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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable R. Markley Dennis, Jr., Former Circuit Court Judge

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Case No. 2021-CP-1005255
Appellate Case No. 2022-000973

Teresa Melhado and Dane Neller……..……Appellants,

v.

City of Charleston, City of Charleston
Board of Zoning Appeals, George Wallace,
Erika Wallace, Erika R. Hayes, Trustee of the
Erika R. Hayes Revokable Trust u/a/d 8-42016…… Respondents,

APPELLANTS' INITIAL BRIEF

Dated: December 23, 2022

Respectfully submitted,

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STATEMENT OF ISSUES ON APPEAL

1. Did the circuit court err by applying *federal* procedural law in declining to reconsider issues that were raised but not ruled upon and are now put to this Court to decide?

2. Should this Court vacate the circuit court's affirmance of the board of zoning appeals and remand this matter for the board of zoning appeals to hold a new, *de novo*, public hearing because it relied on tainted, faulty evidence to which the appellants, impacted neighbors, were not afforded the opportunity to object when they were technologically gagged and ousted in violation of the procedural ordinance and statute, as well as constitutional due process?

3. Should this Court vacate the circuit court's affirmance of the board of zoning appeals based on further errors of law and arbitrary and capricious findings regarding unsworn remarks and comments by City staff, business uses, unnecessary hardship, and an additional variance and special exception required for allowance of the construction project?

STATEMENT OF THE CASE

This is a zoning appeal, taken under the South Carolina Local Government Comprehensive Planning Act of 1994, pursuant to S.C. Code Ann. § 6-29-850 (Supp. 2018), of the circuit court's order dated May 18, 2022 and subsequent order denying reconsideration dated June 15, 2022. (Cir. Ct. Orders).

This matter was commenced on May 27, 2021, when George and Erika Wallace (on behalf of Erika R. Hayes, as Trustee of the Erika R. Hayes Revokable Trust u/a/d 8-42016) (the "Construction Applicants"), who own 62 Church Street in historic Charleston, submitted an application to the City of Charleston Board of Zoning Appeals (the "BZA") for both a variance and a special exception to allow an otherwise unpermitted new construction project impacting their neighbors, Teresa Melhado and Dane Neller ("Impacted Neighbors"), who own 60 Church Street. (Application).

The BZA held a public hearing on September 7, 2021. (BZA Sept. 7 Tr.). At the close of the public hearing, the BZA passed a motion to approve the application. (BZA Sept. 7 Tr., p. 28, l. 9 - p. 29, l. 7). The BZA issued a written order granting the application

the same day. (BZA Sept. 7 Order). The Impacted Neighbors then made an appeal for reconsideration to the BZA, seeking relief provided by City of Charleston Ordinance, Appendix C, Article III, § 3, that the "decision shall be withdrawn and the matter heard and considered *de novo*, as if no hearing, consideration or determination had been previously made or heard." (Appeal for Reconsideration to BZA; Reply to BZA; BZA Oct. 19 Tr.; Reply Brief to Circuit Court, p. 2, n. 2). The BZA denied the appeal for reconsideration and declined to hold a new, *de novo* public hearing on October 19, 2021. (BZA Oct. 19 Tr.). The BZA mailed its final decision approving the application on October 20, 2021, which mailing date started a statutory 30-day period to file a notice of appeal with the circuit court, per S.C. Code Ann. § 6-29-820. (BZA Oct. 19 Order).

The Impacted Neighbors filed a notice of appeal with the circuit court on November 18, 2021. (Not. App. to Cir. Ct.). The circuit court held a hearing on the appeal on April 20, 2022. (Cir. Ct. Tr.). The circuit court issued an order affirming the BZA on May 18, 2022 and then denied a motion for reconsideration on June 15, 2022. (Cir. Ct. Orders).

The Impacted Neighbors filed a notice of appeal with this Court on July 14, 2022. (Not. of App. to Ct. App.).

STATEMENT OF FACTS

A. The Public Hearing

The public hearing was conducted by the BZA using video conferencing technology. (BZA Sept 7 Tr.; BZA Zoom Meeting Protocol; BZA Video Recording).[1] *To be clear at the outset, this appeal does not challenge the ubiquitous and well-accepted use of video conferencing technology, as a general matter.* Rather, the more specific problem

[1] A video recording of the BZA public hearing was cited in the record below and made available to the circuit court and is publicly available on You Tube at https://www.youtube.com/watch?v=GzTu4Tp6pEE.

leading to this appeal arose from the BZA's particular misuse of a specific feature and functionality of a video conferencing platform known as "Zoom Webinar."

To wit, the BZA, using the "Zoom Webinar" platform, implemented its own self-written, so-called "Zoom Meeting Protocol," to digitally "enable" and "disable" who could be seen and heard during the video conference, in connection with digitally designating some people as "panelists" and others as "attendees." (BZA Sept. 7 Tr., p. 15, ll. 3-4; BZA Zoom Meeting Protocol; BZA Video Recording). This protocol was doomed to fail because a public hearing on a zoning application is not the same thing as a "Webinar," having "panelists" and "attendees."

In this case, the Construction Applicants were "enabled" as "panelists" for the entire hearing, whereas the Impacted Neighbors were mostly "disabled" as "attendees." (BZA Sept. 7 Tr.; BZA Video Recording). The public hearing on the application lasted approximately 1 hour. (BZA Sept. 7 Tr.; BZA Video Recording). The Impacted Neighbors' counsel was only "enabled" for approximately 10 minutes in the middle, which was after City staff and the Construction Applicants combined to make approximately 30 minutes of initial presentations. (BZA Sept. 7 Tr., p. 15, ll. 3-4; BZA Video Recording). The Impacted Neighbors' counsel was then abruptly "disabled" before the Impacted Neighbors had a chance to step in front of the computer's camera and offer testimony themselves. (BZA Sept. 7 Tr., p. 15, ll. 1-2, p. 20, l. 10; BZA Video Recording). The Impacted Neighbors, themselves, never got to say a word during the entire public hearing. (BZA Sept. 7 Tr., p. 15, ll. 1-2; BZA Video Recording).

