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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Walton J. McLeod, IV, Circuit Court Judge

Opinion No. 2022-UP-307 (S.C. Ct. App. filed July 20, 2022)

Frieda H. Dortch, ...Petitioner,

v.

City of Columbia, Planning & Development Services/Zoning Division a/k/a City of Columbia Board of Zoning Appeals,.....Respondent.

RESPONDENT'S RETURN TO PETITION FOR A WRIT OF CERTIORARI AND FOR A WRIT OF MANDAMUS

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the reviewing courts employed the correct standard of review.
2. Whether Petitioner preserved for appellate review the issue concerning vested rights.
3. Whether the reviewing courts correctly found that Petitioner lost the legal nonconforming use of the property as a duplex.
4. Whether the reviewing courts correctly found that Petitioner was not entitled to a variance from the zoning ordinance's lot size requirements so that Petitioner could reestablish a duplex.

STATEMENT OF THE CASE

This is a simple zoning dispute arising out of decisions made by the City of Columbia Board of Zoning Appeals (the "Board") concerning real property owned by Petitioner on which a duplex is situated. The parcel of real property is significantly less than 10,000 square feet in area. The zoning ordinance requires 5,000 square feet per dwelling unit. The Board decided in 2008, in an administrative appeal from the zoning administrator's decision, that the structure on the property had lost its legal nonconforming ("grandfather") status as a duplex on the undersized lot because the property had been vacant for over twelve months. The Board also denied Petitioner's variance requests in 2008 and 2012. Petitioner was asking for a variance to the lot size requirements for a duplex. Petitioner needed the variance because the lot on which the duplex was located was not large enough to accommodate a duplex.

In May 2008, Petitioner sought a zoning permit to renovate and reestablish a duplex. The City of Columbia zoning staff informed Petitioner that it would not be able to issue a zoning permit to perform work to a duplex because the structure had been vacant for a period of greater than 12 consecutive months and had lost its legal nonconforming use.

Petitioner then sought a certificate of zoning compliance for a nonconforming use. The zoning administrator denied the application, and the Petitioner sought administrative review by the Board. The Board upheld the zoning administrator's decision that the legal nonconforming use of the property had been lost based on facts presented showing a period of vacancy of 12 months.

Petitioner also filed an application for a variance in 2008. The Board denied the request for a variance, finding Petitioner had not shown any extraordinary or exceptional conditions pertaining to the property which warranted the granting of a variance.

Petitioner filed another application for a variance about three years after the initial denial. The Board again denied Petitioner's request for a variance.

It is from these three Board decisions that this appeal arises.

Petitioner lost the grandfather status of a duplex on a lot that is too small for a duplex. The three hearings before the Board consisted of a straightforward application of the City's ordinances regarding variances and nonconforming uses. The Board, in its quasi-judicial capacity, after hearing the facts and evidence, determined the property lost its grandfather status because it had been vacant for more than 12 months. This entire litigation saga began after Petitioner admitted, on the record, that the property had been vacant for more than 12 months. The Board also decided that the facts and evidence did not support the granting of a variance. A variance, in effect, would have re-established the grandfather status that had been lost by allowing a duplex on an undersized lot.

Substantial facts were presented showing that the property had been vacant for more than 12 months. The first words uttered by Petitioner, at the first Board hearing in this matter, were: "I am requesting to reestablish duplex status of this property . . . because the property has been vacant

for more than 12 months." So began Petitioner's saga to reestablish her property's use as a duplex after the admitted loss of its legal nonconforming use.

The Board heard evidence that the property had suffered fire damage in April 2004, that the property had been vacant for about two years, and that the water and electricity had been turned off during that time. Petitioner did not approach the City in an attempt to obtain a permit to perform repairs to the structure until sometime in 2007.

