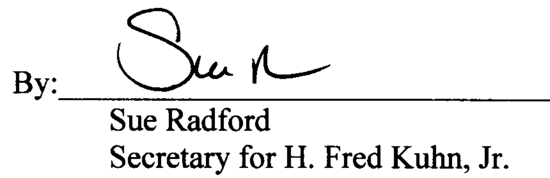
CERTIFICATE OF SERVICE

Undersigned certifies that the Corrected Petition for Rehearing to Appellant Beaufort County, to which this certificate is affixed, was served upon the party(s) to this action by hand delivery or by depositing a copy of same, enclosed in a first class, postpaid wrapper properly addressed to the attorney(s) of record:

Mary Bass Lohr, Esquire
Howell, Gibson & Hughes, P.A.
Post Office Box 40
Beaufort, South Carolina 29901

Lee E. Berlinsky
Assistant United States Attorney
151 Meeting Street, Suite 200
Charleston, South Carolina 29401

in a post office or official depository under the exclusive care and custody of the United States Postal Service, on May 24, 2019.



By:____________________________
Sue Radford
Secretary for H. Fred Kuhn, Jr.

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RECEIVED
MAY 31 2019
SC Court of Appeals

May 24, 2019

Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
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RE: Grays Hill Baptist Church v. Beaufort County
Case Nos: 2012-CP-07-01394, 2010-CP-07-04844 and 2008-CP-07-0-1114
Appellate Case No.: 2016-000687

Dear Mrs. Kitchings:

Enclosed please find the original and six (6) copies of the Corrected Petition for Rehearing regarding the above-referenced matter. The only changes are the typographical corrections.

With kindest regards, I am

Very truly yours,

MOSS, KUHN & FLEMING, P.A.

H. Fred Kuhn, Jr.
HFKjr:sr
Enclosures

cc: Mary Bass Lohr, Esquire (w/enclosure)
Lee E. Berlinsky, Esquire (w/enclosure)

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May 24, 2019

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RE: Grays Hill Baptist Church v. Beaufort County
Case Nos: 2012-CP-07-01394, 2010-CP-07-04844 and 2008-CP-07-0-1114
Appellate Case No.: 2016-000687

Dear Mrs. Kitchings:

The Petition for Rehearing which was filed yesterday in the above-referenced matter inadvertently enclsoed a check in the amount of $25.00 instead of the required $50.00 filing fee. Enclosed you will find my firm's check in the amount of $50.00 for the filing of the Petition.

With kindest regards, I am

Very truly yours,

MOSS, KUHN & FLEMING, P.A.

H. Fred Kuhn, Jr.
HFKjr:sr
Enclosures

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cc: Mary Bass Lohr, Esquire
Lee E. Berlinsky, Esquire