Most critically for purposes of this appeal, the Impacted Neighbors and their counsel were "disabled" when the Construction Applicants offered new, objectionable evidence during their time for reply and during a question and answer session with the

members of the board of the BZA. (BZA Sept. 7 Tr., p. 22, l. 1 – p. 29, l. 7; BZA Video Recording). The Impacted Neighbors and their counsel were never again "enabled" to object, or be seen and heard in any way, before the BZA ended the public hearing and reached its decision. (BZA Sept. 7 Tr., p. 22, l. 1 – p. 29, l. 7; BZA Video Recording).

For the duration of being "disabled" as mere "attendees" in the "Zoom Webinar," the Impacted Neighbors and their counsel could do nothing but look on at the non-interactive computer screen in front of them, as if they were watching the news on television, or as if they had been locked out of a city hall and could only peer in through a window at what was transpiring in their absence. (BZA Sept. 7 Tr., p. 22, l. 1 – p. 29, l. 7; BZA Video Recording).

B. The Construction Project

The Construction Applicants' property, 62 Church Street, is occupied by a beautifully preserved and updated 2,554 square foot home. (Application; BZA Sept. 7 Tr., p. 12, l. 2, p. 13, ll. 7-8; BZA Materials Presented). For the last nine years, the Construction Applicants described themselves to be happy residents and willing stewards of the home's two-century history. (BZA Sept. 7 Tr., p. 8, l. 23 – p. 9, l. 12). Their proposed new construction project, however, which is not permitted by the City's zoning ordinance without a variance and special exception, represents a sudden and drastic change.

The proposed new construction project includes a large, two-story addition, together with new structures housing a gas-powered generator and multiple, new HVAC compressors. (Application; BZA Materials Presented). The applied-for variance is to exceed the lot-occupancy percentage (the overall footprint) restricted by City of Charleston Ordinance § 54-301. (Application). The applied-for special exception is to extend a non-conforming side setback under City of Charleston Ordinance § 54-110 (f). (Application).

Notably, the application did not request a variance or special exception to encroach the rear setback under City of Charleston Ordinance § 54-301, which would have also been needed for the proposal to be properly allowed. (Application).

Of further note, in addition to using the property as their residence over the last nine years, the Construction Applicants have used the property for multiple businesses, namely, for the Charleston location of Mr. Wallace's multi-state architecture firm, "Island Architects Charleston," and Mrs. Wallace's interior design business, "Stone Ridge Interiors." (BZA Materials Presented; BZA Sept. 7 Tr., p. 16, l. 11 – p. 17, l. 13). Both businesses publicly advertised and used 62 Church Street as their actual location (not just as a registered agent mailing address). (BZA Materials Presented; BZA Sept. 7 Tr., p. 16, l. 11 – p. 17, l. 13).

C. The Impacted Neighbors

The Impacted Neighbors' property, 60 Church Street, is an L-shaped lot, containing two historic, residential buildings, with a house positioned on each arm of the L-shape. (BZA Materials Presented; BZA Sept. 7 Tr., p. 15, ll. 16-19). The lot wraps around the right side and the rear of the Construction Applicants' property, 62 Church Street. (BZA Materials Presented; BZA Sept. 7 Tr., p. 15, ll. 16-19). The Impacted Neighbors and the Construction Applicants are therefore neighbors along not just one property line, as is typical, but two property lines. The house to the right side of the Construction Applicant's property belongs to the Impacted Neighbors, as does the house to the rear. The location of the new construction project is pressed into the very corner of the L-shape, such that its adverse impact is felt doubly and entirely by the Impacted Neighbors, while being of no real relevance to others in the neighborhood. In this corner location, the new construction project will loom over the Impacted Neighbors' two historic, residential buildings,

including their windows, bedrooms and other living areas, porches, pool, and yard – adversely and substantially impacting them with regard to light, air, space, view, and noise. (BZA Sept. 7 Tr., p. 17, ll. 17-22, p. 19, ll – p. 20, ll. 5).

D. Evidence Taken While The Impacted Neighbors Were Technologically Gagged And Ousted

The reality and extent of the adverse impact of the project on the Impacted Neighbors was distorted and denied with objectionable evidence at the public hearing while the Impacted Neighbors were technologically gagged and ousted. In pertinent part, the following excerpts from the transcript show the BZA purporting to close the public part of the hearing and then – contrary to the introductory statements made by the chairman describing the procedure at the beginning of the hearing – engaging in a question and answer session with the City staff and the Construction Applicants about the Impacted Neighbors' property and the impact of the project on them:

> Chair Michael Robinson: . . . We then close the public hearing portion of the meeting for that particular application and open discussion to the Board of Zoning Appeals ***members only***, who will then make a decision to approve, approve with conditions or deny the application.

(BZA Sept. 7 Tr. p. 1, ll. 13-15) (emphasis added).

> Chair Robinson: Thank you. Any questions from the board for Mr. Litton? Okay, well the ***public hearing portion of the meeting is closed***. Mr. Batchelder, it seems to me that the contention on the uses that are occurring in the building really not properly before us. We don't deal with those sorts of things. We're dealing with the physical, a request of a physical change to the property. So it's my feeling that we don't have to deal with any uses that may or may not be occurring in there other than residential.
>
> Ms. Vargas-Vargas: I would agree with that.
>
> Chair Robinson: Do you agree with me, Mr. Batchelder?
>
> Mr. Batchelder: I agree with you on that.

Chair Robinson: Let me ask you on another issue. Did you hear anything during the opposition presentation that was news to you, or shed a different light on your approval, your recommendation for approval of the application?

Mr. Batchelder: No, I did not hear anything.

Chair Robinson: Does the board have any questions for Mr. Batchelder or anyone else or any comments?

Howell Morrison: This is Howell. What is your view about the issues of mechanical systems and being close to the master bedroom?

Mr. Batchelder: Let me go down here. Let me go into... let me see

Ms. Vargas-Vargas: Lee, maybe while you're doing that, maybe we could see where the existing units are, as opposed to where they're going to be.