From Respondent's standpoint, this entire matter is fairly straightforward. Petitioner applied to the Board for various forms of relief in her attempt to reestablish the use of the structure as a duplex after the zoning administrator decided the structure had lost its legal nonconforming status. A total of three hearings were held by the Board, of which there are video and audio recordings and written transcripts. The Board applied the City's ordinances regarding variances and nonconforming uses and decided Petitioner was not entitled to a variance or to the reestablishment of the nonconforming use as a duplex. The circuit court reviewed this record and affirmed the Board's decisions. Petitioner noticed her appeal to the court of appeals and the court of appeals affirmed.

Petitioner filed a Petition for Rehearing on August 4, 2022. In the petition, Petitioner requested the court of appeals to re-issue a published decision addressing and ruling on all of the dispositive issues presented on appeal. Petitioner also requested the court of appeals to "review" all of the briefs in this matter, as if the court had not already done so, and "change" the court's rulings. Petitioner addressed the following issues in her petition: (1) the standard of review; (2) statutory grandfathering; (3) denial of the variance; and (4) violation of Petitioner's vested constitutional right to continued use as a duplex. But, rather than address the merits, Petitioner spent a vast majority of her argument on the court of appeal's issuance of an unpublished opinion.

The court of appeals denied the petition for rehearing on September 22, 2022, and Petitioner filed her Petitioner for a Writ of Certiorari and for a Writ of Mandamus ("Petition") on October 24, 2022.

The Petition lists forty questions presented for review, even though the questions should be "expressed in the terms and circumstances of the case but without unnecessary detail." Rule 242(d)(2), SCACR. In the Petition, Petitioner spends the vast majority of her argument on the form of the court of appeals' decision. As to the merits, without much detail, Petitioner argues that the court of appeals should have ruled on the vested rights issue, and that the court did not understand, identify, or decide the remaining issues. Petitioner hardly identifies the remaining issues and fails to explain the source of any error by the court of appeals. The Petition is without merit.

ARGUMENT

1. The circuit court and court of appeals applied the correct standard of review.

The circuit court correctly stated the standard of review employed by appellate courts for decisions made by zoning boards. In this case, the Board issued three decisions based on the facts as presented to the Board. There should not be any dispute about the standard employed by an appellate court when reviewing a decision by a zoning board. There is no merit to Petitioner's argument that a *de novo* standard of review was required for review of a zoning board's decisions.

"The appellate court gives 'great deference to the decisions of those charged with interpreting and applying local zoning ordinances.'" *Arkay, LLC v. City of Charleston*, 418 S.C. 86, 91, 791 S.E.2d 305, 308 (Ct. App. 2016). "The appellate court is not free to substitute its judgment for that of the [Board]. Accordingly, [the court of appeals] will not reverse the circuit court's affirmance of the [Board] unless the [Board's] findings of fact have no evidentiary support

or the [Board] commits an error of law." *Gurganious v. City of Beaufort*, 317 S.C. 481, 487, 454 S.E.2d 912, 916 (Ct. App. 1995).

A decision of a board of zoning appeals will not be overturned unless it is arbitrary, capricious, has no reasonable relation to a lawful purpose, or if the board has abused its discretion. *Austin v. Bd. of Zoning Appeals*, 362 S.C. 29, 606 S.E.2d 209 (Ct. App. 2004). "An abuse of discretion occurs when a . . . decision is unsupported by the evidence or controlled by an error of law." *Cnty. of Richland v. Simpkins*, 348 S.C. 664, 668, 560 S.E.2d 902, 904 (Ct. App. 2002).

The court of appeals was absolutely correct in finding that no authority supports *de novo* review of the Board's decisions. The Board is a creature of statute. The Board has those powers and responsibilities as set forth in the statute. The statute also provides the standard of review to be used in the appeal from a decision of a zoning board. *See* S.C. Code Ann. § 6-29-840(A) (Supp. 2021). There is **no authority** that an entire zoning appeal should be reviewed *de novo* simply because it is alleged the decision is incorrect as a matter of law. Petitioner is so strenuously urging a *de novo* standard of review because there is no other way for Petitioner to overcome the significant evidence in the record supporting the loss of grandfather status. To prevail, Petitioner would need the Court to substitute its judgment for that of the fact-finder, which is not permitted under the well-established and oft-cited standard of review. This is not to say that a reviewing court cannot correct an error of law. A reviewing court may overturn a board's decision if the board has abused its discretion. However, this does not mean that the entire proceeding should be reviewed under a *de novo* standard. There is no authority to support Petitioner's argument that *de novo* review is required of these zoning decisions.

