**THE STATE OF SOUTH CAROLINA**
**In The Court Of Appeals**

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

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Civil Action No.: 2012-CP-07-01394
Appellate Case No.: 2016-000687

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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

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# FINAL BRIEF FOR THE UNITED STATES OF AMERICA

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## STATEMENT OF ISSUES ON APPEAL

1. Did the lower court err in concluding that a development permit issued in response to an application for a two-phased development entitled the permit holder to pursue the second phase of the development ten years after the permit was issued?

2. Did the lower court err in substituting its judgment for that of county planning officials and concluding that a new 10,000 square foot hall would not increase the "occupant load" of an existing non-conforming structure?

3. Did the lower court err in overturning a decision of expert county zoning officials denying respondent a variance, particularly where the public good would not be served by further development because the area in question has been identified as having a heightened chance of an air crash from the nearby Marine Corps Air Station?

## STATEMENT OF THE CASE

On April 3, 2008, Grays Hill Baptist Church (respondent) commenced action No. 2008-CP-07-1114 in the Court of Common Pleas, challenging a decision of the Beaufort County Planning Commission denying respondent a development permit. The action was remanded to the Planning Commission for the purpose of compiling a record, after which, respondent filed a new action (No. 2012-CP-07-1394) challenging the denial of the development permit.

On October 4, 2010, respondent filed action No. 2008-CP-07-1114, challenging a decision of the Beaufort County Zoning Board of Appeals denying respondent a variance from the zoning rule that had formed the basis of the Planning Commission's decision denying respondent a development permit.

On May 20, 2011, the United States moved to intervene on behalf of Beaufort County.

On March 21, 2013, the Court of Common Pleas issued a final order of judgment in respondent's favor, concluding that respondent was entitled to a development permit or, in the alternative, a variance.

On February 29, 2016, the Court of Common Pleas denied reconsideration.

On March 29, 2016, the County and the United States served a notice of appeal.

## FACTS

This dispute involves the efforts of respondent to build a new 10,000 square foot hall near a U.S. Marine Corps Air Station in Beaufort County. The Air Station is the home of the Marine Corps' Atlantic Coast fixed-wing, fighter-attack aircraft assets including six Marine Corps F/A-18 squadrons and one F-35B Fleet Replacement Squadron. It is the only location in the world where pilots train to fly the F-35B.[1]

[1] *See* http://www.beaufort.marines.mil/About/.

The Marine Corps and Beaufort County ("the County") have designated respondent's property as falling within an "Accident Potential Zone," meaning that it is in an area that has a heightened potential for air crash. In order to protect both public safety and the integrity of Air Station operations, the County has adopted zoning rules that sharply limit further development within the Accident Potential Zone.. Expert County development and zoning officials have concluded that those rules preclude respondent from constructing a substantial new structure, and that there is no extraordinary circumstance that would entitle respondent to a variance. The court below, however—without taking any new evidence and ruling only on the administrative record compiled in the county zoning and development proceedings—overturned the judgment of the County and held that respondent was entitled to a development permit or, in the alternative, a variance.

### A. The Important Interest In Limiting Development Near Federal Air Stations

The Department of Defense has long recognized that unchecked development in the immediate vicinity of a military air station endangers public safety and can also compromise the integrity of air station operations. Unchecked development even can—and has—led to base closures. *See* Bernard K. Schafer, *The Air Installation Compatible Use Zone Program: The Science and the Law*, 31 A. F. L. Rev. 165, 165 (1989). To address these concerns and ensure that development near military air stations is limited to compatible uses, the

Department of Defense has for decades followed a planning program known as the Air Installation and Compatible Use Zone policy (AICUZ). *See* U.S. Dep't of Def., Instruction No. 4165.57, *Air Installation Compatible Use Zones (AICUZ Program)* (May 2, 2011).[2] The AICUZ Program exists to serve two primary objectives. First, it "[p]romote[s] the health, safety, and welfare of persons in the vicinity of and on air installations by minimizing aircraft noise and safety impacts." *Id.* at 2; *see also* A. F. Handbook 32-7084 § 1.2, *AICUZ Program Manager's Guide* (Mar. 1, 1999).[3] Second, it serves to "protect . . . operational capability from the effects of land use which are incompatible with aircraft operations." *AICUZ Program Manager's Guide* § 1.2.

