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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

Case No. 2021-CP-10-05255
Appellate Case No. 2022-000973

Theresa 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 8-4-2016,..... Respondents.

FINAL BRIEF OF RESPONDENTS GEORGE WALLACE, ERIKA WALLACE, AND ERIKA R. HAYES, TRUSTEE OF THE ERIKA R. HAYES REVOKABLE TRUST U/A/D 8-4-2016

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STATEMENT OF ISSUES ON APPEAL

I. Whether the circuit court properly determined the BZA applied and adhered to its Rules and Regulations at its September 7, 2021 meeting, and that its procedures afforded Appellants a meaningful opportunity to be heard on their objections to the Wallaces' application?

II. Whether the circuit court properly rejected Appellants' suggestion that the BZA relied on "tainted" and "faulty" evidence when Appellants failed to raise such arguments to the circuit court, and have failed to show, at any level, that the materials and testimony presented to the BZA were tainted, faulty, or would have otherwise affected the outcome?

III. Whether the circuit court erred in finding that the record before the BZA was sufficient for review and contained evidence reasonably supporting the BZA's findings and that the BZA's decisions were not based on any error of law, were not arbitrary or capricious, and did not amount to an abuse of discretion?

IV. Whether the circuit court properly denied Appellants' Motion for Reconsideration when its ruling was not erroneous as a matter of law, was supported by the record, and there was no new evidence, change in law, or other reason to disturb the ruling?

STATEMENT OF THE CASE

This case involves one neighbor's objection to the other's plans for renovating a portion of their 200+ year-old historic home in downtown Charleston. Respondents George Wallace, Erika Wallace, and Erika R. Hayes, Trustee of the Erika R. Hayes Revokable Trust (the "Wallaces" or the "Respondents"), are the owners of the historic home subject to the renovations. Appellants, part-time occupants of a neighboring property, are the objectors. The City of Charleston Board of Zoning Appeals – Zoning (the "BZA" or the "Board") rendered decisions on the Wallaces' plans and is a co-Respondent in this appeal.

The Wallaces' home at 62 Church Street was constructed 214 years ago. **(R. pp. 107:6-109:23)**. The last major renovation to the structure was completed between 1973-1974. **(R. pp. 107:15-109:3)**. The current renovation is designed to add certain improvements to the property to make it viable for use as a full-time residence in the 21st century. **(R. p. 107:15-21)**. To that end, the renovation incorporates a small, rear addition adding functional amenities such as a laundry room, storage areas, and walk-in closet. **(R. pp. 108:4-5, 182)**.

Like many homes in the historic district, 62 Church Street predates the City of Charleston's Zoning Ordinances and does not conform to them. **(R. pp. 19-20, 101:13-23, 102:4-5, 103:17-18)**. City zoning ordinances restrict structures to covering no more than 35% of a residential lot. **(R. pp. 19-20, 102:6-7)**. City zoning ordinances further require a nine-foot (9') setback from one side lot line. **(R. pp. 19-20, 103:18-19)**. The existing home at 62 Church is physically non-conforming as to these two zoning standards. **(R. pp. 19-20, 101-104)**.

The Wallaces' renovation plans required them to obtain a variance and special exception to barely increase the property's existing non-conformity with these two requirements. **(R. pp. 19-20)**. The plans slightly extend the non-conforming lot coverage ratio from 37.14% to 42.96% and

extend the encroachment into the side setback a total of 2 feet and 9 5/8 inches (14" less encroachment than the existing structure). **(R. pp. 19-20)**.

The Wallaces applied to the BZA for a variance and special exception on May 21, 2021. **(R. pp. 19-20)**. Their application was considered at the BZA's September 7, 2021 meeting. **(R. pp. 101-127, 200)**.[1] The meeting was conducted via Zoom®. **(R. pp. 167, 200)**. Appellants remotely appeared at the meeting with their attorneys to oppose the Wallaces' application. **(R. pp. 112-118)**.

Appellants were provided an opportunity to present their opposition to the Wallaces' application, subject to a 10-minute time limitation. **(R. pp. 99-100, 113-118)**. Appellants' attorney presented their opposition. **(R. pp. 112-118)**. He spoke for more than 10 minutes before closing his remarks with a request that the BZA deny the Wallaces' application. **(R. pp. 118:1-5, 200)**.