2. Petitioner failed to preserve the vested rights issue and lost the legal nonconforming use through vacancy of the property (Issues 2 and 3 in Questions Presented for Review).

a. Petitioner failed to preserve the issue.

The issue of vested rights, which Petitioner argues would upend any attempt by towns and counties to amortize nonconforming uses out of existence, was not preserved. Petitioner claims in this appeal that any statutory attempt to terminate a vested right is unconstitutional. The Board did not hear or decide any issue concerning vested rights, so it was incumbent upon Petitioner to clearly set forth this issue in her petition for appeal. *See Newton v. Zoning Bd. of Appeals for Beaufort Cnty.*, 396 S.C. 112, 719 S.E.2d 282 (Ct. App. 2011) (stating that error preservation requires an appellant to state her issues on appeal in a written petition filed with the circuit court). The closest Petitioner came to specifically raising this issue to any lower tribunal was the language in the first *pro se* petition for appeal to the circuit court in which Petitioner claimed that "the actions and prohibitions to which she had been subjected . . . were 'fundamentally unfair and denial of due process.'" *See* Petition for Rehearing, p. 10; R. p. 192. This does not sufficiently raise the issue of the alleged unconstitutional denial of a vested right to maintain a duplex. Petitioner also asserted numerous other meritless claims about the record of the appeal and the manner in which the Board hearings were held. Are these the due process concerns alluded to in the petition for appeal?

The petition for appeal to the circuit court also stated that the property had been family property for many years before any change in the zoning code. *See* Appellant's Brief, p. 23; R. p. 191. This was simply a restatement of the same factual argument that Petitioner had made to the Board, and does not sufficiently raise the specific legal issue that Petitioner possessed a vested right to continue the use as a duplex forever and ever. It certainly does not put any tribunal on

notice that Petitioner contended that she had a vested right as a matter of constitutional law, regardless of the objective facts of vacancy. Petitioner's amended petition of appeal similarly does not sufficiently raise the issue. In any event, amended petitions for appeal and additional materials are "expressly forbidden." *Austin v. Bd. of Zoning Appeals*, 362 S.C. 29, 606 S.E.2d 209 (Ct. App. 2004).

Therefore, the constitutionality of terminating Petitioner's vested rights was not preserved for appellate review, and the court of appeals correctly decided not to address this issue.

b. On the evidence, Petitioner's property lost its status as a legal nonconforming use as a duplex and the application of an objective time limitation for reestablishment of a nonconforming use does not unconstitutionally deprive Petitioner of her vested rights.

Because the issue concerning vested rights to a nonconforming use was not preserved, it leaves only the issue of whether the Board erred, based on the evidence before it, in denying the request to allow a legal nonconforming use. However, in briefing to the court of appeals, Petitioner concentrated solely on the unpreserved issue. Petitioner did not present any argument that the facts of vacancy were not sufficient to support the Board's decision. Therefore, this issue has been abandoned and is the law of the case because Petitioner did not challenge the sufficiency of the evidence concerning the finding of the loss of grandfather status. The Board's decision concerning the loss of grandfather status can be affirmed for this reason alone.

In any event, the grandfathering issue facing the Board was whether the evidence showed the legal nonconforming use had been lost by a 12-month period of vacancy. The term "nonconforming" is one that is "applied to lots, structures, uses of land or structures . . . which were lawful before the passage of the [zoning] ordinance . . . but which are prohibited by [the zoning ordinance] or which are not in compliance with the requirements of [the zoning ordinance]. City Code § 17-55. The zoning ordinance recognizes that there may be lots and uses of land and

structures which were lawful before passage of the zoning ordinance. Therefore, the zoning ordinance is intended to allow the nonconformities "to continue until they are removed, but not to encourage their survival." City Code § 17-201.

