

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF CHARLESTON )  
 )  
Teresa Melhado and Dane Neller, )  
 )  
Appellants, )  
 )  
v. )  
 )  
City of Charleston, City of Charleston )  
Board of Zoning Appeals, George Wallace, )  
and Erika R. Hayes, Trustee of the Ericka )  
R. Hayes Revocable Trust u/a/d 8-4-2016, )  
 )  
Respondents. )  
\_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
FOR THE NINTH JUDICIAL CIRCUIT  
Case No.: 2021-CP-10-05255

**ORDER AFFIRMING DECISIONS  
OF BOARD OF ZONING APPEALS  
AND DISMISSING APPEAL**



This matter is before the Court on Appellants Teresa Melhado’s and Dane Neller’s appeal to the Circuit Court, pursuant to S.C. Code Ann. § 6-29-820, of the decision of the Board of Zoning Appeals-Zoning (“BZA”) of the City of Charleston on September 7, 2021, granting a variance and special exception to Respondents George Wallace and Erika R. Hayes, Trustee of the Erika R. Hayes Revocable Trust u/a/d 8-4-2016, who own 62 Church Street in downtown Charleston (the “Owners”). Appellants, who own the property next door at 60 Church Street, initiated their appeal after the BZA denied their Request for Reconsideration of its final decision. The Court conducted a hearing on the appeal by Webex® on April 20, 2022, in which the attorneys for the parties presented their respective positions.

After carefully considering the record of proceedings before the BZA, including the transcripts of the board’s meetings, the board’s written decisions, the Appellants’ petition in

support of their appeal, the memorandums of law submitted by the parties, and the oral arguments by counsel, the Court hereby affirms the final decision of the BZA and dismisses the appeal.<sup>1</sup>

### **STANDARD OF REVIEW**

S.C. Code Ann. Section 6-29-840 charges a circuit court presented with an appeal of a zoning board's decision to "determine only whether the decision of the board is correct as a matter of law." The statute is deferential to a board's findings and equates them to a jury's findings. S.C. Code Ann. § 6-29-840(A) ("The findings of fact by the [zoning] board of appeals must be treated in the same manner as a finding of fact by a jury, and the court may not take additional evidence."). The circuit court shall not disturb the board's findings unless the record contains no evidence reasonably supporting the board's findings. *Boehm v. Town of Sullivan's Island Bd. of Zoning Appeals*, 423 S.C. 169, 813 S.E.2d 874 (Ct. App. 2018); *see also Venture Eng'g for DT LLC v. Horry Cnty. Zoning Bd. of Appeals*, 433 S.C. 419, 426, 858 S.E.2d 638, 642 (Ct. App. 2021) ("[T]he decision of a zoning board of appeals must not be disturbed if there is supporting evidence in the record."). "Further, a court must not substitute its judgment for that of the board, 'even if it disagrees with the decision.'" *Venture Eng'g*, 433 S.C. at 426 (quoting *Rest. Row Assocs. v. Horry Cnty.*, 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999)).

The zoning board's decision should only be overturned where there is no evidence to support it, where it is based on an error of law, or where the board acts arbitrarily, capriciously, or has abused its discretion. *Boehm v. Town of Sullivan's Island Bd. of Zoning Appeals*, 423 S.C. 169, 813 S.E.2d 874 (Ct. App. 2018).

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<sup>1</sup> The Court's ruling on the appeal renders moot the Appellants' Motion for Supersedeas and Stay of Matters Affected by This Appeal filed March 16, 2022.

## LAW AND ANALYSIS

A review of the record filed with the Court demonstrates that the decision of the BZA was not erroneous as a matter of law and that there was evidence to support the board's decision to grant the variance and to grant the special exception subject to the conditions imposed by the BZA. Because the decision was supported by evidence and not erroneous as a matter of law, the decision was neither arbitrary nor capricious.

The transcript of the two meetings (the first on September 7, 2021, to consider the original application and the second on October 19, 2021, to consider Appellants' Request for Reconsideration) amply shows the factual matters relied upon and discussed by the board members in making their decision. The Owners' Memorandum in Opposition to the Appeal points to much of this evidence.

The written decision of the BZA on September 7, 2021, contains all the findings and conclusions required by the applicable ordinances and statutes to sustain both the variance and the special exception. Additionally, as noted in the parties' legal memorandums, our courts have determined that factual matters and statements in the transcript of a meeting of a municipal or county board of zoning appeals that support the findings and conclusions may be considered as the written decision or to supplement the written decision. *Vulcan Materials Co. v. Greenville Cty. Bd. of Zoning Appeals*, 342 S.C. 480, 494, 536 S.E.2d 892, 899 (Ct. App. 2000) ("Generally, the format of a final decision is immaterial as long as the substance of the decision is sufficiently detailed so as to allow a reviewing court to determine if the decision is supported by the facts of the case."); *cf. Austin v. Bd. of Zoning Appeals*, 362 S.C. 29, 35, 606 S.E.2d 209, 212 (Ct. App. 2004) (holding that reading the hearing transcript together with a letter informing the applicant of the board's decision provided a "sufficient basis for a reviewing court to determine whether the

decision was supported by the facts of the case” because the evidence was “clearly laid out in the transcript” and the issue raised to the board was limited to a narrow factual question).

