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Jun 07 2021

SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM Horry COUNTY
Court of Common Pleas

Honorable Benjamin H. Culbertson, Circuit Court Judge

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

In Re: Venture Engineering, agent for DT LLCRespondent,

vs.

Horry County Zoning Board of AppealsAppellant.

**PETITION FOR REHEARING OF
OPINION No. 5819
Heard February 2, 2021 – Filed May12, 2021**

Pursuant to Rule 221, SCACR, Respondent, “In Re: Venture Engineering, agent for DT, LLC” (hereinafter, “Thompkins”), hereby petitions this Court for rehearing of its decision in In Re: Venture Engineering, agent for DT, LLC v. Horry County Zoning Board of Appeals, Opinion No. 5819 (May 12, 2021). This Petition for Rehearing should be granted as this Court has overlooked or misapprehended material points of law and/or fact. As is more fully set forth in the accompanying Memorandum in Support of this Petition incorporated herein, this standard is readily satisfied here.

Respondent respectfully requests this Court rehear and reconsider its Opinion No. 5819. In so requesting, Respondent appreciates and acknowledges this Court’s attention to this important

matter. The important issues concerning Respondent's vested right to continue the long-standing use of its property following the imposition of zoning ordinances clearly extends to similarly situated businesses throughout the State of South Carolina.

Respondent seeks rehearing and reconsideration as to the Court's conclusion that "the circuit court dialed to give deference to the Board as required by the representative standards of review for each appeal." (Opinion p. 5)

For the above reasons and those set forth more fully in the attached and incorporated Memorandum in Support of this Petition, this Court should grant this petition for Rehearing, vacate its prior Opinion, and conduct rehearing proceedings.

Respectfully Submitted,

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Heard February 2, 2021 – Filed May 12, 2021**

Pursuant to Rule 220, SCACR Respondent Venture Engineering, agent for DT LLC seeks rehearing of this Appellate Case No 2018-001221.

BACKGROUND

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.

Oral argument in this matter took place virtually on February 2, 2021 and Opinion No. 5819 was issued May 12, 2021. Respondent moves the Court for Rehearing to reconsider its determinations: the circuit court did not apply the appropriate standard of review; Thompkins' use of his property did not qualify as a principal use under section 717 of the Horry County Code of Ordinances; the circuit court failed to give deference to the Board as required by the respective standards of review; and, the "zoning classification for the Property did not permit Thompkins' acceptance of construction debris from other contractors for recycling;" that "the activity of taking outside debris does not qualify as an accessory use"

ARGUMENT

This Court determined the circuit court "failed to give deference to the Board as required by the respective standards of review for each appeal." (Opinion p. 2) Respectfully, this Court's position disregards the circuit court's exhaustive consideration of each appeal during the hearing on this consolidated matter and in its April 6, 2018 Order. As in *Wyndham Enters., LLC v. City of N. Augusta*, 401 S.C. 144 735 S.E.2d 659 (2012), the Board's ultimate decision in this matter was not supported by competent, substantial, and material evidence, and was based on opinion and uncertain, speculative testimony. The testimony cited in the Opinion on this matter is that of persons who claim to live near Thompkins' family business. However, this Court correctly noted "[a]ll of the residents who testified at the May 2015 meeting were under the mistaken impression that a landfill was going to be located on the Property." (Opinion p. 3) And that while some "of

these residents also expressed dissatisfaction with noise and dust in the community,” it was to this Court “unclear whether they were referring to Thompkins’ operations or the concrete plant’s operations next-door.”

However, this Court then went on to rely heavily upon persons who spoke at the March 14, 2016 Board meeting. Those persons, who identified themselves as Janice Dowe and Wesley Finley, refuted sworn statements from Steve Powell, whose identity was well-known to the Board. Powell personally attested to having taken demolition materials to Thompkins’ facility prior to the enactment of zoning in Horry County. (R. p. 484, Lines 21-25 (pg. 8); R. p. 485, Lines 1-2 (pg. 9); Opinion p. 47) Moreover, as noted by this Court, Powell explained the designation of recycling as “accessory” by then Zoning Administrator Meyer was “completely different” from the long-existing recycling center Thompkins operated. (R. p. 485, Lines 15-20 (pg. 12); Opinion p. 47) Notably, Wesley Finley stated there was “no plant there thirty years ago.” (R. p. 494, Lines 11-12 (pg. 45); Opinion p. 47) It is clear Mr. Finley had confused the request before the Board with the same concrete plant operation next door referenced above. Moreover, Ms. Dowe’s statement that such a facility did not exist thirty-five years earlier, even were it true, is irrelevant and does not actually contradict Mr. Powell’s testimony; Ms. Dowe spoke of a time thirty-five years prior to the March 14, 2016 meeting. Ms. Dowe was therefore referencing 1981. (R. p. 492, Lines 22-25 (pg. 39), Lines 1-2 (pg. 40); Opinion p. 47) Horry County did not adopt zoning ordinances until 1987, some six years later. The relevant point sought by the Board was whether the Thompkins’ recycling operation pre-dated the zoning laws, which it clearly did. Finally as to those who spoke at the Board meetings, the only persons known to the Board prior to the meetings were Steve Powell and counsel for Thompkins. None of the others were subject to any form of cross-examination nor any attempt to verify any of their allegations.