A nonconforming use cannot be reestablished after vacancy, abandonment or discontinuance for any period of 12 consecutive months. City Code § 17-202(e). Likewise, the zoning administrator may not issue a certificate of zoning compliance for a nonconforming use unless the zoning administrator receives reasonable proof that the nonconformity has not been vacant, abandoned or discontinued for any period of 12 consecutive months within the last six years. City Code § 17-84(b)(1).

The evidence in the record reasonably supported the Board's decision that the property had been vacant for a 12-month period and had lost its legal nonconforming status. The electricity was cut to the property at the time of a fire in 2004. Water service was discontinued as of August 2005. The City's inspection history states the property was vacant as of November 7, 2005, and placards were placed on the structure. In October 2005, Petitioner's brother notified the City he would be out of the house by November 1, 2005.

Petitioner testified she did not attempt to obtain a permit until December 2007 after she obtained full ownership of the property. Contradictorily, Petitioner testified her first attempt to get a permit from the City was in January 2007. In any event, it was many years after the fire and the termination of utilities that Petitioner attempted to obtain a permit.

The Board did not err in finding that the duplex was a nonconformity that should not have been grandfathered. The evidence outlined above supported the Board's decision that the use had been vacant, discontinued, or abandoned for at least a 12-month period. There is evidence that there was no water or electricity for many years together with evidence that Petitioner's brother

moved out and Petitioner made no attempt to obtain a permit for the property until almost three years after the fire.

Concerning the unpreserved vested rights issue, Petitioner argues that the application of section 17-202(e) of the City Code contradicts vested-right rules and unconstitutionally deprived Petitioner of her vested right to use the property as a duplex in perpetuity, until such time as she affirmatively discontinues such use.

Petitioner misapprehends the law of nonconforming uses as related to vested rights. The overriding public policy of zoning laws is aimed at the reasonable restriction and eventual elimination of nonconforming uses. *See Boehm v. Town of Sullivan's Island Bd. of Zoning Appeals*, 423 S.C. 169, 187, 813 S.E.2d 874, 883 (Ct. App. 2018) ("[T]he intention of all zoning laws, as regards a nonconforming use of property, is to restrict and gradually eliminate the nonconforming use."); S.C. Code Ann. § 6-29-730 (2004) (providing that the governing authority may enact regulations for the termination of nonconformities by specifying the period or periods in which the nonconformity is required to cease).

"A landowner acquires a vested right to continue a nonconforming use already in existence at the time his property is zoned in the absence of a showing that the continuance of the use would constitute a detriment to the public health, safety or welfare." *Vulcan Materials Co. v. Greenville County Bd. of Zoning Appeals*, 342 S.C. 480, 498, 536 S.E.2d 892, 901 (Ct. App. 2000); *see Gurganious v. City of Beaufort*, 317 S.C. 481, 490, 454 S.E.2d 912, 917-18 (Ct. App. 1995) ("Once a valid zoning ordinance is enacted based upon a comprehensive zoning plan, it is generally recognized that nonconforming uses detract from the public purpose to be achieved by the plan.").

Petitioner argues *James v. City of Greenville*, 227 S.C. 565, 88 S.E.2d 661 (1955) does not permit a municipality to statutorily terminate nonconforming uses upon a cessation of use.

However, *James* is patently distinguishable from the present case. The zoning ordinance in *James*, unlike the City's ordinance, did not provide any allowance for the continuation of a nonconforming use until some period of cessation of use. The Greenville ordinance required that any use of land which did not comply with the provisions of the ordinance had to be discontinued within one year from the effective date of the ordinance. *Id.* at 574, 88 S.E.2d at 665. Thus, pursuant to the ordinance, the landowner was forced to discontinue the use to which he had been applying it. *Id.* at 581, 88 S.E.2d at 669. This Court held that the operation of the ordinance amounted to a taking and a violation of due process because it arbitrarily discontinued nonconforming uses. The Court stated, "one's property may be continued to be used for the same purpose it was being used at the time of the passage of the zoning ordinance." *Id.* at 578, 88 S.E.2d at 667. This is also true in Columbia, South Carolina. One's property may continue to be used for the same purpose, *unless* that purpose or use is vacated, discontinued, or abandoned. The City of Columbia's ordinance does not arbitrarily order a discontinuance of use like the ordinance at issue in *James*.