After the Wallaces' attorney replied, the Board proceeded to discuss the matter. **(R. pp. 120-127)**. The Board posed certain questions to City Zoning Administrator, Lee Batchelder, and Respondent George "Skip" Wallace during its discussion, to which they responded. **(R. pp. 122-125)**. The Board did not ask any questions of Appellants, their attorney, or any other members of the public. **(R. pp. 120-127)**.

In a 7-0 decision, the BZA unanimously decided to grant the Wallaces' application, subject to one condition. **(R. pp. 3, 4, 126-127, 318)**. The BZA conditioned their approval on the Wallaces taking steps to reduce the sound coming from the air conditioning units and generator to address Appellants' concern about potential noise impacts. **(R. p. 3)**.

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[1] A video recording of the BZA's September 7, 2021 meeting is accessible on YouTube® at: https://www.youtube.com/watch?v=GzTu4Tp6pEE. References herein to the "BZA Video Recording" are to this recording.

Appellants petitioned the BZA for reconsideration. **(R. pp. 21-24)**. The BZA heard the Appellants' petition for reconsideration at its October 19, 2021 meeting, again by Zoom®. **(R. pp. 128-142)**. Appellants did not appear at the meeting. **(Id.)**. Their attorney was afforded 10 minutes to present their argument in support of reconsideration and an additional opportunity for rebuttal. **(Id.)**.

The BZA unanimously denied Appellants' petition for reconsideration. **(R. p. 4)**. Appellants appealed the BZA decisions to the circuit court. **(R. pp. 39-40)**. The Honorable R. Markley Dennis, Jr., presided over the appeal, and heard oral arguments via WebEx® on April 20, 2022. **(R. pp. 143-157)**. Appellants focused their oral argument on their contention that the BZA's general use of Zoom® technology violated their due process rights. **(R. pp. 146-149)**.

Judge Dennis rejected Appellants' arguments in a 10-page order affirming the decisions of the BZA. **(R. pp. 5-15)**. Appellants then filed a Motion for Reconsideration. **(R. pp. 84-91).** Judge Dennis denied Appellants' Motion for Reconsideration without argument. **(R. pp. 16-18)**.

Appellants now appeal Judge Dennis's orders. **(R. pp. 97-98)**.