One important aspect of the AICUZ Program is a process for identifying Accident Potential Zones, areas in the immediate vicinity of an air station that statistical analysis indicates have an elevated possibility of an air crash. An Accident Potential Zone I is an area that possess "a significant potential for accidents." *AICUZ Program* 30. An Accident Potential Zone II is the area beyond an Accident Potential Zone I that still has "a measureable potential for accidents." *Id.* In Accident Potential Zones, "some type of land use control is essential." *AICUZ Program Manager Guide* § 1.4.4; *see also id.* at A3.1. High density uses

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[2] http://www.dtic.mil/whs/directives/corres/pdf/416557p.pdf.

[3] http://static.e-publishing.af.mil/production/1/af_a4_7/publication/afh32-7084/afh32-7084.pdf.

such as places of assembly, including churches, are not considered appropriate in an Accident Potential Zone II. *Id.* § 2.6.4.1.

Designations made under the AICUZ program have no independent operative legal effect. See *AICUZ Program* 7 ("This Instruction does not impose any requirements on members of the public or State or local governments, nor does it prescribe any specific course of action for these groups to take in dealing with the DoD on land-use questions."); *see also Blue v. United States*, 21 Cl. Ct. 359, 362 (1990) ("AICUZ studies are for advisory purposes only. The authority to permit or restrict development or use of private lands is left to the local jurisdiction."). Rather, the AICUZ program recommends procedures for collaborating with local governments to adopt land use policies consistent with the findings of AICUZ studies. Base officials work with their surrounding communities, like the County, to ensure the adoption of appropriate land use regulations. The "AICUZ program is [then] implemented through the local government's police power over land use, zoning, and building codes." Schafer, *supra*, 31 A. F. L. Rev. at 178.

In order to encourage local communities to address concerns identified in AICUZ studies and to ensure adequate input from the surrounding community, the United States has a program of pursuing Joint Land Use Studies, which are cooperative efforts between the military installation and the nearby community.

*See AICUZ Program* 14; *AICUZ Program Manager Guide* § 2.6.5. These joint studies are then used to guide local jurisdictions in adopting land use regulations that ensure that future development "will be compatible with both the military mission and the development needs of the community." *AICUZ Program Manager Guide* § 2.6.5.1.1.

### B. Factual Background And Procedural History

1. In December 1996, respondent sought a development permit from the County. Respondent's application included a plan for the proposed development that depicted two primary structures, a church building and a second building to the south (which, though not identified as such in respondent's application, has been known in this litigation as a Fellowship Hall). In a narrative accompanying the application, respondent described the proposed project as consisting of two phases. Phase I was to consist of construction of only the church building and supporting infrastructure. Phase II was identified as the construction of the second building. [R. p. 245].

The County issued respondent a development permit for the project, which stated that it would expire two years from the date of approval "unless substantial improvement has occurred." [R. p. 35]. The County also approved a building permit for the church building and surrounding infrastructure, and respondent went forward with construction of Phase I. Respondent did not seek a building permit

for Phase II and otherwise took no steps to commence development of Fellowship Hall. In December 1997, the County conducted a final inspection of the completed church building and issued a certificate of compliance. [R. p. 247].