Thompkins, however, was sent-away by deferral several times by the Board prior to any vote on the appeal of the Zoning Administrator’s decision, each time in pursuit of evidence of its claims of continuous use. Each time Thompkins returned to the Board, it provided the requested evidence supporting its claims. In that regard, respectfully, this Court misapprehended the importance of the referenced load tickets “ostensibly” documenting the receipt of materials from outside contractors prior to the enactment of zoning in Horry County. (Opinion p. 50, Footnote 6) These tickets appear in the Record beginning at page 221 and are present sense recordings of transactions with outside contractors prior to the enactment of zoning. They identify the outside contractors (L. Dean Weaver; B + N, Trebor, Waccamaw Pottery, Southern Disposal, etc.) the dates, the tonnage, and the price charged for disposal. (R. pp. 221-265) The circuit court, after reviewing the entire record, held that each of the One Hundred and Thirty-Eight load tickets provided were from November and December 2006, and each “bears a scale stamp from which the weight of each load was determined” and that the scale was regularly inspected by the Department of Agriculture. (R. pp. 19-20)

Additionally, this Court relied upon statements from Wayne Grissett to support its determination “recycling does not qualify as a principal use under section 717” of Horry County’s Zoning Ordinances. (Opinion p. 6) However, when questioned by Board member Parker, the following exchange took place:

MR. PARKER: WHAT I’M INTERESTED IN IS THE ACTUAL GRINDING OF THE CONCRETE. YOU MADE MENTION OF THE DUST ON THE HOUSES. HAS THAT BEEN AN ISSUE IN THE PAST?

A NO, NOT WHAT THEY BE DOING BACK THERE.

(R.p. 117)

Moreover, it is absolutely undisputed that anyone, located anywhere, at any time, ever waged a complaint against the Thompkins' operation with Horry County. Testimony from neighbor Reverend Harold Nye revealed:

A. I'D LIKE TO SAY TO THE BOARD THAT THE THOMPKINS FAMILY HAS BEEN A VERY, VERY, VERY DECENT NEIGHBOR. WE HAVE CREATED A CEMETERY OUT IN OUR AREA THAT THE COUNTY DOESN'T MAINTAIN AN ACCESS ROAD TO IT. MR. THOMPKINS AND HIS MATERIALS WERE FILLING IN THOSE POT-HOLES AND GRADING THAT ROAD. IT HAS BEEN A VERY, VERY PLEASING THOUGHT TO THE COMMUNITY AS A WHOLE. I'VE BEEN OUT THERE NOW MAYBE NINETEEN YEARS GOING ON TWENTY EARS AND I HAVE NEVER HAD ANY COMPLAINES FROM (INAUDIBLE). IT HAS ALWAYS BEEN AN ISSUE AND I DON'T SEE WHAT COULD BE A PROBLEM AND NOT ALLOW HIM AND HIS FATHER TO CONTINUE. ESPECIALLY WITH HIS SAYING HE'LL KEEP THE DUST DOWN. THERE WERE QUESTIONS HERE ABOUT CONCRETE TRUCKS. YES, THEY WERE A PROBLEM AND THEY WERE A PROBLEM ON MY ROAD BASICALLY.

MR. BENIK: Y'ALL WERE PART OF THE COMMUNITY OUT THERE?

A. YES. THEY WERE COMPLAINING TO RON MCNEIL BASICALLY. TIGHT FITTING ON A PIPE MAKING PLANT DOWN THERE, CONCRETE COMPANY DOWN THERE AND THE TRUCKS WERE JUST AWFUL. IT WASN'T HIS.

(R.pp. 121-122)

Moreover, sworn witness Ron Gilkerson, agent for Respondent, explained Thompkins' operation had never had any complaints or compliance issues. (R. pp. 176, 204)

Still, this Court determined Thompkins' recycling did not qualify as a primary use under LI zoning, presumably because the operation constituted a nuisance. (Opinion p. 6) In order to support a claim of nuisance, an unreasonable interference with the use and enjoyment of one's property must be shown. *Chestnut v. AVX Corp.*, 413 S.C. 224, 776 S.E.2d 82 (2015). No such evidence exists in the record.

The validity of the load tickets is undisputed. 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. No complaints or evidence of nuisance were ever presented below. However, 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 of the Board, it merely agreed with the Board's initial, well-reasoned Order. As such, the appropriate standard of review was fully satisfied.

CONCLUSION

For the above reasons and those set forth in Respondent's filings of record in this matter, this Court should grant rehearing in this matter, vacate its prior Opinions, and conduct rehearing proceedings.

Respectfully submitted,
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PROOF OF SERVICE

I certify that I have served the **Respondent’s Petition for Rehearing and Memorandum of Law in Support of Petition for Rehearing** in the above-captioned matter on the following individuals by depositing a copy in the United States Mail, with sufficient first-class postage affixed, addressed as follows:

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Re: In Re: Venture Engineering, agent for DT LLC v. Horry County Zoning Board of Appeals
Appellate Case No.: 2018-001221

Dear Ms. Kitchings:

Please find enclosed for filing Respondent's Petition for Rehearing of Opinion No. 5819, Memorandum of Law in Support of Petition for Rehearing, and Proof of Service. By copy of this letter, I am serving a copy of the Petition and Memorandum on counsel of record for this matter.

With kindest regards, I am

Yours very truly,
BELLAMY, RUTENBERG, COPELAND,
EPPS, GRAVELY & BOWERS, P.A.

s/Robert S. Shelton
Robert S. Shelton

RSS:nmr
Enclosures as noted
cc: Client
Matthew R. Magee, Esq.