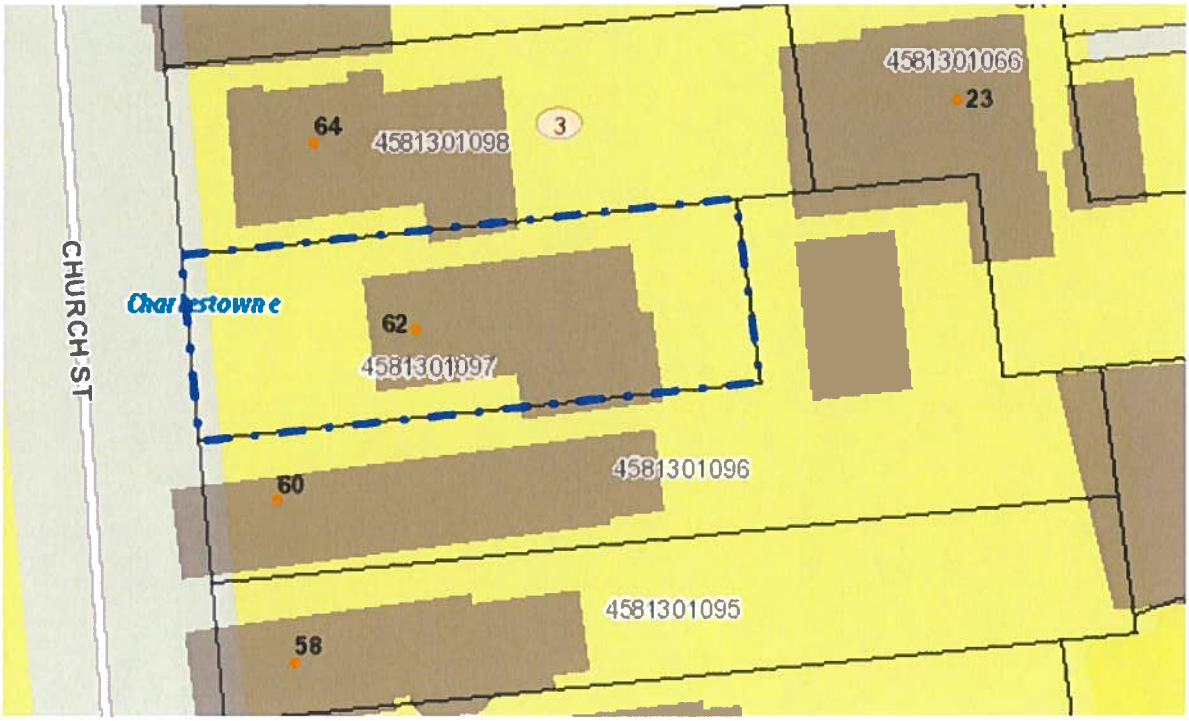
STATEMENT OF THE FACTS

On May 27, 2021, after four years of planning (and six years of design), the Wallaces applied to the BZA for a special exception and variance from the City's Zoning Ordinances to construct a small addition to the rear of their historic home at 62 Church Street. **(R. pp. 19-20, 108:4-5, 182)**. The proposed addition was designed to extend from the rear of the house into a courtyard that is currently enclosed by a brick border wall that is eight feet (8') tall in most places. **(R. pp. 180, 186, 191, 192-193)**. Within the courtyard was a small sitting area, overgrown landscaping, a generator, HVAC units, a platform for this equipment, and a tool shed. **(R. pp. 191-**

195). The area of 62 Church Street as it existed prior to these renovations is shown in the photograph below:

(R. p. 193).

Appellants' neighboring property at 60 Church Street is situated behind the tool shed and wraps around in an "L" shape to the east (i.e., to the rear and left side of the photograph, behind the brick border wall). **(R. pp. 113:15-19, 121:4-6, 172, 174-175)**. The configuration of these neighboring properties is shown below:



(R. p. 174).[2] Appellants' single-story pool house[3] is on the other side of the brick border wall. **(R. p. 131:10-17)**. Appellants property includes a tall tree line buffer on their side of the brick wall. **(R. p. 193)**.

The Wallaces submitted their application to the BZA on May 27, 2021, along with their plans for the renovations. **(R. pp. 19-20)**. Respondent George "Skip" Wallace, a licensed architect for more than 38 years, refined the plans over a four-year period in coordination with Charleston's two historic preservation organizations. **(R. pp. 106:23-107:4)**. As Mr. Wallace explained, the Wallaces were very sensitive and deliberate about the design process, given the historic character of their property and the surrounding neighborhood:

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[2] As shown by the property map above, Appellants' property at 60 Church Street is considerably larger than the Wallaces' property.

[3] Here to date, Appellants have referred to the smaller, secondary structure on their property as their pool house. **(R. pp. 35, 116:2-5)**. For purposes of this appeal, they decided to christen it as one of the "two historic, residential buildings" on their property. **(App. Br. at 5)**.

> So, we've been working on this for about four years and we, just as an introduction, I was on the preservation committee for my local county in Virginia for 26 years, so I take historic properties very seriously. I love them. That's why I'm here. This is over (sic.) 200-year-old house. It's got one of Loutrel Briggs' latest, last gardens back in 1974. We have the actual drawings on the wall. So we really feel like we are stewards to an amazing piece of property. We open it up the public whenever we can. Historic Charleston Foundation uses it for its garden tours about four times this spring. We allow people to take pictures in the garden, wedding pictures all the time. We, we just feel like it's, we're just here temporarily and we're the stewards of this amazing, caretaker of this amazing piece of property.

(R. p. 107:4-12).[4]

In keeping with the unique character of this property, defined by the Loutrel Briggs garden in the front, the plans call for a garden room and a courtyard on the first floor of the small rear addition. **(R. pp. 107:7, 225)**. The second story of the rear addition, which is smaller in footprint than the first, adds a laundry room, storage areas, and walk-in closet to the home – all of which the home currently lacks. **(R. pp. 103:11-12, 108:4-5, 226)**.[5] The proposed garden room ties-in to the existing tool shed. **(R. p. 225)**. The existing emergency generator, situated behind the black lattice in front of the existing tool shed as shown in the photograph at the outset of this section, was to be raised up from its current position (higher, but in the same place). **(R. pp. 122:4-6, 225)**. Existing mechanical equipment that is currently visible to Appellants is to be relocated behind a parapet wall, such that they will be concealed from Appellants' view. **(R. pp. 122:4-14, 226)**. The Wallaces also planned to replace the existing compressors with smaller compressors and add a

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[4] The Historic Charleston Foundation acknowledged the Wallaces' efforts to this end. **(R. p. 196)** ("We have been impressed with the applicants' thoughtful consideration of the historic structure and the important garden elements as they developed this proposal…").