Mr. Batchelder: There's a photograph here. I need to ... I got to figure out where I am in this slide [indiscernible] [00:54:36]. Now we're getting into the applicant slides. And so I believe this, this plan illustrates the location of those units right now. So you've got this, this one-story building that you've seen in photographs. Back here is an AC stand and generator in this back corner. And I believe it's these units that would be elevated to the ... let me just move on. So perhaps the units are in this enclosed space right back here right now. And they would be, and there's a view looking into that enclosed space that we just saw. This wall that you see is the back property line of 62 Church Street and beyond is the, that L-shaped section at 60 Church Street and another view. That's, I guess that would be, I'm not sure what that is. Generator platform behind [indiscernible] [00:56:15]. And moving on, let me get back to the drawings. [indiscernible] [00:56:32] through. So this is the deck area where the, the HVAC compressors will be relocated to I believe and any applicants could correct me if I'm wrong on that.

Howell: Why do they have to be raised?

Mr. Batchelder: I'm not sure, but ***perhaps that would be a good question for the applicant***.

Howell: Well, let me make sure I understand. It's the same compressor unit or a bigger compressor unit or a second compressor unit required by the addition and the same generator or a second generator? I'm lost on that.

Mr. Batchelder: I don't know the answers to those questions. So, but I will say that again if you look at the side view, I believe this is the existing parapet to that [indiscernible] [00:57:46], the existing section of the house.

Howell: Yeah.

Mr. Batchelder: And so, I believe that's clear and then these units will be on the other side of that wall, so they wouldn't have, there would be a wall separating those units from the adjoining property. I believe it is the correct way of looking at that. ***Again, I'd like the applicants to maybe chime in on this point if you don't mind.***

Chair Robinson: ***Is the applicant still present?***

Skip Wallace: ***Yes.***

Chair Robinson: ***Could you comment on the questions please?***

Skip Wallace: Absolutely, absolutely. We are not getting a second generator, we're just taking the same one we have. It's in the same location we're raising it up. The two, it's low to the ground right now, which is bothersome. The two compressors are going to be relocated. They're in the way of the, of the footprint right now, the addition. And we are, one of them is a new one. The new one's very quiet and the other one is not. We're going to replace that with a new one. These, these new jet compressors are whisper quiet. So they will be behind that parapet wall. That parapet wall starts at 6'6" high above the deck, where the compressors are and rises at about 8 and 12. So they will never, they will never see these compressors, whereas they do right now. They can see, they can look down upon our compressors, and the location in terms of relationship to the bedroom is, is almost similar. They're a little closer, but they do have that wall that will baffle the sound of them.

Howell: So, your existing louder compressor is going to be switched out for a newer model, less noisy compressor. Is that what you're saying?

Skip Wallace: Yes sir.

Howell: And, and the generator I presume only comes on in the event of loss of power.

Skip Wallace: That's right.

Howell: So, an emergency generator.

Skip Wallace: Absolutely.

Howell: Okay.

Chair Robinson: Any other questions, any comments from the board?

Ms. Vargas-Vargas: I think I have a question. Is the, is the neighbor's views 60 Church Street, is the view from the bedroom going to be now the facade of the, of the new addition? And is that substantially impacting their light?

Mr. Batchelder: Well, the ... can you hear me.

Ms. Vargas-Vargas: Yes sir.

Skip Wallace: Their bedroom is back from this porch. And in fact, the, the addition that we supported in 2016 actually has a window on the northside that looks directly into our bedroom. Their bedroom is back property 15 feet from that back of that addition. So, they're already looking at the side of our house. The view, the view angle that's cut off by this addition will be almost miniscule because of the existing parapet wall. And they are to our south so there is no sunlight being blocked, because the sun is to our south and all shadows are cast to the north.

Ms. Allie Grass: I have a question too for you all please. The letter of support that you received from the property owner on the East Bay Street, is that the property owner to the rear of your property?

Skip Wallace: No, no they're on Longitude Lane, but they are friends of ours and they're very familiar with the addition, and so I asked if they would write us a letter of support. They're on East Bay but they are actually on Longitude Lane, which intersects with Church Street just north of our house, three houses up.

Ms. Allie Grass: Thank you. And I have one more question. Just to clarify about the, the second floor porch, is that the very edge of their structure closest to your, closest to where your addition will be? I'm confused about this drawing that we're looking at.

Skip Wallace: Oh, well I did that, sorry. It is kind of messy. I didn't know you were going to show it. Where Lee is pointing right now, that's their second-floor porch right there, that rectangle.

Ms. Allie Grass: And that's not the farthest structure part of the building is what I'm trying to [overlap] [1:02:23]. Okay, so okay.

Skip Wallace: Yes, yeah. [indiscernible] [01:02:24] That little section to the right was just something I was doing to study the view angle of somebody sitting on their porch. And we stepped our second floor back and did a slopped roof so you can see the view angle is only 27 degrees from someone sitting in a sitting position.

Ms. Allie Grass: Thank you.

Howell: Where will the HVAC units be relative to that second-floor porch?

Skip Wallace: To their second-floor porch, they'll be on the other side of the 6½ foot alleyway. And on the other side of a parapet wall that's about 14" thick. It's right where the red dot is, where Lee's red dot is, there. There are things I can do to help with the sound too. When we do these on [indiscernible] [01:03:16] we use sound baffles to, to help control them. So we could certainly do something like that to absorb the sound. Because I get it, you know, I don't want to hear compressors either, but the new ones are very quiet.

Chair Robinson: Any other questions for the board, any comments? Any motions? Ms. Vargas-Vargas: I'll make a motion to approve.

Ms. Allie Grass: I'll second it.

Chair Robinson: Ms. Vargas-Vargas, would you consider that was a condition that an additional baffling be provided around the compressors?

Ms. Vargas-Vargas: Mr. Robinson, how would we, how would we measure or evaluate whether that condition is met?

Chair Robinson: Well, we're going on good faith here I believe of the next door neighbor.

