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 REPLY BRIEF

Dated: May 1, 2023

Respectfully submitted,

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ARGUMENT

This reply brief utilizes the same defined terms as the opening brief. The appellants are the "Impacted Neighbors." The respondents are the "Construction Applicants" and the "BZA." This is a reply to the response brief filed by the Construction Applicants. The BZA did not file a brief.

A. Time

The mantra of the Construction Applicants' response brief is that the 10 minutes of time allotted to the Impacted Neighbors in the middle of the one-hour hearing was enough. (Resp. Br., pp. 3, 11, 13, 15, 16, 17, 20, 22, 23, 24, 25, 27). This appeal does not challenge the imposition of reasonable time limitations, as the opening brief already made clear. (App. Br., p. 20). Rather, this appeal is about the Impacted Neighbors being technologically gagged and ousted from participating in the most critical part of the hearing that led to the BZA's decision, contrary to the BZA's own rules, its enabling act, and fundamental due process. (App. Br., p. 1). But given the Construction Applicants' twisted focus on the non-issue of reasonable time limitations, it is notable that they significantly exceeded their own allotted time, without being technologically "disabled."

More particularly, as the chairman of the BZA explained at the outset of the hearing, "[o]ur rules call for us to allow the applicant and anyone else in favor of the application to have a total of 10 minutes per presentation and the opposition to have 10 minutes in their opposition presentation, and then the applicant has a rebuttal time of 5 minutes." (BZA Sept. 7 Tr. p. 2, ll. 15-17). The chairman also explained that "[w]e 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).

The initial presentations favoring the application totaled approximately 30 minutes (going 20 minutes over the 10 minutes of total allotted time), with the Construction Applicants and their lawyer speaking for approximately 15 minutes (going 5 minutes over, by themselves) and Lee Batchelder also speaking in favor of the application for an additional 15 minutes. (BZA Sept. 7 Tr. p. 3, l. 5 – p. 14, l. 6; BZA Video Recording at 6-minute mark through 36-minute mark). Additionally, the Construction Applicants' lawyer spoke for a few minutes in reply. (BZA Sept. 7 Tr. p. 20, l. 13 – p. 21, l. 22; BZA Video Recording at 48-minute mark through 52-minute mark). And then the Construction Applicants were given even more time to testify during the question and answer session with the BZA, after the BZA purported to close the public hearing and began what was supposed to be a discussion among the board members only. (BZA Sept. 7 Tr. p. 22, l. 1 – p. 28, l. 3; BZA Video Recording at 52-minute mark through 66-minute mark).

Critically, the board members' questions pertained to the Impacted Neighbors' property, and could have been answered, properly and correctly, by the Impacted Neighbors, instead of objectionably and incorrectly by the Construction Applicants, had the Impacted Neighbors not been technologically "disabled." (BZA Sept. 7 Tr. p. 22, l. 1 – p. 28, l. 3; BZA Video Recording at 52-minute mark through 66-minute mark). This lack of due process deprived the Impacted Neighbors of a fair opportunity to make their case and persuade the members of the board before they made up their individual minds and collectively rendered a decision.

B. No Rehearing

The Construction Applicants' response brief all but concedes that the above-described dispositive evidentiary hearing was unfair, so it repeatedly points out that the BZA held another hearing, on the Impacted Neighbors' so-named-by-ordinance *appeal* for reconsideration, more than one month later. (Resp. Br., pp. 13, 15, 16, 21, 25, 27, 32). That appeal hearing, held under City of Charleston Ordinance, Appendix C, Article III, § 3, was not a rehearing, but was instead an appeal hearing to determine whether there should be a rehearing, as follows:

> An appeal for reconsideration of a decision of the Board must be filed within five (5) business days from the date of the Board's decision, order, requirement or determination by delivery of the approved appeal form and fee to the Zoning Division office. To grant the appeal for reconsideration, the Board must find that it misapprehended or misconceived the question or questions involved, or that it erred in its finding or disposition of the appeal, application or matter. *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.*

City of Charleston Ordinance, Appendix C, Article III, § 3 (emphasis added). (Appeal for Reconsideration to BZA; Reply to BZA; BZA Oct. 19 Tr.; BZA Oct. 19 Order; Reply Brief to Circuit Court, p. 2, n. 2).