[5] The property currently lacks these features. **(R. p. 108:5-7)**. Prior to Respondents' ownership of 62 Church Street, it "was never used as a fulltime residence." **(R. p. 107:13)**. Respondent Skip Wallace testified that the lack of these features has made it difficult for Respondents to use the property as a full-time residence. **(R. p. 108:4-7)**.

third, such that they will total 10% less area than the two existing units. **(R. p. 122:4-14, 222-232)**. All compressors will be new, jet-style compressors that are very quiet. **(Id.)**.

Appellants did not own or occupy 60 Church Street at the time Respondents submitted their application. **(R. p. 113:13)**. Appellants' contractor apparently noticed the posted BZA meeting notice and informed Appellants. **(Id.)**. Appellants asked the Wallaces to defer their application from BZA's August 3, 2021 agenda. **(R. p. 118:15-17)**. The Wallaces accommodated their request and agreed to the deferral. **(Id.)**. Unbeknownst to them, Appellants used the postponement to hire attorneys immediately to oppose the application. **(Id.)**.

Appellants and their attorneys appeared at the September 7, 2021 BZA meeting. **(R. pp. 113-118)**. Appellants focused much of their opposition presentation cobbling together an argument that the Wallaces work from home as an architect and interior designer, and by doing so, they are using their home in an illegal way. **(R. pp. 114:11-115:13, 116:5-9, 116:23-117:1, 158-167)**. Appellants said they "feel" the Wallaces plan is to intensify their illegal, business use of their home. **(R. p. 115:8-9)**. The Wallaces contested Appellants' unfounded contention, pointing to the obvious intended domestic use shown in the design documents. **(R. p. 106-108, 134-136, 222-232)**. They also explained that Mr. Wallace does not use the house for any office use and instead rents a studio in the Confederate Home on Broad Street where he works every day (in addition to his architectural firm's headquarters in Richmond, Virginia). **(R. pp. 135:11-20)**. They further explained Mrs. Wallace has a very small home office where she keeps up with paperwork while conducting most of her interior design work outside of her house. **(R. pp. 107:1-3, 108:2-8; 135:11-15)**. The Wallaces merely use their home address for mail. **(R. pp. 118:19, 135:11-20)**. Appellants offered no proof of anyone ever coming to the house to meet with either of them about their businesses. **(R. pp. 118:17-119:3, 135:15-16)**.

Apart from Appellants, the BZA heard from City Zoning Administrator Lee Batchelder at its September 7, 2021 meeting, who made a detailed presentation relating to Respondents' application and ultimately recommended approval. **(R. pp. 101-105, 170-199)**. The Historic Charleston Foundation that holds a conservation easement over both 60 and 62 Church Street, requested approval of the application. **(R. p. 196)**. The Historic Charleston Foundation stated:

> Historic Charleston Foundation has a preservation easement on the property at 62 Church Street and has met with the applicant multiple times to review the proposed alterations to confirm that the work complied with the terms of the easement.
>
> The small historic house is set on the rear portion of the lot with an exceptional Loutrel Briggs garden in the front portion of the parcel. Because of the relatively unusual placement of the house on the lot, there are considerable limitations for an addition that is sensitive to the historic character of the property. The proposed alterations were carefully designed to attach to the non-historic 'L' addition to the house with minimal impact to historic fabric and minimal visual impact from the street. We have been impressed with the applicants' thoughtful consideration of the historic structure and the important garden elements as they developed this proposal.
>
> The Foundation is in support of the request for a special exception under Section 54-110 to allow a horizontal expansion and vertical expansion that extends a non-conforming 6'2" south side setback, and the request for a variance from Section 54-301 to allow a 2-story addition having a 43% lot occupancy. We respectfully recommend approval of this application.

(R. p. 196). Multiple neighbors submitted letters in support. **(R. pp. 197-199)**. Appellants were the *only* opponents to the Wallaces' application. **(R. pp. 99-127)**.