Ms. Vargas-Vargas: Mr. Wallace, what do you think about adding that condition? Is that something, that sounded to me like it's something that you could accomplish.

Ms. Allie Grass: If needed.

Skip Wallace: Yes, I'd be, I'd be fine with that, because it would, it would be something that I could, I could deal with and make a lot better.

Ms. Vargas-Vargas: What would be the best way to describe that condition?

Skip Wallace: Are you asking me?

Ms. Vargas-Vargas: Oh I am sorry, I guess I'm thinking out loud. So maybe making commercially reasonable efforts to minimize or do implement changes that minimize any excessive noise, I don't know if that ...

Skip Wallace: Yeah. And we can also purchase, you know, high-seer ratings to get them even quieter, which we intend to do.

Ms. Vargas-Vargas: So if we say the condition that you purchase the high-seer ratings and make any reasonable, make any reasonable [indiscernible] [01:05:56] some direction some area...

Skip Wallace: Yeah.

Ms. Vargas-Vargas: ...effort to further minimize.

Skip Wallace: Yeah, we'll do all we can to, to meet the noise and keep it down. We can, we can even measure the decibels and prepare it through a chart.

Ms. Vargas-Vargas: Okay. Do, do my colleagues think that that would be acceptable to have two conditions – one to purchase the high-seer ratings. Am I saying that correctly?

Skip Wallace: Yes, S-E-E-R.

Ms. Vargas-Vargas: So one, purchase the high-seer ratings and then make reasonable efforts to further minimize noise production.

Ms. Allie Grass: I think I'd be more comfortable seconding just the second part of your proposal and not requiring them to, like not [overlap] [0:01:06] not burdening, but just a condition.

Ms. Vargas-Vargas: Okay. Yep, I think that's actually a good point, because making reasonable efforts to minimize the noise with purchasing the appropriate mechanism would be captured with that. So I think you're right Ms. Grass. So Mr. Robinson, I will make the motion to approve with a condition that the applicant make reasonable efforts to further minimize the noise production from the generators and the mechanical units outside of 60 Church Street [indiscernible] [01:07:30].

Chair Robinson: Is there a second to that?

Ms. Allie Grass: I second it.

Chair Robinson: Any comments? All in favor signify by saying aye, Mr. Morrison.

Mr. Morrison: Aye.

Chair Robinson: Mr. Judan.

Mr. Judan: Aye.

Chair Robinson: Ms. Grass.

Ms. Grass: Aye.

Chair Robinson: Ms. Richards.

Ms. Richards: Aye.

Chair Robinson: Ms. Vargas-Vargas.

Ms. Vargas-Vargas: Aye.

Chair Robinson: Mr. Bennett.

Mr. Bennett: Aye.

> Chair Robinson: Mr. Robinson votes aye.
>
> The motion is unanimously approved. Thank you very much.
> [End of audio 1:08:03]

(BZA Sept. 7 Tr., p. 22, l. 1 – p. 29, l. 7) (emphases added).

The BZA relied on this objectionable evidence, as did the circuit court in affirming the BZA. (BZA Sept. 7 Tr., p. 22, l. 1 – p. 29, l. 7; Cir. Ct. Order).

STANDARD OF REVIEW

This appeal is governed by the South Carolina Local Government Planning Enabling Act of 1994, S.C. Code Ann. §§ 6-29-310, *et seq*. (the "Act").

The Act enables municipalities to adopt zoning ordinances, S.C. Code Ann. § 6-29-710; the municipalities' board of zoning appeals to grant variances and special exceptions, S.C. Code Ann. §§ 6-29-800 (A)(2) & (3); the circuit court to hear appeals therefrom, S.C. Code Ann. § 6-29-820; and this Court to hear appeals from the circuit court, S.C. Code Ann. § 6-29-850.

The legal elements that must be established for a variance are prescribed by the Act itself, S.C. Code Ann. § 6-29-800 (A)(2), whereas the Act provides that the terms and conditions for a special exception should be forth in the zoning ordinances, S.C. Code Ann. § 6-29-800 (A)(3).

For a variance, the elements prescribed by the Act, S.C. Code Ann. § 6-29-800 (A)(2), are as follows:

> (A) The board of appeals has the following powers:
>
> . . . (2) to hear and decide appeals for variance from the requirements of the zoning ordinance when strict application of the provisions of the ordinance would result in unnecessary hardship. A variance may be granted in an individual case of unnecessary hardship if the board makes and explains in writing the following findings:

> (a) there are extraordinary and exceptional conditions pertaining to the particular piece of property;
>
> (b) these conditions do not generally apply to other property in the vicinity;
>
> (c) because of these conditions, the application of the ordinance to the particular piece of property would effectively prohibit or unreasonably restrict the utilization of the property; and
>
> (d) 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.

For a special exception, the Act provides that the terms and conditions should be forth in the zoning ordinances, S.C. Code Ann. § 6-29-800 (A)(3), as follows:

> (A) The board of appeals has the following powers:
>
> . . . (3) to permit uses by special exception subject to the terms and conditions for the uses set forth for such uses in the zoning ordinance . . .

Turning accordingly to the City of Charleston Ordinance § 54-110, at issue here, its subsection (f) provides the following terms and conditions for the special exception, as follows:

> f. The non-conforming use of a building or structure cannot be physically extended to provide more area for the non-conforming use, and the number of bedrooms in a non-conforming two-family dwelling or muli-family dwelling use cannot be increased, unless the Board of Zoning Appeals—Zoning, after a duly advertised public hearing, finds that the extension or increase of the non-conforming use is: (1) limited to extending or increasing the non-conforming use then in existence; and (2) would not result in an unreasonable intensification of the non-conforming use. In considering the reasonableness of the intensification of the extension or increase, the Board shall consider the effect of the extension or increase on properties in the vicinity to include traffic impacts; vehicular and pedestrian safety; parking impacts; potential impacts of 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.

(Pet. in Support of App. to Cir. Ct., p. 13).