The record establishes a factual basis in the evidence presented at the meeting on September 7, 2021, for the BZA’s findings and conclusions that there are extraordinary and exceptional conditions pertaining to 62 Church Street that do not generally apply to neighboring properties, including the location of the historic home on the lot (positioned well away from the street in comparison to the many houses abutting the street) and its lack of functional utilities and storage areas. Moreover, there is support within the record for the BZA’s finding that the denial of the variances would unreasonably restrict the utilization of the property and that the small addition to the rear of 62 Church Street would not be of substantial detriment to adjacent property, the character of the neighborhood, or the public good.

The Court also finds the BZA properly evaluated the Owners’ request for a special exception, and the board’s decision is supported by the record. The Owners’ historic house is physically non-conforming because it extends into the side setback that was created by an ordinance adopted after the house was constructed. There is no evidence that the Owners were seeking to use the small addition to their house for any business use, nor is the Owners’ request for a special exception from City Zoning Ordinance § 54-211, governing home occupations. The plans submitted by the Owners clearly show that no commercial space, storefront, parking lot, or even a home office is contemplated in this small addition to the rear of the house. Accordingly, as instructed by the ordinance, the board’s analysis properly focused on whether the small expansion to the house will cause an intensification or increase of traffic impacts, vehicular and pedestrian safety, parking impacts, potential impacts of light and noise, lighting, fumes or obstruction of air flow or light on adjoining property; impacts on the aesthetic character of the

environs, to include the possible need for screening. Mr. Batchelder's analysis as to the *minimal* light, view, and air obstruction the proposed addition may have on 60 Church Street, standing alone, fully supports the BZA's decision. The BZA addressed the Appellants' noise concern from the air conditioning units by imposing a condition on the special exception. It is well within the BZA's authority to approve the special exception subject to conditions that it considers will minimize the adverse effects, if any, upon the Appellants.

Having determined that the decision is factually supported and not legally erroneous, the Court will next address the Appellants' claim of a prejudicial procedural deficiency that was the focus of their oral argument at the hearing. Appellants contend the conduct of the meeting on September 7, 2021, deprived them of procedural due process because of the time limitations imposed by the BZA as well as the inability of the individual Appellants to comment after their attorney exhausted the entire 10 minutes allocated to their opposition of the Owners' application.

The Appellants maintain that if the subject meetings had been conducted in person they could have spoken in addition to their attorney and they could have responded in person to the comments of the Owners after the Owners short reply to the objection of Appellants. Appellants assert the BZA prevented them from doing so here via the participant control function on Zoom®. They argue that because the BZA did not hear more argument from them that they were deprived of their right to due process.

The Court finds and concludes that Appellants were not deprived of any procedural right. The procedures governing BZA meetings do not afford opponents the right to argue against the application more than ten minutes. The conduct of BZA meetings is governed by its Rules and Regulations. *See generally* Appendix C to City of Charleston Zoning Ordinances ("Rules and

Regulations of the Board of Zoning Appeals”). As stated in those rules of procedure, the normal order of hearings before the BZA is as follows:

- a. Presentation by the secretary or designated member of City staff of matter to be heard with a recommendation of the zoning administrator or his/her designated staff member (if the recommendation of the zoning administrator or his/her designated staff member is in favor of the application and no objection has been filed with the Board and no one is present to oppose the matter, the Board may approve the matter without further presentation);
- b. Presentation by applicant or appellant and others in support of the application or appeal (10-minute limit);
- c. Presentation by opponents (10-minute limit);
- d. Rebuttal by applicant (3-minute limit);
- e. The Board may question participants at any point in the hearing;
- f. Matters in which additional time is granted may be moved to the end of the agenda.

City of Charleston Zoning Ordinances at App. C, Art. IV, § 4 (“Conduct of Hearing”).

The transcript of the BZA meeting on September 7, 2021, shows that Chairperson Robinson made clear at the outset that these rules apply and stated them into the record. Opponents to an application are provided a 10-minute opportunity to present their objections. Opponents are not afforded any further participation unless a board member opts to direct a question directly to the opponents. Notably, the order of presentation is such that an opponent’s opportunity to make its arguments and/or objections is *after* staff has made its presentation and *after* the applicant as well as any supporters have stated their reasons for granting or supporting the application. Accordingly, to the extent an opponent has an objection to the testimony or documentary evidence an applicant has presented to the BZA, the opponent may expand on the objection during its presentation.

The transcript of the BZA proceedings shows that the BZA gave the Appellants the full 10 minutes to make their presentation in opposition to the Owners' applications.<sup>2</sup> Appellants do not assert otherwise. Instead, they contend they should have received more time and were "gagged" by the remote technology.

I find that there is nothing about use of Zoom® that affected the order of these hearings or the Appellants' procedural due process rights. The Appellants had a full and fair opportunity to present the grounds for their objection to the Owners' application and any evidence they wanted to submit in opposition. The BZA's use of the universally accepted Zoom® platform to conduct the meeting did not deprive the Appellants of due process.