All seven BZA members were present at the meeting. **(R. p. 99:1-4)**.[6] After an exhaustive review of more than one hour on this one application, the Board unanimously approved the lot coverage variance and unanimously approved the special exception for the side setback. **(R. pp. 3, 99-127, 318-322)**. As to the Wallaces' request for a special exception, the BZA granted their

[6] The transcript of the meeting reflects an indiscernible name at 00:00:17, which is Ms. Allison Cannon Grass. **(R. pp. 99-127, 200)**.

request, subject to the condition that they make best efforts to baffle or reduce the noise emanating from the emergency generator and HVAC units. **(R. p. 3)**. With respect to the variance request, the order reflects the following findings of fact and conclusions, made after consideration of the evidence and arguments presented:

1. There are extraordinary and exceptional conditions pertaining to the particular piece of property.
2. These conditions do not generally apply to other property in the vicinity.
3. 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
4. Authorization of the variance will not be of substantial detriment to adjacent property or to the public good, and the character will not be harmed by granting the variance.

(R. p. 3).

On September 13, 2021, Appellants filed an appeal for reconsideration. **(R. pp. 21-24)**. The Board heard the Appellants' request for reconsideration at its meeting on October 19, 2021, and discussed the request for reconsideration in detail. **(R. pp. 139-142)**. The seven-member Board unanimously denied Appellants' appeal for reconsideration. **(R. pp. 4, 142)**.

Appellants appealed the BZA decisions to the circuit court pursuant to S.C. Code Ann. § 6-29-820 on November 18, 2021. **(R. pp. 39-40)**. The parties extensively briefed the matter. **(R. pp. 41-56, 57-77, 78-81, 82-83)**. Judge Dennis conducted a hearing on the appeal by Webex® on April 20, 2022. **(R. pp. 143-157)**. Appellants' counsel concentrated his remarks on Appellants' contention that they were not afforded due process because he had been limited to 10 uninterrupted minutes to express their objections at both BZA meetings conducted via Zoom®. **(R. pp. 146-149, 153-154)**.

Judge Dennis ruled at the close of the appeal hearing, affirming the BZA decisions. **(R. p. 155:3-25)**. Judge Dennis subsequently entered a ten-page formal order affirming the decisions of

the BZA and dismissing the appeal on May 18, 2022. (**R. pp. 5-15**). In his order, Judge Dennis first considered the merits of Appellants' appeal under S.C. Code § 6-29-820, and made the following findings:

> A review of the record filed with the Court demonstrates that the decision of the BZA was not erroneous as a matter of law and that there was evidence to support the board's decision to grant the variance and to grant the special exception subject to the conditions imposed by the BZA. Because the decision was supported by evidence and not erroneous as a matter of law, the decision was neither arbitrary nor capricious.
>
> . . .
>
> The record establishes a factual basis in the evidence presented at the meeting on September 7, 2021, for the BZA's findings and conclusions that there are extraordinary and exception conditions pertaining to 62 Church Street that do not generally apply to neighboring properties, including the location of the historic home on the lot (positioned well away from the street in comparison to the many houses abutting the street) and its lack of functional utilities and storage areas. Moreover, there is support within the record for the BZA's finding that the denial of the additional variances would unreasonably restrict the utilization of the property and that the small addition to the rear of 62 Church Street would not be of substantial detriment to adjacent property, the character of the neighborhood, or the public good.
>
> The Court also finds that the BZA properly evaluated the Owners' request for a special exception, and the board's decision is supported by the record. The Owners' historic house is physically non-conforming because it extends into the side setback that was created by an ordinance adopted after the house was constructed. . . . [T]he board's analysis properly focused on whether the small expansion to the house will cause an intensification or increase of traffic impacts, vehicular and pedestrian safety, parking impacts, potential impacts of light and noise, lighting, fumes, or obstruction of air flow or light on adjoining property; impacts on the aesthetic character of the environs, to include the possible need for screening. Mr. Batchelder's analysis as to the *minimal* light, view, and air obstruction the proposed addition may have on 60 Church Street, standing alone, fully supports the BZA's decision. The BZA addressed the Appellants' noise concern from the air conditioning units by imposing a certain condition on the special exception. It is well within the BZA's authority to approve the special exception subject to conditions that it considers will minimize the adverse effects, if any, upon the Appellants.

(R. pp. 7-9) (emphasis in the original).