The meaning of "non-conforming use," as used in the ordinance above, is set forth in S.C. Code Ann. § 6-29-730, which provides as follows:

> The regulations may provide that land, buildings, and structures and the uses of them which are lawful at the time of the enactment or amendment of zoning regulations may be continued although not in conformity with the regulations or amendments, which is called a nonconformity. The governing authority of a municipality or county may provide in the zoning ordinance or resolution for the continuance, restoration, reconstruction, extension, or substitution of nonconformities. The governing authority also may provide for the termination of a nonconformity by specifying the period or periods in which the nonconformity is required to cease or be brought into conformance, or by providing a formula where the compulsory termination of nonconformities may be so fixed as to allow for the recovery or amortization of the investment in the nonconformity.

For each application for a variance or special exception, the Act requires the board to hold a public hearing, S.C. Code Ann. § 6-29-800 (D), and to then make a final decision, separately stating its findings of fact and providing an explanation of its conclusions of law, in writing, S.C. Code Ann. §§ 6-29-800 (2)(A) & (F).

On appeal, the Act authorizes the circuit court to reverse the decision of the board if it is incorrect as a matter of law, S.C. Code Ann. § 6-29-840 (A). The board's findings of fact are to be treated as if made by a jury and should not be disturbed if there is supporting evidence in the record. S.C. Code Ann. § 6-29-840 (A); *Rest. Row Assocs. v. Horry Cty.*, 335 S.C. 209, 215, 516 S.E.2d 442, 446 (1999); *Boehm v. Town of Sullivan's Island Bd. of Zoning Appeals*, 423 S.C. 169, 182, 813 S.E.2d 874, 880 (Ct. App. 2018). A court must not substitute its judgment on the facts for that of the BZA, "even if it disagrees

with the decision." *Rest. Row Assocs.*, 335 S.C. at 216, 516 S.E.2d at 446. Nonetheless, a reviewing court "may rely on uncontroverted facts [that] appear in the record, but not in a zoning board's findings." *Vulcan Materials Co. v. Greenville Cty. Bd. of Zoning Appeals*, 342 S.C. 480, 491, 536 S.E.2d 892, 898 (Ct. App. 2000). Moreover, a board's decision "will be overturned if it is arbitrary, capricious, has no reasonable relation to a lawful purpose, or if the board has abused its discretion." *Rest. Row Assocs.*, 335 S.C. at 216, 516 S.E.2d at 446. "An abuse of discretion occurs when a [tribunal's] decision is unsupported by the evidence or controlled by an error of law." *Boehm*, 423 S.C. at 182, 813 S.E.2d at 880 (quoting *Newton v. Zoning Bd. of Appeals for Beaufort Cty.*, 396 S.C. 112, 116, 719 S.E.2d 282, 284 (Ct. App. 2011)).

"In the event the judge determines that the certified record is insufficient for review, the matter may be remanded to the zoning board of appeals for rehearing." S.C. Code Ann. § 6-29-840 (A).

In reviewing a decision of the BZA, this Court applies the "same" standard of review as the circuit court. *Venture Eng'g v. Horry Cnty. Zoning Bd. of Appeals*, 858 S.E.2d 638, 642 (Ct. App. 2021).

ARGUMENT

A. The circuit court erred by applying federal procedural law in declining to reconsider issues that were raised but not ruled upon and are now put to this Court to decide.

Before appealing to this Court, the Impacted Neighbors filed a motion under Rule 59(e), SCRCP, asking the circuit court to reconsider the arguments that were raised but not ruled upon and are now set forth in this brief. (Mot. for Rec.). The circuit court declined to do so, relying on federal procedural law discouraging and limiting reconsideration

motions in federal court, and finding as follows in its order (prepared and proposed by the Construction Applicants):

> Motions for reconsideration are only granted under highly unusual circumstances. *U.S. ex rel. Becker v. Westinghouse Savannah River Co.*, 305 F.3d 284, 290 (4th Cir. 2001). Courts have recognized three circumstances in which a court should grant a Rule 59(e) motion: (1) where there is an intervening change in controlled law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice. *Hutchinson v. Staton*, 994 F.2d 1076, 1081 (4th Cir. 1993); *see also Daves v. Cleary*, 355 S.C. 216, 584 S.E.2d 423 (Ct. App. 2003). The Court denies Appellants' motion because Appellant has failed to demonstrate any of these circumstances.

(Cir. Ct. June 15 Order, pp. 1-2).

South Carolina law, however, encourages and indeed obligated the Impacted Neighbors to file a motion for reconsideration under these circumstances based on the following principles:

> The losing party must first try to convince the lower court it is has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred. This principle underlies the long-established preservation requirement that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments. *E.g., Smith v. Phillips*, 318 S.C. 453, 458 S.E.2d 427 (1995) (appellate court generally will not address an issue unless the issue was raised to and ruled upon by the trial court); *State v. Williams*, 303 S.C. 410, 401 S.E.2d 168 (1991) (same); *Sumter Building & Loan Ass'n v. Winn*, 45 S.C. 381, 23 S.E. 29 (1895) (same).
>
> If the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review. *E.g., Pelican Bldg. Centers of Horry-Georgetown, Inc. v. Dutton*, 311 S.C. 56, 427 S.E.2d 673 (1993); *Hoffman v. Powell*, 298 S.C. 338, 380 S.E.2d 821 (1989); *see also* Rules 52(b) and 59(e), SCRCP.

> Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments. *See Roche v. South Carolina Alcoholic Beverage Control Comm'n*, 263 S.C. 451, 211 S.E.2d 243 (1975) (purpose of an appeal is to determine whether the trial judge erroneously acted or failed to act and when appellant's contentions are not presented or passed on by the trial judge, such contentions will not be considered on appeal).

I'ON, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716 (2000) (cited in more than 500 cases in South Carolina).

The circuit court accordingly erred by applying the wrong legal standard and declining to provide the parties and this Court with a proper analysis of the case for review. As a result, the arguments set forth below are now put to this Court to decide.[2]

B. This Court should vacate the circuit court's affirmance of the board of zoning appeals and remand this matter for the board of zoning appeals to hold a new, *de novo*, public hearing because it relied on tainted, faulty evidence to which the appellants, impacted neighbors, were not afforded the opportunity to object when they were technologically gagged and ousted in violation of the procedural ordinance and statute, as well as constitutional due process.