In 2006, Beaufort County adopted a new zoning ordinance, known as the Airport Overlay District, which was designed to limit development near Beaufort's Marine Corps Air Station. Under the designations made in the Airport Overlay District, respondent's property falls within an Accident Potential Zone II. [R. p. 19]. These new zoning regulations had only prospective effect, so respondent's existing building became a grandfathered non-conforming use. However, under the new zoning rules, respondent has only a limited right to expand on its existing facility, and even then, may do so only if the new expansion would not increase the "occupant load" of the building. [R. pp. 21-22].[4]

In 2007, respondent applied to the County for a construction permit in order to build Fellowship Hall. [R. p. 20]. The County notified respondent that it would first need to apply for a development permit. Respondent then applied for a development permit and the application was considered by the County's Development Review Team, which rejected it. The Development Review Team

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[4] At the time that the application was filed, the pertinent ordinance allowed for a 15% increase of the "disturbed area" of the existing non-conforming development. The regulation has since been reworded to allow a 15% increase in the "floor area." [R. p. 21-22].

noted that to "protect the public health and safety, the County has prohibited uses within [the Accident Potential Zones] that attract concentrations of individuals such as . . . churches," and that while the regulations allowed for a modest increase in the size of existing non-conforming buildings, it "was not the intent to permit an expansion that could allow more people to be in harm's way." [R. p. 50]. Accordingly, the request for a permit authorizing construction of a new 10,000 square foot building was denied.

Respondent appealed to the Beaufort County Planning Commission, which unanimously upheld the denial of the development permit. The Commission concluded that "the number of persons that could be on the site at any one time could be increased with the expansion," and thus, that the construction of Fellowship Hall would increase the "occupancy load" of the existing structure. [R. p. 54].

Respondent filed an action in the Court of Common Pleas, challenging the decision of the Planning Commission. Due to the absence of a record, that action was remanded with consent of the parties to the Planning Commission for the purpose of conducting a de novo proceeding. [R. pp. 13, 16]. The Planning Commission subsequently denied respondent's application and respondent filed a new action challenging that denial.

2. While respondent's initial challenge to the denial of the development permit was pending, respondent also filed a request with the Beaufort County Zoning Board of Appeals, seeking a variance that would enable it to proceed with construction of Fellowship Hall. The Zoning Board of Appeals denied that request after finding that respondent had not met the criteria for a variance. The Zoning Board of Appeals concluded, among other things, that there were no extraordinary and exceptional conditions pertaining to the property and that a variance would adversely affect adjacent properties and the public good. [R. p. 237].

Respondent filed an action in the Court of Common Pleas challenging the denial of a variance. That appeal was consolidated with respondent's appeal from the decision of the Planning Commission denying respondent a development permit.

3. In light of the federal interest in proper application and enforcement of the Airport Overlay District, which serves to protect the Marine Corps Air Station and the adjacent public, the United States intervened in order to support Beaufort County in defending the denials of the permit and variance. The United States explained that the Air Station "facilitates and supports the essential training of military pilots" and that respondent's property "lays directly in the immediate landing pattern of military aircraft operating from the Marine Corps Air Station." [R. p. 131].

4. In 2013, the Court of Common Pleas entered judgment in respondent's favor. [R. p. 13-33]. The court first concluded that the 1997 Development Permit granted respondent the right to build Fellowship Hall, and thus that respondent had no need to obtain further development approval from the County in order to move forward with its project. In so holding, the court rejected the County's determination that only the first phase of the project (the initial church building) was authorized in 1997. [R. pp. 18-19, 27-28, 31-32]. The court also reasoned that because respondent had engaged in "substantial improvement" by completing construction of the church building, the 1997 Development Permit never expired and gave respondent a vested right to complete construction of Fellowship Hall a decade later. [R. p. 19].

The court further held that, in any case, respondent's 2007 request for a new development permit should have been granted. [R. p. 32]. Whereas the County had found that the zoning rules would not allow for the construction of a new 10,000 square foot structure on the ground that such a structure would expand the "occupancy load" of the building, the court found that conclusion to be unsupported. [R. p. 30]. Rather, the court determined that the relevant inquiry should be whether the new building would lead to an increase in the number of people using the church property (rather than whether the development would increase the capacity of the property). The court further determined that the

buildings would not be occupied simultaneously because the existing congregation would simply move between the two buildings. [R. pp. 26-27, 30-31].