The BZA denied the appeal and declined to grant a rehearing, opting instead to defend the way it conducted the dispositive evidentiary hearing and the insufficient record on which its decision had already been rendered, as opposed to considering the project anew and allowing the evidence from each side, and objections thereto, to be presented in full. (BZA Oct. 19 Tr.; BZA Oct. 19 Order). The BZA's denial of that appeal did not cure

its legal error or negate the right to take this appeal based on the record upon which the BZA's decision was rendered.

C. Additional Evidence

Another theme of the Construction Applicants' response brief, echoing the circuit court's order on appeal, is an argument that the Impacted Neighbors should have filed this statutory appeal together with additional evidence, namely, affidavits and other evidentiary documents, to further support the objections and corrections that they would have made to the testimony taken during the question and answer session with the BZA, while they were technologically "disabled" and appear to be silent in the record. (Resp. Br., pp. 13, 20, 29, 30, 35).

This argument is misguided because, by statute, no such additional evidence may be taken by the court, which is restricted to reviewing the record, filed and certified by the board, as it is, as a matter of law; and the statute further reflects that a need to supplement an insufficient record with additional evidence calls for a remand to the BZA for a rehearing, as follows:

> . . . [T]he clerk of the circuit court must give immediate notice of the appeal to the secretary of the board and within thirty days from the time of the notice, the board must file with the clerk a duly certified copy of the proceedings held before the board of appeals, including a transcript of the evidence heard before the board, if any, and the decision of the board including its findings of fact and conclusions.

S.C. Code Ann. § 6-29-830 (A).

> . . . The findings of fact by the board of appeals must be treated in the same manner as a finding of fact by a jury, and *the court may not take additional evidence. 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.* In determining the questions

> presented by the appeal, the court must determine only whether the decision of the board is correct as a *matter of law*.

S.C. Code Ann. § 6-29-840 (A) (emphasis added).

Put another way, the "any evidence" standard of review that typically warrants deference to the BZA on questions of fact in this type of statutory zoning appeal only controls if there is a sufficient record for review and no need to take additional evidence.

CONCLUSION

Though there are many other points of disagreement that are apparent in comparing the parties' briefs, which are not rehashed in this reply,[1] nothing that the Construction Applicants argue defeats the statutory directive to remand this matter to the BZA for a rehearing. The Impacted Neighbors should be entitled to fully participate in a truly public hearing, *de novo*, so that the members of the board may take all of the evidence from each side, hear objections and corrections thereto, and fairly decide the matter on the merits, creating a record sufficient for review.

[1] A footnote here is warranted here about the Construction Applicants' appeal preservation argument, which they specifically articulate as follows: "No mention was made of the letter in support submitted by the owners of 69 East Bay Street, or the view angle study prepared by Skip Wallace. Appellants did not preserve these issues for review because they failed to raise these specific issues to the circuit court." (Resp. Br., pp. 30-31). That letter, which the board confused as being written by the property owner to the rear and asked Skip Wallace about during the question and answer session, and the view angle study, which Skip Wallace used to illustrate his description of the Impacted Neighbors' property during the question and answer session, were discussed by the Impacted Neighbors in their briefs filed with the circuit court in the same manner as their opening brief to this Court. (Pet. in Support of App. to Cir. Ct., pp. 1, 4, 5, 12; Reply in Support of App. to Cir. Ct., pp. 1-2, n.1, Ex. A; Supplement in Support of App. to Cir. Ct., p. 3; Motion for Reconsideration, pp. 5, 7; App. Br. pp. 20-22).

Dated: May 1, 2023

Respectfully submitted,

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