As a matter of law that is central to this appeal, the BZA is required to conduct its public hearings in accordance with the following procedural ordinance and statute:

- City of Charleston Ordinance, Appendix C, Article IV, § 3 ("The chairman will *rule on all evidentiary matters*. Evidence may be placed in the record with an *objection noted*.") (emphasis added). (Supp. to App. Pet. to Cir. Ct., p. 2; Cir. Ct. Apr. 20 Tr., p. 5, l. 6 – p. 7, l. 8; p. 11, l. 21 – p. 12, l. 20).
- S.C. Code Ann. § 6-29-790 ("The board shall adopt rules of procedure

[2] Cir. Ct. Apr. 20 Tr., p. 13, l. 22 – 25 ("THE COURT: I'll restate it. I asked Mr. Walker to prepare the order denying the appeal, and you'll have a chance to take that up to the - - to Columbia, and maybe you can expand it, good luck.").

in accordance with the provisions of an ordinance adopted pursuant to this chapter.").

The circuit court's order (prepared and proposed by the Construction Applicants) avoids addressing this procedural ordinance and statute, as Appellants' pointed out in their disregarded motion for reconsideration. (Cir. Ct. Order; Mot. for Rec., pp. 1-2). Instead, as Appellants also pointed out in their disregarded motion for reconsideration, the circuit court's order contrives and knocks down strawman arguments (not made by the Impacted Neighbors) about the general use of Zoom, trial-type cross examination, and reasonable time restrictions. (Cir. Ct. Order, pp. 5-9; Mot. for Rec., pp. 1-2).

Disregarded by the circuit court, it is now put to this Court to decide that this procedural ordinance and statute could not possibly be complied with when the adverse parties who would raise objections are technologically gagged and ousted, as the Impacted Neighbors were in this case, pursuant to the BZA's so-called "Zoom Meeting Protocol," using the "Zoom Webinar" platform, detailed above. (BZA Sept. 7 Tr., p. 22, l. 1 – p. 29, l. 7; BZA Zoom Meeting Protocol; BZA Video Recording). No objection could possibly be made and heard, ruled upon by the chairman, or noted in the record, as the Impacted Neighbors' silence in the record here reflects. (BZA Sept. 7 Tr., p. 22, l. 1 – p. 29, l. 7; BZA Zoom Meeting Protocol; BZA Video Recording).

As a result, the reality and extent of the adverse impact of the new construction project on the Impacted Neighbors was distorted and denied with objectionable evidence. More particularly, as detailed above, Mr. Wallace presented incompetent, unqualified, and false testimonial and documentary evidence about *the Impacted Neighbors' property*, having no foundation of personal knowledge or expertise, including as to *their* view, *their* sunlight, *their* porch, *their* bedroom, where *they* sit, and what *they* see and hear. (BZA

Sept. 7 Tr., p. 22, l. 1 – p. 29, l. 7). *See Wyndham Enterprises, LLC v. The City of North Augusta*, 401 S.C. 144, 151, 735 S.E.2d 659, 663 (Ct. App. 2012) (holding that a board's decision must be "supported by competent, substantial, and material evidence" and cannot be based on "opinion and speculation").

The BZA was so confused and misled by the Construction Applicants that a member of the board even asked Mr. Wallace if a letter of support that had been submitted (by a friend of the Construction Applicants who lived a block away) was from the property owner to the rear. (BZA Sept. 7 Tr., p. 25, ll. 13-15). The Impacted Neighbors could do nothing to object and provide correct answers to the BZA's questions that should have been posed to *them* in the first place. *They* are the relevant neighbors who are impacted because of the corner location of the project. *They*, not the Construction Applicants' irrelevantly supportive friend a block away, own the property to the rear, which includes a historic residential building with five windows facing the project that Mr. Wallace conspicuously omits from the picture. And *they* are the ones who can speak to *their* view, *their* sunlight, *their* porch, *their* bedroom, where *they* sit, and what *they* see and hear.

In further detail, the "view angle" on the Impacted Neighbors' property that will be "cut off" by the project is not "miniscule," "only 27 degrees," as Mr. Wallace testified and illustrated in a hand-drawing, with arbitrarily drawn lines extending from "someone sitting in a sitting position" on one of the Impacted Neighbors' porches, which drawing also inaccurately and misleadingly depicted the structures on the properties, by among other things, completely omitting the Impacted Neighbors' house to the rear. (BZA Sept. 7 Tr., p. 25, ll. 9-10; p. 25, l. 20 – p. 26, l. 9; BZA Materials Presented). Additionally, it is not true that "they are to our south so there is no sunlight being blocked, because the sun is to our south and all shadows are cast to the north," as Mr. Wallace testified, again omitting

the Impacted Neighbors' house to the rear (which is to the east), that has five impacted windows, as well as their yard. (BZA Sept. 7 Tr., p. 25, ll. 10-12). Further, the nuisance of loud noise emanating from compressors to be located just outside of the Impacted Neighbors' master bedroom window will not be obviated by "baffles," as Mr. Wallace purported to opine and speculate, without being qualified as a noise expert. (BZA Sept. 7 Tr., p. 26, l. 12 – p. 28, l. 14).

This tainted evidence is of direct legal consequence and prejudice, given that the element of adverse impact on neighbors is a key part of both of the legal standards for a variance and a special exception, respectively, which the BZA was supposed to be considering in this case. *See* S.C. Code Ann. § 6-29-800 (A)(2)(d) ("…substantial detriment to adjacent property…"); City of Charleston Ordinance § 54-110 (f) ("…effect of the extension or increase on properties in the vicinity to include traffic impacts; vehicular and pedestrian safety; parking impacts; potential impacts of 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."); *see also* S.C. Code § 6-29-710(A)(1) (first among many purposes of zoning ordinances is "to provide for adequate light, air, and open space"). Indeed, these relevant legal standards led the BZA to ask the questions it did, and rely on the objectionable answers provided thereto, including but not limited to the following questions:

- "Is the, is the neighbor's views 60 Church Street, is the view from the bedroom going to be now the facade of the, of the new addition? And is that substantially impacting their light?" (BZA Sept. 7 Tr., p. 25, ll. 1-3).