The court further held that, in any event, respondent should have received a variance. [R. pp. 24-26, 32-33]. The court found that there were exceptional conditions that would justify a variance because respondent, in reliance on the 1997 Development Permit, invested in construction on the property, and that it is "'extraordinary and exceptional' for the County to deny the lawful completion of a development which has been permitted." [R. p. 25]. The court further reasoned that the public good would not be impaired by the grant of a variance because "construction of the Fellowship Hall . . . will not increase the probability of anyone on the ground being injured in an aircraft accident." [R. p. 26].

5. A motion for reconsideration was filed, but the parties asked the court to delay ruling upon it while they explored settlement. When settlement discussions were unsuccessful, the court denied reconsideration in February 2016. [R. p. 63]. This timely appeal followed.

## STANDARD OF REVIEW

This Court gives "great deference to the decisions of those charged with interpreting and applying local zoning ordinances" and will not "substitute its judgment" for that of county zoning officials. *Historic Charleston Found. v. Krawcheck*, 313 S.C. 500, 505, 443 S.E.2d 401, 405 (Ct. App. 1994).

Accordingly, the finding of those expert officials must be affirmed unless they "have no evidentiary support or the Board commit[ed] an error of law." *Id.*; *see also Brock v. Board of Adjustment & Appeals of Rock Hill*, 308 S.C. 539, 545, 419 S.E.2d 773, 777 (1992) ("The reviewing court will not disturb the findings and decision of the Board of Adjustment unless it determines that such findings or decision resulted from action of the Board which is arbitrary, an abuse of discretion, illegal, or in excess of lawfully delegated authority.").

**ARGUMENT**

The Airport Overlay District was adopted to limit the density of development in an area that has been statistically shown to have a heightened potential for air crash. It also preserves the integrity of the operations of the Marine Corps Air Station, by, for example, allowing the Marine Corps to conduct pilot training missions without jeopardizing the surrounding community. The Beaufort County Planning Commission and the Zoning Board of Appeals were faithful to the important purposes of the Airport Overlay District when they denied respondent a development permit or variance that would enable respondent to build a new 10,000 square foot hall on property in the immediate landing pattern of military aircraft operating from the Air Station.

The brief of Beaufort County well explains why the Court of Common Pleas committed legal error in setting aside the judgment of these expert planning

officials. We will not repeat that analysis here. The United States submits this brief to highlight the important interests jeopardized by the decision below and to emphasize a few of the legal errors committed by the court below.

## I. THE COURT BELOW ERRED IN CONCLUDING THAT THE 1997 DEVELOPMENT PERMIT VESTED RESPONDENT WITH A RIGHT TO CONSTRUCT FELLOWSHIP HALL AT ANY INDEFINITE FUTURE DATE WITHOUT NEED FOR FURTHER APPROVAL

The court below held that a development permit issued in 1997 vested respondent with the right to construct Fellowship Hall at any indefinite future date, irrespective of any intervening changes in the applicable zoning laws. But respondent's application divided the project into two phases and designated construction of Fellowship Hall as the second phase of development. In conjunction with its application for a development permit, respondent applied for a building permit that covered only the first phase (i.e., the church building and supporting infrastructure). Properly construed, the 1997 Development Permit did not authorize construction of Phase II or, if it did, any rights in Phase II expired in 1999, more than seven years before respondent sought to construct Fellowship Hall.

The development permit issued by the County in 1997 does not specifically address whether it authorizes both phases of the proposed project or only Phase I. But the development permit does expressly state that the permit will expire within

two years unless "substantial improvement" has occurred, indicating that the County did not intend to convey to respondent an indefinite right to pursue development. It would be anomalous to read the permit, as the court below did, as conveying a time-limited right to build Phase I of the development, while allowing respondent to build the second phase at any unspecified date in the future. Common sense confirms that the County would not waive its authority to regulate land use a decade—or on respondent's reading, even a century—in the future. Such a construction would lend itself to abuse, with developers using phased development as a means of circumventing land use regulation and securing a right to build at an indefinite point in the future. And it would hamper the ability of the County to effectively implement important land use regulations like the Airport Overlay District.

