

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

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SEP 12 2016
SC Court of Appeals

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,

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.

RESPONDENT'S INITIAL BRIEF
RESPONDING TO APPELLANT UNITED STATES OF AMERICA

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Attorneys for the Respondent

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ORDINANCE

PAGE:

Beaufort County Zoning Ordinance Section 106-522 4

COUNTER STATEMENT OF ISSUES ON APPEAL

- I. 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.
- II. 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.
- III. The lower Court properly concluded that the Appellant Beaufort County committed errors of law in denying the Respondent Church’s request for a variance.

STATEMENT OF THE CASE

The Appellant United States of America ("USA") references several alleged facts in its Statement of the Case in that section of its Brief entitled "Facts." See Brief of Appellant United States of America pp. 2 – 6. The Respondent respectfully objects to the Court's consideration of the alleged "facts" on the grounds that they are not part of the record in this case. More specifically, Respondent objects to the alleged facts set forth in the Appellant USA's Brief which are purportedly supported by citation to the following references:

- a. <http://www.beaufort.marines.mil/About/>;
- b. US Department of Defense Instruction No. 4165157, *Air Installation Compatible Use Zones (AICUZ Program)* (May 2, 2011);
- c. A.F. Handbook 32-7084 § 1.2, *AICUZ Program Manager's Guide* (March 1, 1999);
- d. <http://www.dtic.mil/whs/directives/corres/pdf/416557p.pdf>; and
- e. http://static.e-publishing.af.mil/production/1/af_a4_7/publication/afh32-7084/afh32-7084.pdf

The foregoing documents and websites are not part of the record in this case. The lower Court was not asked to take judicial notice of the foregoing websites.

Since the foregoing alleged "facts" are not part of the record in this case it is respectfully requested that the Court not consider that portion of the Appellant USA's Brief which cites these alleged "facts". See Appellant USA's Brief, pp. 2-6.

I. 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.

This alleged specification of error by the Appellant USA is the same alleged specification of error alleged by the Appellant Beaufort County in the first subsection of its first alleged specification of error. Rather than repeat its response, the Respondent Church craves the Court's reference to its Respondent's Brief filed in response to the Appellant Beaufort County, Respondent's Brief pp. 4 - 9. 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.

II. 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.

This alleged specification of error by the Appellant USA is the same specification of error raised by the Appellant Beaufort County under the second part of the first specification of error alleged by the Appellant Beaufort County in its Brief. Rather than repeat its response, the Respondent Church directs this Court's reference to that portion of the Respondent Church's Brief filed in response to the Appellant Beaufort County's Brief, at Respondent's Brief, pp. 9 – 13.

In summary, 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.

III. THE LOWER COURT PROPERLY CONCLUDED THAT THE APPELLANT BEAUFORT COUNTY COMMITTED ERRORS OF LAW IN DENYING THE RESPONDENT CHURCH'S REQUEST FOR A VARIANCE.

This third alleged specification of error by the Appellant USA is the same as the second alleged specification of error raised by the Respondent Beaufort County. Accordingly, this Court's attention is directed to that portion of the Respondent Church's Brief filed in response to the Appellant Beaufort County which addresses this issue. See Respondent's Brief, pp. 14 - 15.

In sum, 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.

CONCLUSION

The Beaufort County Master-In-Equity properly concluded that Beaufort County wrongfully required the Grays Hill Baptist Church to apply for a new Development Permit in order to construct its Fellowship Hall, inasmuch as the Development Permit which had previously been issued by the County to the Church included the Fellowship Hall.

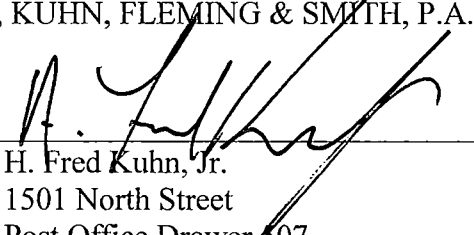
As an additional sustaining ground, the Beaufort County Master-In-Equity properly concluded that the County wrongfully refused to issue a new Development Permit for the Fellowship Hall, inasmuch as the Church's use of the Fellowship Hall would not increase the "occupant load" of the site.

Finally, as a further additional sustaining ground, the Master-In-Equity properly found that Beaufort County's decision to refuse to grant the Church's request for a variance was an abuse of discretion and controlled by errors of law.

It is accordingly respectfully requested that the Order of the Beaufort County Master-In-Equity be affirmed.

Respectfully submitted,

MOSS, KUHN, FLEMING & SMITH, P.A.

By: 

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Beaufort, South Carolina
September 8, 2016

Attorneys for Respondent

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
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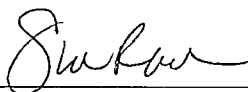
CERTIFICATE OF SERVICE

Undersigned certifies that the Respondent's Initial Brief Responding to Appellant United States of America, 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.
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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 September 8, 2016.

By: 

Sue Radford
Secretary for H. Fred Kuhn, Jr.

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SC Court of Appeals

Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

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

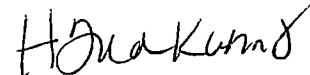
Dear Mrs. Kitchings:

Enclosed please find the original and one (1) copy of the Respondent's Initial Brief Responding to Appellant Beaufort County, Respondent's Initial Brief Responding to Appellant United States of America and Designation of Matter to be Included in Record on Appeal regarding the above-referenced matter. I would appreciate your returning one (1) filed copy to me in the enclosed self-addressed stamped envelope. By copy of this letter I am serving a copy of the same on all counsel of record.

With kindest regards, I am

Very truly yours,

MOSS, KUHN & FLEMING, P.A.

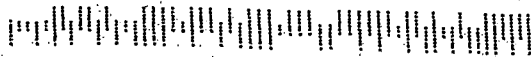


H. Fred Kuhn, Jr.

HFKjr:sr

Enclosures

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



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