Additionally, Appellants have not submitted any affidavits nor set out what they would have said if they had been able to provide additional testimony. At the second meeting where the BZA heard the Appellants' Request for Reconsideration, Appellants' counsel was once again given ten minutes to make any argument or showing as to what objections or "proof" Appellants would have presented if they had spoken at the first meeting. As the transcript shows, the BZA considered all these arguments and rejected them. The Appellants have failed to show anything else they would have said at the meeting on September 7, 2021, would have affected the outcome. In being unable to do so, Appellants have failed to show that they were in any manner prejudiced by the conduct of the meeting. *See Tall Tower, Inc. v. S.C. Procurement Review Panel*, 294 S.C. 225, 233, 363 S.E.2d 683, 687 (1987) (holding that demonstration of substantial prejudice is required to establish a due process claim).

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<sup>2</sup> The Appellants' arguments were made by their counsel, Brian Hellman. Mr. Hellman announced that his clients were sitting with him in his conference room. There is nothing in the Rules or Regulations that prevented Mr. Hellman, Ms. Melhado, and Mr. Neller from dividing their 10 minutes among them such that the Appellants could have spoken directly to the BZA.

The Appellants also lodged their procedural due process argument as a question of whether the general use of remote technology to conduct proceedings in this State is constitutional. The Appellants claim the Owners were able to present their case to the board without any cross-examination by the Appellants. According to Appellants' counsel, this case, which at its core is one neighbor objecting to the other's proposed rear addition, is an "important case of statewide significance" because remote videoconferencing technology allows the host to control participant participation. While there may be a case that presents a novel issue of due process in the context of remote proceedings, it is not this one.

"Due process does not require a trial-type hearing in every conceivable case of government impairment of a private interest." *Kurschner v. City of Camden Planning Com'n*, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008). "Rather, due process is flexible and calls for such procedural protections as the particular situation demands." *Id.* at 172, 350. The South Carolina Supreme Court was presented with similar due process arguments in the context of a planning commission's decision and flatly rejected the notion in *Kurschner v. City of Camden Planning Com'n*, 376 S.C. 165, 172, 656 S.E.2d 346, 350 (2008). In this case, the Kurschners applied to the City of Camden Planning Commission for approval to subdivide their property into 8 lots. *Id.* at 169, 348. After the seven-member Commission unanimously voted to disapprove their application, they appealed, arguing the Commission "did not inform them of the opposing evidence prior to trial, considered hearsay evidence, deprived them of the opportunity to cross-examine adverse witnesses, and failed to allow them to conduct *voir dire* questioning of the members of the Commission." *Id.* at 171, 349.

In keeping with the Supreme Court's holding in *Kurschner*, the Court finds that "due process does not require the full gamut of rules and procedures" to which the Appellants claim

they were entitled. *Id.* at 172, 350. Administrative bodies exercising *discretionary* authority in the area of local planning and zoning afforded to them by the legislature do not have to conduct trial-type hearings. *Id.* Indeed, our Supreme Court has acknowledged the additional procedures requested by the Kurschners and the Appellants here would actually hinder, not aid, the ability of a board like this one to make an informed and reasoned decision and would intrude into their statutorily-granted discretion. *Id.* at 172, 350.

Based on the foregoing, I find the record shows that the BZA conducted its meetings in accord with its Rules and Regulations and gave interested parties notice of this procedure at the meeting on September 7, 2021, and that the Appellants were given a meaningful opportunity to be heard before the BZA at both the September 7, 2021 and October 19, 2021 meetings. The Appellants were afforded due process.

### CONCLUSION

The record is replete with evidence reasonably supporting the BZA's decisions. Given the "any evidence" standard of review and deference that is to be afforded to a zoning board's decision, this Court must not substitute its or Appellants' judgment for the BZA's and must affirm the BZA's decisions to grant these requests. *See* S.C. Code Ann. § 6-29-840(A); *Boehm v. Town of Sullivan's Island Bd. of Zoning Appeals*, 423 S.C. 169, 813 S.E.2d 874 (Ct. App. 2018); *see also Venture Eng'g for DT LLC v. Horry Cnty. Zoning Bd. of Appeals*, 433 S.C. 419, 426, 858 S.E.2d 638, 642 (Ct. App. 2021). The Court has fully considered all the arguments made by Appellants in their Petition, in their other filings with the Court, and in the arguments of their counsel at the hearing. The Court rules on all other arguments and grounds for appeal not directly addressed herein and finds them also to be without merit, particularly in light of this Court's limited scope of review.

IT IS, THEREFORE, ORDERED that the appeal by Appellants be, and the same is hereby, DENIED and DISMISSED and that the decision of the BZA under appeal is AFFIRMED.

IT IS SO ORDERED.

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R. Markley Dennis, Jr.  
Circuit Court Judge

Charleston, South Carolina  
\_\_\_\_\_, 2022



Charleston Common Pleas

**Case Caption:** Teresa Melhado , plaintiff, et al VS Charleston City Of , defendant, et al  
**Case Number:** 2021CP1005255  
**Type:** Order/Dismissal

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