Background legal principles confirm that the 1997 Development Permit should be read as limited to the first phase described in the development permit.. General principles of zoning law provide that "each section or phase is treated as a separate project." 2 *Subdivision Law and Growth Mgmt.* § 10:16 (2d ed.); *see also F.B.R. Inv'rs v. County of Charleston*, 303 S.C. 524, 527-28, 402 S.E.2d 189, 191 (Ct. App. 1991) (conditional development permit did not give developer a vested right to complete Phase II of a project where only Phase I had been completed

before changes in zoning law ).[5] Thus, in the absence of a clear statement to the contrary, the permit should be read as limited to Phase I.

This understanding of the development permit as limited to Phase I is also evidenced by the fact that the building permit issued by the County only authorized construction of the church and supporting infrastructure. In December 1997, the County conducted a final inspection of the completed church building and issued a certificate of compliance. In doing so, the County effectively closed out the development permit.

Finally, even if the 1997 permit were construed as authorizing both phases of the proposed development, it still would not follow that respondent could wait a decade before initiating construction of Phase II. If the permit is read as authorizing both phases of development, the requirement of "substantial improvement" within two years should be read as applying to each of the two phases separately. Under this interpretation, had respondent sought to construct Phase II within two years of the issuance of the development permit, it could have done so without obtaining a new development permit. But respondent's right to construct Phase II was still dependent upon respondent completing "substantial

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[5] The present version of the Beaufort County Community Development Code explicitly provides: "A phased Land Development Plan or Subdivision shall remain subject to review and approval of all phases prior to any portion of the project being vested in accordance with this Section." Section 7.4.120(C), at http://www.bcgov.net/departments/Planning-and-Development/planning/cdc/.

improvement" *of Phase II* within two years of the issuance of the development permit. The court below erred in treating substantial improvement of *Phase I* as sufficient to secure any rights respondent had in developing Phase II. Even if the 1997 Development Permit authorized Phase II, respondent's rights had expired by 2007 and respondent was required to obtain a new development permit.

## II. THE COURT BELOW ERRED IN SUBSTITUTING ITS JUDGMENT FOR THAT OF EXPERT COUNTY DEVELOPMENT OFFICIALS AND IN CONCLUDING THAT A NEW 10,000 SQUARE FOOT BUILDING WOULD NOT INCREASE THE OCCUPANT LOAD OF RESPONDENT'S PROPERTY

The court below held in the alternative that the Planning Board should have granted respondent a new development permit in 2007. But by 2007, the Airport Overlay District had been adopted to ensure that development near the Marine Corps Air Station would be limited to compatible uses. It is undisputed that the Airport Overlay District designated respondent's property as falling within an Accident Potential Zone 2. It is also undisputed that under the Airport Overlay District zoning rules, construction of new places of assembly within an Accident Potential Zone 2 is generally prohibited.

The Airport Overlay District allows for a limited exception in cases where an existing house of worship within an Accident Potential Zone seeks to expand by 15%, but only if the expansion would not increase the "occupant load" of the property. The County Planning Commission construed those regulations, which it

is charged with administering, as not allowing for the construction of a new 10,000 square foot building on the ground that it would increase the "occupant load" of respondent's existing non-conforming building. According to the Planning Commission, it would be incompatible with the limited exception in the Airport Overlay District to allow construction of a large new building with capacity for many hundreds of additional people. In reaching that determination, the Planning Commission considered evidence from a fire code official, who testified that the occupancy load of a structure is measured by reference to the maximum number of people the structure can accommodate. The Planning Commission acted well within its discretion in interpreting the development code in harmony with the fire code, and its judgment is entitled to deference. *See Historic Charleston Found. v. Krawcheck*, 313 S.C. 500, 505-06, 443 S.E.2d 401, 405 (Ct. App. 1994) (recognizing the need to "[g]iv[e] deference to the interpretation of the Zoning Ordinance by the Board which is charged with its interpretation"); *Heilker v. Zoning Bd. of Appeals for the City of Beaufort*, 346 S.C. 401, 412, 552 S.E.2d 42, 48 (Ct. App. 2001) ("The local zoning boards, and not the courts, are the primary entities responsible for the planning and development of our communities.").