Petitioner had a vested right to continue the use of her property as a duplex until such time as the use was cut off for a period of 12 months by vacancy, abandonment or discontinuance of that use. The authorities cited by Plaintiff do not prevent a municipality from legislating the extinguishment of nonconforming uses after an objective period of vacancy, discontinuance, or abandonment.

In *Gurganious v. City of Beaufort*, 317 S.C. 481, 454 S.E.2d 912 (Ct. App. 1995), a property owner challenged an architectural board's decision to deny grandfather status to a fence without regard to the issue of intent to abandon the nonconforming fence. The applicable ordinance contained an objective time limitation on the reestablishment of the use. *Id.* In the face of the objective time limitation, the court of appeals declined to apply the common law definition of

abandonment. *Id.* The court affirmed the board's denial of a certificate of appropriateness for the fence. The architectural board found the nonconforming fence lost its grandfathered status because the prior fence had been destroyed over one year prior to the construction of the new fence. *Id.* The ordinance at issue stated, in part, that a nonconforming use could not be "[r]eused or reoccupied after discontinuance of use or occupancy for a period of one (1) year or more . . . ." *Id.* at 489, 454 S.E.2d at 917. The court held the time allowed for reoccupation was reasonable and that the ordinance was properly applied without regard to the actual intentions of the property owner. *Id.* at 490, 454 S.E.2d at 918.

To the extent that an intent to abandon needs to be demonstrated before a nonconforming use can be terminated, which is denied, the evidence heard and relied upon by the Board demonstrates this intent. Petitioner failed, for a period in excess of 12 months after the fire, to take any action to reestablish the use of the property as a duplex. Petitioner does not claim that she made any efforts during this time to reestablish the use of the property as a duplex. She did not contact anyone. She did not attempt to obtain any permits. She did not appeal the posting of the property. In other words, the discontinuance and vacancy were voluntary. Now, many years later, Petitioner simply asserts she intended all along to continue the use of the property as a duplex. The position urged by Petitioner would allow nonconforming uses to be extended indefinitely, on the whim of the landowner.

The Board's conclusion not to allow reestablishment of the nonconforming use, which should not be disturbed if there is any evidence to support it, is supported by the evidence that there was no water or electricity for many years and no attempt by Appellant to obtain a permit for the property for many years. Appellant's subjective, self-serving testimony regarding her intention should not be given credence now in the face of the objective evidence heard by the Board. *See*

Gurganious, 317 S.C. at 488, 454 S.E.2d at 916 (holding that an owner's intentions are not to be regarded where a zoning ordinance contains an objective time limitation on the resumption of usage); *see also S & S Auto Sales, Inc. v. Zoning Bd. of Adjustment for Borough of Stratford*, 862 A.2d 1204, 1211 (N.J. Super. Ct. App. Div. 2004) ("An unsubstantiated assertion of intention cannot carry the day, for that would . . . defeat advancement of the elimination policy.").

3. Petitioner was not entitled to a variance (Issue 4 on Questions Presented for Review).

In her Petition, Petitioner makes no argument concerning the denial of her variance requests. Petitioner has abandoned this issue.