- "The letter of support that you received from the property owner on the East Bay Street, is that the property owner to the rear of your property?" (BZA Sept. 7 Tr., p. 25, ll. 13-15).

- "Just to clarify about the, the second floor porch, is that the very edge of their structure closest to your, closest to where your addition will be? I'm confused about this drawing that we're looking at." (BZA Sept. 7 Tr., p. 25, ll. 20-22).

- "And that's not the farthest structure part of the building is what I'm trying to [overlap] [1:02:23]. Okay, so okay." (BZA Sept. 7 Tr., p. 26, ll. 4-5).

- "What is your view about the issues of mechanical systems and being close to the master bedroom?" (BZA Sept. 7 Tr., p. 22, ll. 16-17).

- "Where will the HVAC units be relative to that second-floor porch?" (BZA Sept. 7 Tr., p. 26, l. 11).

- "[W]ould you consider that was a condition that an additional baffling be provided around the compressors?" (BZA Sept. 7 Tr., p. 26, ll. 21-22).

- "[H]ow would we, how would we measure or evaluate whether that condition is met?" (BZA Sept. 7 Tr., p. 27, ll. 1-2).

- "Well, we're going on good faith here I believe of the next door neighbor." (BZA Sept. 7 Tr., p. 27, ll. 3-4).

- "Mr. Wallace, what do you think about adding that condition? Is that something, that sounded to me like it's something that you could accomplish." (BZA Sept. 7 Tr., p. 27, ll. 5-6).

Moreover, in addition to violating the BZA's own procedural ordinance and statute, the fundamental defect in the public hearing conducted by the BZA also constitutes a deprivation of constitutional due process. *See Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) ("The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'"); *Stono River Environmental Protection Ass'n v. South Carolina Dept. of Health and Environmental Control*, 406 S.E.2d 340, 342, 305 S.C. 90 (1990) ("[T]he parties were entitled to notice and the opportunity to be heard.").

For these reasons, the circuit court's order affirming the BZA's defective and prejudicial public hearing protocol, leading to the BZA's acceptance and reliance upon tainted, faulty evidence, should be vacated as a matter of law because it is controlled by legal errors and it is arbitrary, capricious, and constitutes an abuse of discretion. S.C. Code Ann. § 6-29-840 (A); *Wyndham*, 401 S.C. at 151, 735 S.E.2d at 663; *Rest. Row Assocs.*, 335 S.C. at 216, 516 S.E.2d at 446; *Boehm*, 423 S.C. at 182, 813 S.E.2d at 880. Further, because the record is not what it should been, that is, because it reflects only the absence of the Impacted Neighbors while they were technologically gagged and ousted, the record may be deemed insufficient for review, in which case the Act contemplates that the appropriate relief is a remand to the BZA for a new, *de novo* hearing. S.C. Code Ann. § 6-29-840 (A) ("In the event the judge determines that the certified record is insufficient for review, the matter may be remanded to the zoning board of appeals for rehearing.").

To be sure, the Impacted Neighbors were not already afforded a fair, second chance by the BZA, thereby curing all of the above-discussed issues, as the circuit court's order incorrectly suggests, and the Construction Applicants will no doubt argue in their responsive brief. Instead, the BZA refused to cure the above-discussed issues, by denying the appeal for reconsideration and declining to hold a new, *de novo* public hearing, as it should have done, according to City of Charleston Ordinance, Appendix C, Article III, § 3 § 3, which provides: "If such appeal is granted by the Board, the decision shall be withdrawn and the matter heard and considered *de novo*, as if no hearing, consideration or determination had been previously made or heard." (Appeal for Reconsideration to BZA; Reply to BZA; BZA Oct. 19 Tr.; Reply Brief to Circuit Court, p. 2, n. 2). If a new, *de novo* hearing had been held, both the Construction Applicants and the Impacted Neighbors would have been given a full and fair opportunity to be heard and the members of the BZA

would have considered the question of whether to approve the project anew. But this did not happen. The BZA was defensive of its defective protocol and declined to revisit the project anew. (BZA Oct. 19 Tr., p. 12, ll. 1-4) ("Howell Morrison: . . . I presume Mr. Hellman is correct that once his time is up, the way the Zoom process works is he is effectively unable to communicate anything further by virtue of how the technical aspects work. Lee Batchelder: That's correct. Howell Morrison: Okay.").

C. This Court should vacate the circuit court's affirmance of the board of zoning appeals based on additional errors of law and arbitrary and capricious findings.

Beyond technologically gagging and ousting the Impacted Neighbors and thereby tainting the evidence in the record regarding the key issue of adverse impact, which, as discussed above, is critical to the legal standards for both a variance and a special exception, the circuit court made additional errors of law and arbitrary and capricious findings in affirming the BZA.

1. Unsworn remarks and comments by City staff

The circuit court's order places undue reliance on things said at the hearing by a member of the City's staff, Mr. Lee Batchelder, who was not sworn in to testify, either as fact or expert witness, but rather merely offered unsworn remarks and recommendations, favoring the project and opining and speculating that the impact on Appellants will be minimal. (Cir. Ct. May 18 Order, p. 5; BZA Oct. 19 Tr., p. 6, ll. 13-17). This is not evidentiary support for the BZA's decision, whatsoever. *See Wyndham*, 401 S.C. at 151, 735 S.E.2d at 663 (holding that a board's decision must be "supported by competent, substantial, and material evidence" and cannot be based on "opinion and speculation"). Yet the circuit court goes so far as to state that Mr. Batchelder's commentary, "standing alone," supports the BZA's decision that the impact on Appellants will be minimal. (Cir

Ct. May 18 Order, p. 5).