The Planning Commission's interpretation of the regulation is also in keeping with the purpose and intent of the Airport Overlay District. The Airport Overlay District was adopted out of recognition that both public safety and the

integrity of Air Station operations would be compromised by construction of places of assembly within an Accident Potential Zone. Accordingly, any exception to the general limitations on construction in an Accident Potential Zone should be construed narrowly. And while the court below focused on its conclusion that respondent does not presently intend to use Fellowship Hall to increase the number of people on the property, the Planning Commission properly considered the impact on public safety of a "10,000 square foot addition [which] could accommodate an expanded church population *in the future*." [R. p. 54] (emphasis added).

## III. THE COURT BELOW ERRED IN CONCLUDING THAT RESPONDENT IS ENTITLED TO A VARIANCE

The court below held in the alternative that the Zoning Board of Appeals erred in denying respondent a variance. This holding is particularly troubling because variances are only supposed to be available under "extraordinary and exceptional" circumstances. In overturning the Zoning Board's ruling, the court stripped that standard of its rigor. If the court's analysis were applied in future cases, it would make variances the norm, rather than the exception, and undermine the important purposes served by the Airport Overlay District, to the detriment of the community and public safety.

In overruling the Zoning Board, the court below found multiple exceptional and extraordinary factors [R. pp. 25-26], but none justified the decision to overrule

the Zoning Board's determination that no variance should be granted. First, the court concluded that it was exceptional "to deny the lawful completion of a development which has been permitted." [R. p. 25]. But this pronouncement merely repackages the court's conclusion that respondent was entitled to a development permit, which, as explained in Part I and II, *supra*, was incorrect. The court also found it to be exceptional that respondent had relied on its understanding of the 1997 Development Permit as authorizing Fellowship Hall in investing in the construction of the church building and other improvements that constituted the first phase of the development. [R. p. 25]. But it would set a dangerous precedent to hold that the fact that the applicant has spent money in constructing the first phase of a development is an extraordinary circumstance that would entitle the applicant to complete a later phase. Third, the court found an exceptional circumstance based on its conclusion that a grant of a variance would not increase the number of people using the property. [R. pp. 25-26]. But the Airport Overlay District is too important to set aside the findings of expert County planning officials based on respondent's expressed intention to use the buildings sequentially. Moreover, even if the number of people on the property is constant, construction of a new 10,000 square foot hall would still increase the density of development in the Accident Potential Zone, which is contrary to the policies of the AICUZ program.

Finally, the court below erred in its consideration of the public good. The public good is not served by the construction of a new building with the capacity to put hundreds of people in harm's way. Nor is it served by allowing further development that would encroach on the Air Station and interfere with the integrity of Marine Corps missions. Accordingly, respondent is not entitled to a variance for this reason as well.

**CONCLUSION**

For the reasons stated, and those stated in the Brief of Beaufort County, this Court should reverse the judgment of the Court of Common Pleas.

Respectfully submitted,

BETH DRAKE
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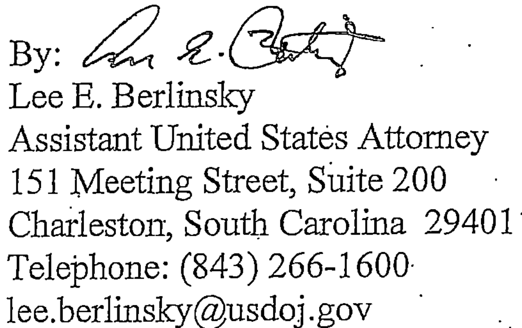

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Charleston, S.C.
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**AMENDED FINAL REPLY BRIEF FOR THE UNITED STATES OF AMERICA**

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## INTRODUCTION

The decision below poses a troubling threat to land use regulations that were enacted to protect the public from air crashes and shield a military air station from encroaching development. Under firmly established precedents, the applicability of which respondent never disputes, the judgment of expert Beaufort County development officials as to the meaning and application of those regulations is entitled to significant deference. Here, the County determined that under the regulations at issue, respondent is not entitled to build a new 10,000-square-foot hall in an area that has been restrictively zoned based on its potential for air crashes. This determination should be upheld and the County should be allowed to enforce its regulations consistent with their important purposes.