The Board may grant a variance from the terms of the zoning ordinance "as will not be contrary to the public interest where, owing to special conditions, a literal enforcement of the provisions of [the zoning ordinance] will, in an individual case, result in unnecessary hardship, so that the spirit of [the zoning ordinance] shall be observed, public safety and welfare secured, and substantial justice done." City Code § 17-112(3)a.1. The City's criteria for a variance are taken directly from S.C. Code Ann. § 6-29-800 (Supp. 2019). A variance may be granted in an individual case of unnecessary hardship only upon a finding by the Board that the following conditions have been met:

> (1) There are extraordinary and exceptional conditions pertaining to the piece of property;
> (2) The extraordinary and exceptional conditions do not generally apply to other property in the vicinity;
> (3) Because of the conditions, the application of the zoning ordinance to the particular piece of property would effectively prohibit or unreasonably restrict the utilization of the property; and
> (4) The authorization of a variance will not be of substantial detriment to adjacent property or to the public good, and the

> character of the district will not be harmed by the granting of the variance.

City Code § 17-112(3)b.1.(i) - (iv).

The Board must also find that the reasons set forth in the application justify a variance, and that the variance is the minimum variance that will make possible the reasonable use of the land. City Code 17-112(3)b.6. Finally, in order to grant a variance, the Board must find it will be in harmony with the general purpose and intent of the zoning ordinance, and will not be injurious to the neighborhood or otherwise detrimental to the public welfare. City Code 17-112(3)b.7.

"Granting a variance is an exceptional power which should be sparingly exercised and can be validly used only where a situation falls fully within the specified conditions." *Restaurant Row Assocs. v. Horry Cnty.*, 335 S.C. 209, 215, 516 S.E.2d 442, 445-46 (1999); *see also Hodge v. Pollock*, 223 S.C. 342, 348, 75 S.E.2d 752, 754 (1953) ("It is generally held that before a variance can be allowed on the ground of 'unnecessary hardship', there must at least be proof that a particular property suffers a singular disadvantage through the operation of a zoning regulation."). The general rule is that variances are to be granted sparingly, only in rare instances and under peculiar and exceptional circumstances. 8 McQuillin, Municipal Corporations § 25:179.32 (3d ed. 2010). A variance should be strictly construed and granted only in cases of extreme hardship where the requirements of the ordinance are present. *Id.*

An applicant bears the burden of proving its entitlement to a variance and a board correctly denies a variance if the applicant fails to meet the requirements of each element of the ordinance. *Restaurant Row*, 335 S.C. at 215, 516 S.E.2d at 445. A board's decision will not be disturbed if there is evidence in the record to support it. *Id.* at 215, 516 S.E.2d at 446.

The reviewing courts did not err in finding that the Board properly denied the variance requests. This question, like the question of loss of grandfathering, was fact-specific and the Board

correctly found the facts did not support the granting of a variance. When she applied for the variance, Petitioner had lost the legal nonconforming use of the property. That was the starting point for the variance requests. Petitioner would not have needed a variance had she not lost the legal nonconforming use. The court of appeals' opinion cited the ordinance requiring the Board to find "extraordinary and exceptional conditions pertaining to [a] piece of property" before granting a variance. On this point, in the tribunal below, Petitioner simply argued that her structure had been a duplex for a long time. The Board was not required to find that a thing which Petitioner lost, i.e., the legal nonconforming use, was now something that would entitle Petitioner to a variance. The Board was not required to find that long-time use as a duplex created extraordinary and exceptional conditions. In the grand scheme of things, this is certainly not extraordinary or exceptional. Many buildings are used in one way for a while, and then transformed or renovated into another use. Even if a nonconforming use legally could be an exceptional condition, it does not mean that the Board was required to come to this conclusion. There is no compelling legal or factual reason for this Court to substitute its judgment for the Board.