2. Business uses

The BZA was incorrect as a matter of law in deciding to disregard the business uses of the Construction Applicants' property. Specifically, the BZA determined:

> [T]he contention that the uses that are occurring in the building really are not properly before us. We don't deal with those sorts of things. We're dealing with the request for a physical change to the property. So it's my feeling that we don't have to deal with any uses that may or may not be occurring in there other than residential.

(BZA Sept. 7 Tr., p. 22, ll. 1-6).

Compare this determination with the language of City of Charleston Ordinance § 54-110(f) and S.C. Code Ann. § 6-29-730, set forth in the legal standard above, which require the BZA to consider the uses occurring in the property, contrary to the Board's determination otherwise. Specifically, the Construction Applicants' use of the property for their businesses, starting within in the last nine years, was not "then in existence," per City of Charleston Ordinance § 54-110 (f)(1), "at the time of the enactment or amendment of zoning regulations," per S.C. Code Ann. § 6-29-730, a time period in which the property was used as a residence, as admitted by the Construction Applicants, before they purchased the property and over the prior two centuries. (BZA Sept. 7 Tr., p. 8, l. 22 – p. 9, l. 6). Nor would those business uses have been "lawful" and thus allowed to be continued as a "nonconformity," per S.C. Code Ann. § 6-29-730. Those business uses, therefore, are expressly prohibited from being extended under the terms and conditions of this special exception, restated here in pertinent part: "The non-conforming use of a building or structure cannot be physically extended to provide more area for the non-conforming use . . . unless . . . [it was] . . . then in existence," per City of Charleston Ordinance § 54-110 (f). Furthermore, it is "unreasonable" to "intensif[y]" what is prohibited, per City of Charleston

Ordinance § 54-110 (f). The business uses further affect "traffic" and "parking," which also must be considered under this test, per City of Charleston Ordinance § 54-110 (f)(2).

The circuit court's order avoided this issue by finding that there was no evidence in the record of business uses. (Cir. Ct. May 18 Order, p. 4). This finding is verifiably incorrect. The materials presented to the BZA show that the Construction Applicants use the house, unlawfully, for multiple businesses, namely, for the Charleston location of Mr. Wallace's multi-state architecture firm, "Island Architects Charleston," and Mrs. Wallace's interior design business, "Stone Ridge Interiors." (BZA Materials Presented; BZA Sept. 7 Tr., p. 16, l. 11 – p. 17, l. 13). Both businesses publicly advertise and use 62 Church Street as their actual location (not just as a registered agent mailing address). (BZA Materials Presented; BZA Sept. 7 Tr., p. 16, l. 11 – p. 17, l. 13).

3. Unnecessary hardship

The Construction Applicants admitted that the house they seek to expand is already a sizeable 2,554 square feet, that they have lived there for nine years, that it is a lovely house, and that others have lived there for more than two hundred years. (BZA Sept. 7 Tr., p. 8, l. 23 – p. 9, l. 12). These admitted facts establish that there is no "unnecessary hardship," per S.C. Code Ann. § 6-29-800 (A)(2), and that there are no conditions that "effectively prohibit or unreasonably restrict the utilization" of the property, per S.C. Code Ann. § 6-29-800 (A)(2)(c). No guesswork is needed as to the whether the property might be reasonably utilized. It has been and currently is, demonstrably, according to the Construction Applicants' own testimony. (BZA Sept. 7 Tr., p. 8, l. 23 – p. 9, l. 12). To illustrate the point further by contrast, the property at issue here is not akin to a plot of undeveloped land that might be rendered useless by an incidental zoning ordinance that effectively prevents its development. The notion that the already existing, sizeable, livable,

and lovely house might be improved by an addition, which is the true thrust of Construction Applicants' position, in other words, "utilized more profitably," per S.C. Code Ann. § 6-29-800 (A)(2)(d)(i), both as a residence and an unlawful business location, cannot be considered grounds for a variance.

4. The application failed to request an additional variance or special exception required for allowance of the construction project.

The Construction Applicants' proposal that was approved by the BZA includes a new structure, elevating a gas-powered generator 6 feet off of the ground, along the rear property line that abuts Impacted Neighbors' property at the corner of its L-shape. (Application). This new structure, as well as the generator itself, violate the rear setback minimum of 3 feet required by the City of Charleston Ordinance § 54-301, where a "setback" is defined as an "open unoccupied space, other than a court, between the building and any lot line," by the City of Charleston Ordinance § 54-120. (Pet. in Support of App. to Cir. Ct., p. 15). The structure and the generator also violate the side setback under the same sections of the City's Ordinance. With respect to these rear and side setback violations, the Construction Applicants did not request variances, as they should have, or special exceptions (if they were to take the position that the generator was a nonconformity existing at the time the ordinance was adopted, which they did not, and there is no evidence of, and surely was not the case). (Application). Because the application failed in this respect, the BZA, in turn, did not consider, nor grant, such variances or special exceptions. (BZA Sept. 7 Tr.; BZA Order). The BZA's approval of the application and its proposal was incorrect as a matter of law for this additional reason, as well.

CONCLUSION

The COVID-19 pandemic has ushered in a new age of virtual hearings using new technology, in this state, and around the country, by all sorts of judicial and quasi-judicial,

governmental bodies. This technological advance of course has many benefits and should not be stopped, but new platforms, features, and protocols must be put to the test, scrutinized, and perfected, so as to preserve the rights that people have had in real-life public hearings for hundreds of years, where people could voice their objections and be heard. Here, the BZA's use of the "Zoom Webinar" platform and implementation of its own "Zoom Meeting Protocol" to digitally "enable" "panelists" and "disable" "attendees" technologically gagged and ousted the Impacted Neighbors from objecting to evidence during most of the public hearing, including during the critical question and answer session with the Construction Applicants that led to the BZA's decision, which should have been a board members only discussion in the first place, as the chairman explained at the outset of the hearing. This is not a protocol that should be sanctioned by this Court.

WHEREFORE, the circuit court's affirmance of the BZA's decision should be vacated and this matter should be remanded to the BZA for a new, *de novo* hearing.

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Respectfully submitted,

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