Respondent does not and cannot deny that the Fellowship Hall it seeks to build in a designated Accident Potential Zone could hold hundreds of people.[1] Respondent insists that it may nonetheless go forward with this project. But

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[1] Respondent challenges our citation to publicly available government documents that were not generated for litigation. Opp'n to U.S. 1. While these publications are judicially noticeable and were cited to provide the Court with further context regarding the Airport Overlay District regulations, nothing turns on them. The Airport Overlay District regulations themselves already make clear that those regulations are based on "accident potential zones as designated in the most recent Air Installations Compatible Use Zones (AICUZ) Report for [Marine Corps Air Station]-Beaufort," and were adopted by the County Council of Beaufort to "ensure the general safety and welfare" and limit development "determined to be incompatible according to federal standards." [R. p. 37]. It is also undisputed that respondent's proposed building site is in an "Accident Potential Zone." [R. p. 19].

respondent errs in relying on a decade-old development permit that covered a different phase of the project and which is, in any case, stale. Respondent similarly errs in challenging the County's decision to interpret its own regulations, consistent with their purposes, in the manner most protective of public safety. And respondent's claim of entitlement to a variance from those regulations rests on an interpretation that would make variances routine, rather than extraordinary. The decision below should be overturned and the County's determinations upheld.

## I. THE 1997 DEVELOPMENT PERMIT DOES NOT PROVIDE RESPONDENT WITH ANY CONTINUING RIGHTS

Respondent's lead argument is that a development permit issued in 1997 authorized construction of Fellowship Hall and that this authorization remained in force when respondent sought to commence construction a decade later in 2007. Respondent acknowledges, as it must, that the application that led to the 1997 Development Permit "discuss[ed] constructing the project in phases." Opp'n to County 7-8. Indeed, respondent's application referred to the structure now known as Fellowship Hall as "Phase II of the development." [R. p. 245]. Respondent insists that this fact is insignificant. According to respondent, notwithstanding respondent's application for approval of a phased development, the County gave respondent more than it had asked for by approving both phases of the project at the outset, thereby vesting respondent with the right to construct the second phase

of the development (Fellowship Hall) at any indefinite point in the future. Opp'n to County 7-8.

The County does not read its own development permit as expansively as respondent, and respondent fails to show why, on deferential review, the Court should construe the 1997 Development Permit more broadly than the underlying application. The County officials charged with regulating development to promote public safety and the public interest acted reasonably in considering the underlying application in determining the scope of the 1997 Development Permit.

The County's construction is supported by the text of the development permit, which makes clear that it is not intended to convey any indefinite rights, and that the permit will expire within two years unless "substantial improvement" has been completed. [R. p. 35]. Respondent assumes that completion of construction of the first phase of development qualified as "substantial improvement" for purposes of the second phase, but respondent never justifies that assumption. Given that the permit is intended to be time-limited, it is unreasonable to construe the permit as authorizing respondent to first begin an entirely new phase of development a full decade after the permit issued.

Finally, the County's construction better accords with background legal principles and public policy. As explained in the United States' opening brief (at 15 & n.5), development law generally treats each phase of a development as a

separate project. Respondent purports to distinguish one of the cases cited by the United States, *F.B.R. Inv'rs v. County of Charleston*, 303 S.C. 524, 527-28, 402 S.E.2d 189, 191 (Ct. App. 1991), but does not challenge the broader principle that separate approvals are generally required for different phases of a development. Likewise, respondent never offers any explanation as to why it accords with common sense or public policy to construe the development permit as waiving the County's authority to regulate land use and prevent development even a century in the future, regardless of any intervening changes in circumstances.