Petitioner did not demonstrate "extraordinary and exceptional *conditions pertaining to the piece of property*." City Code § 17-112(3)b.1. The use of the structure on the property as a duplex is not an extraordinary and exceptional *condition pertaining to the property*. Petitioner's entire body of evidence on this factor was that the structure had been a duplex for a long time. On this point, Appellant admitted at the outset of the hearing that the structure had been vacant and was nonconforming and she was seeking to reestablish it as a duplex. Therefore, Petitioner's argument as to extraordinary conditions basically took the form of stating that a nonconforming use is an extraordinary and exceptional condition that should allow a variance. Petitioner's request was this: My duplex is nonconforming; therefore, my duplex is extraordinary and exceptional. If this

were the standard, nonconforming uses would never be amortized out of existence and would always be grounds for a variance.[1]

The Board was not required to accept Petitioner's facts or reasoning at face value. The Board was correct in deciding, based on the facts presented to it, that there were no extraordinary and exceptional conditions that pertained to the piece of property. Just because Petitioner says the property has been a duplex for a long time does not make the conditions pertaining to the property extraordinary and exceptional. The Board, as the fact finder, can take its own view of the evidence.

The opinion in *Dolive v. J.E.E. Developers, Inc.*, 308 S.C. 380, 418 S.E.2d 319 (Ct. App. 1992), is an example of a variance being granted because of extraordinary and exceptional conditions pertaining to a piece of property. The developer had purchased a piece of property with plans to build an 80-unit motel. *Id.* at 381, 418 S.E.2d at 320. However, the passage of the Beachfront Management Act resulted in the loss of property, preventing the developer from meeting the parking requirements for the planned motel. *Id.* The developer presented evidence of extraordinary and exceptional conditions pertaining to the property, and the court of appeals affirmed the granting of a variance. *Id.* at 384, 418 S.E.2d at 322. In the present case, Petitioner has not presented any evidence of extraordinary and exceptional conditions of the property. Petitioner based her request on the loss of grandfather status. This is not an extraordinary and exceptional condition pertaining to the property.

A variance can be granted where, owing to special conditions, a literal enforcement of the zoning ordinance will result in unnecessary hardship. City Code § 17-112(a)1. It cannot be stressed

[1] It is important to note Petitioner can continue to use the property for residential purposes. This situation is very different from that in *Bennett v. Sullivan's Island Bd. of Adjustment*, 313 S.C. 455, 438 S.E.2d 273 (Ct. App. 1993), where the owner was entitled to a variance because the landowner had no other possible use for the property without a variance.

enough that the unnecessary hardship urged by Petitioner is not from a literal enforcement of the ordinance but rather from Petitioner's own failure to maintain the grandfathered status of the property.

The court of appeals clearly and correctly found that Appellant did not meet her burden of proof to establish the elements of a variance. It was not error to make a finding that an applicant did not meet its burden of proof. *See Rest. Row, supra* (finding the applicant did not meet its burden to show an unnecessary hardship).

4. Unpublished Opinion and whether issues were properly addressed by the court of appeals.

Petitioner contends that the court of appeals is not authorized to issue unpublished opinions. Rule 220(a) states: "The appellate court shall make its decisions in writing by published opinions or memorandum opinions . . . ." Rule 220(a), SCACR. On its very face, then, the Rule authorizes the appellate courts, including the court of appeals, to issue unpublished, memorandum decisions, as has been the practice for decades. So long as the decision rendered by the court of appeals addresses "every point distinctly stated in the case which is necessary to the decision of the appeal and fairly arising upon the record," the court of appeals need not issue a published opinion. Rule 220(b), SCACR. Whether published or not, "[t]he Court of Appeals need not address a point which is manifestly without merit." Rule 220(b)(2), SCACR. Appellant's arguments regarding the form of the subject opinion are without merit.

In Petitioner's brief to the court of appeals Petitioner listed twenty-nine "separate" issues. Petitioner claims the court of appeals should have separately identified and decided all twenty-nine of the distinctly numbered issues stated by Petitioner. This argument is disingenuous. Petitioner somehow creatively crafted twenty-nine issues on appeal but many of the issues are

simply sub-parts of a larger issue. Moreover, even Petitioner did not separately address all issues. Petitioner lumped many of the issues together in the body of the briefs. The statement of issues on appeal "shall be concise and direct as to each issue . . . ." Rule 208(b)(1)(B), SCACR. Petitioner is in violation of this rule but self-corrected by combining issues in the argument of the brief. Petitioner separated her argument into main sections, and discussed the standard of review, vested rights, error preservation, and the denial of the variance requests. These are the issues addressed by the court of appeals.

The court of appeals addressed all issues which had any merit. Many of the issues listed by Petitioner in the Statement of Issues on Appeal are clearly without merit and did not have to be addressed by the Court. For example, Petitioner attempts to argue that the proceedings regarding the variance requests were infected with irregularities and procedural and evidentiary issues. The reviewing courts have been provided the entire record of the proceedings before the Board. Petitioner was afforded a meaningful opportunity to make her case and there are no irregularities that affected the proceedings. *See Kurschner v. City of Camden Plan. Comm'n*, 376 S.C. 165, 656 S.E.2d 346 (2008) (holding due process does not require local boards to adopt strict rules of procedure similar to those in circuit courts); *see also Harbit v. City of Charleston*, 382 S.C. 383, 675 S.E.2d 776 (Ct. App. 2009) (holding property owner received due process when he was provided notice of hearing and was allowed to present arguments). As another example, Petitioner argued that section 17-275 of the City Code does not require 10,000 square feet of lot area for a duplex and leaves citizens guessing as to its requirements. This issue was manifestly without merit, was not raised in the petition to the circuit court,[2] and did not need to be separately addressed by the court of appeals. There was no reason for the court of appeals to attempt to separately address

[2] *See Newton*, *supra* (addressing error preservation from a board decision).

each of the twenty-nine issues stated by Petitioner. The court of appeals combined and ruled on every issue that was necessary to the decision of the appeal and which fairly arose upon the record. *See* Rule 220(b), SCACR.

5. Miscellaneous issues stated by Petitioner in the Petition that have been waived and are without merit.

Petitioner dedicates only about three pages in the Petition to any discussion of the merits of the court of appeals' decision. However, the issues Petitioner now asserts in the Petition were not raised in the petitions for appeal to the circuit court and have been waived. *See Newton*, *supra*. These issues, addressed only in short, conclusory fashion, should also be deemed abandoned. The waived issues include Petitioner's argument that section 17-275 is unconstitutionally vague and does not require 10,000 square feet of lot area for a duplex. Petitioner filed multiple applications for a variance because the lot size was too small to accommodate a duplex. Never, until briefing at the court of appeals, did Petitioner argue that she did not need to apply for a variance because the ordinance did not require 10,000 square feet of lot area. In any event, section 17-275 of the zoning ordinance contains a schedule of area requirements for all zoning districts in the City. The schedule is straightforward and easily applied. Petitioner is manufacturing confusion and doubt in a reasonably understandable statutory scheme.

Petitioner also now asserts on appeal that section 17-202(e) of the City Code should not have been applied by the Board. This is the section that states a use cannot be reestablished after a period of vacancy. Petitioner argues that a different subsection (§ 17-202(f)) should have applied to allow the nonconforming use to continue. This issue was not raised in a petition for appeal to the circuit court and has been waived. But, this issue is without merit. This subsection provides

that continuity of a nonconforming use after damage of less than 75% of the structure depends on beginning reconstruction within six months from the time of damage.

Finally, Petitioner also argues for equitable tolling of the application of the vacancy time period. This issue was also not preserved for appellate review because it was not raised to the circuit court. Petitioner mentions the issue in passing in her Petition. Petitioner devoted only two paragraphs to this issue in her briefs to the court of appeals. The cases cited by Petitioner in support of this issue do not apply equitable tolling to a statutory amortization provision in a zoning ordinance. The cases cited by Petitioner address only the doctrine of equitable tolling in the application of a statute of limitations.[3] There is no reason to apply equitable tolling.

CONCLUSION

For the reasons stated herein, Petitioner's Petition for a Writ of Certiorari and for a Writ of Mandamus should be denied.

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[3] One of the decisions cited by Petitioner was vacated by this Court. *Kimmer v. Wright*, 396 S.C. 53, 719 S.E.2d 265 (Ct. App. 2011), vacated by 2013 WL 8207447.