For all these reasons, this Court should defer to the County's reasonable—indeed, correct—interpretation of its own development permit.

## II. THE COUNTY REASONABLY CONSTRUED ITS OWN REGULATIONS IN DENYING THE 2007 APPLICATION

Respondent next argues that the County was required to issue a new development permit in 2007, and that in refusing to do so, the County misconstrued the Airport Overlay District regulations. Respondent does not deny that, unless some exception applies, its proposed new building would not be allowed in an Accident Potential Zone. Respondent also recognizes that no such exception applies if the new structure would increase the "occupant load" of respondent's existing development. Finally, respondent apparently concedes that if "occupant load" refers to the capacity of the proposed new building, as Beaufort's Planning Commission found, the permit application was properly denied. It can

hardly be contested that a new 10,000-square-foot structure would have the capacity to accommodate hundreds of people—and thus put hundreds more people in harm's way.

Respondent asserts that the County was required to construe its regulation to accommodate respondent's representation that, in practice, no additional people would use its premises. But respondent fails to acknowledge, let alone grapple with, the deference owed the Planning Commission in construing development regulations. *See, e.g., Historic Charleston Found. v. Krawcheck*, 313 S.C. 500, 505-06, 443 S.E.2d 401, 405 (Ct. App. 1994) (recognizing the need to "[g]iv[e] deference to the interpretation of the Zoning Ordinance by the Board which is charged with its interpretation"). Moreover, as respondent acknowledges (Opp'n to County 12), the Planning Commission's construction of the term "occupant load" accords with the meaning given to that term in the fire code, which similarly regulates occupancy for a public-safety purpose.

Respondent also misses the mark in criticizing the Planning Commission for allegedly failing to construe the regulation in a manner that "accords with its general purpose." Opp. to County 12. A principal purpose of the Airport Overlay District is to "ensure the general safety and welfare." [R. p. 37]. The Planning Commission was right to recognize that this purpose would best be served by

construing the regulation so as not to create even the potential for more people to be put in jeopardy.

## III. THE COURT BELOW ERRED IN CONCLUDING THAT RESPONDENT IS ENTITLED TO A VARIANCE

Finally, respondent argues that if the County was not required to issue a development permit, respondent should have been granted a variance. Opp'n to County 14-15. But respondent merely refers the Court to the lower court's analysis, which was erroneous for the reasons explained in our opening brief (at 19-21) and that of the County (at 11-15). Notably, respondent never denies that its position would make variances routine rather than "exceptional and extraordinary," which would undermine the efficacy of the Airport Overlay District, to the detriment of the community. Respondent's argument should be rejected so that variances do not become the norm.

## CONCLUSION

For the reasons stated above and in our opening brief, this Court should reverse the judgment of the Court of Common Pleas.

Respectfully submitted,

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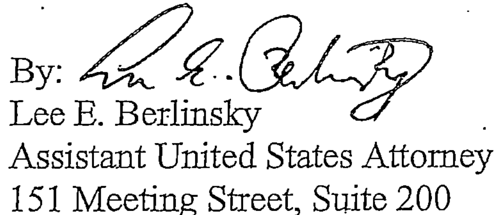
ACTING UNITED STATES ATTORNEY

By: 
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Charleston, S.C.
November 25, 2016

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

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APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Marvin H. Dukes, III, Master-In-Equity

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Civil Action No.: 2012-CP-07-01394
Appellate Case No.: 2016-000687

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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

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CERTIFICATE OF COMPLIANCE WITH RULE 211(b)

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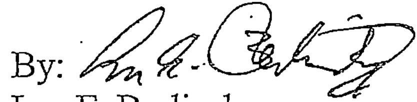
The undersigned counsel hereby certifies that the Amended Final Reply Brief of the United States of America complies with Rule 211(b), and, except for the changes allowed by Rule 211(b), is identical to the initial brief served pursuant to Rule 208.

BETH DRAKE
ACTING UNITED STATES ATTORNEY

By: 
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