Judge Dennis then turned to Appellants' procedural and due process arguments, analyzing the issues as follows:

> I find that there is nothing about [the] use of Zoom® that affected the order of these hearings or the Appellants' due process rights. The Appellants had a full and fair opportunity to present the grounds for their objection to the Owners' application and any evidence they wanted to submit in opposition. The BZA's use of the universally accepted Zoom® platform to conduct the meeting did not deprive the Appellants of due process.
>
> Additionally, Appellants have not submitted any affidavits nor set out what they would have said if they had been able to provide additional testimony. At the second meeting where the BZA heard the Appellants' Request for Reconsideration, Appellants' counsel was once again given ten minutes to make any argument or showing as to what objections or 'proof' Appellants would have presented if they had spoken at the first meeting. As the transcript shows, the BZA considered all these arguments and rejected them. The Appellants have failed to show anything else they would have said at the meeting on September 7, 2021, would have affected the outcome. In being unable to do so, Appellants have failed to show that they were in any manner prejudiced by the conduct of the meeting.

(R. p. 11).

Judge Dennis denied Appellants' Motion for Reconsideration, without hearing, by way of an order entered on June 15, 2022. **(R. pp. 16-18)**. Appellants timely filed this appeal. **(R. pp. 97-98)**.

STANDARD OF REVIEW

The Legislature, through the South Carolina Local Government Planning Enabling Act of 1994, S.C. Code Ann. §§ 6-29-310, *et. seq.*, enables municipal boards of zoning appeals to exercise discretionary authority to grant property owners variances and special exceptions from zoning ordinances. S.C. Code Ann. § 6-29-800(A)(2) & (3). The Legislature's intent for zoning boards to have broad discretion in this area of local planning is reflected in S.C. Code Ann. § 6-29-840, which mandates that a reviewing court is to "determine only whether the decision of the board is correct as a matter of law." *See Kurschner v. City of Camden Planning Comm'n*, 376 S.C. 165,

174, 656 S.E.2d 346, 351 (2008) ("We refuse to apply a standard of review different from the any evidence standard in this case, *for any other standard of review would be contrary to the legislature's intent in granting a planning commission broad discretion in this area.*") (emphasis added). The statute further provides: "[t]he findings of fact by the [zoning] board of appeals must be treated in the same manner as a finding of fact by a jury, and the court may not take additional evidence." S.C. Code Ann. § 6-29-840(A). The Court of Appeals, like the circuit court, is to adhere to this standard of review. *See Venture Eng'g v. Horry Cnty. Zoning Bd. of Appeals*, 433 S.C. 419, 426, 858 S.E.2d 638, 642 (Ct. App. 2021).

Our Supreme Court has summarized the applicable standard of review as follows:

> It is a well settled proposition of zoning law that a court will not substitute its judgment for the judgment of the board. The court may not feel that the decision of the board was the best that could have been rendered under the circumstances. It may thoroughly disagree with the reasoning by which the board reached its decision. It may feel that the decision of the board was a substandard piece of logic and thinking. None the less, the court will not set aside the board's view of the matter just to inject its own ideas into the picture of things.

Restaurant Row Assocs. V. Horry Cnty., 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999) (quoting *Talbot v. Myrtle Beach Board of Adjustment*, 222 S.C. 165, 173, 72 S.E.2d 66, 70 (1952)).

Under the deferential standard of review, "a court must not substitute its judgment for that of the board, 'even if it disagrees with the decision.'" *Venture Eng'g*, 433 S.C. at 426, 858 S.E.2d at 642 (quoting *Rest. Row Assocs. v. Horry Cnty.*, 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999)). With respect to a zoning board's findings of fact, the findings of the zoning board are only to be disturbed when there is not any evidence to support the board's findings. *Heilker v. Zoning Bd. of Appeals for City of Beaufort*, 346 S.C. 401, 406, 552 S.E.2d 42, 45 (Ct. App. 2001) (quoting *Sterling Dev. Co. v. Collins*, 309 S.C. 237, 240, 421 S.E.2d 402, 404 (1992)); *see also Venture Eng'g v. Horry Cnty. Zoning Bd. of Appeals*, 433 S.C. 419, 426, 858 S.E.2d 638, 642 (Ct. App. 2021) ("In other words, the decision of a zoning board of appeals must not be disturbed if there is

supporting evidence in the record."). This Court has previously rejected arguments that the "any evidence" standard of review violates procedural due process. *Kurschner v. City of Camden Planning Comm'n*, 376 S.C. 165, 174 at n. 3, 656 S.E.2d 346, 351 (2008).

ARGUMENT

The conduct of the meetings before the BZA did not deprive the Appellants of due process. Appellants were given timely notice of the BZA meeting. They were provided with an opportunity to submit documentary evidence in advance of the meeting for the Board to consider, and they did so, submitting nine (9) different exhibits. They were represented at the meetings by well-experienced counsel and afforded more than ten minutes to present their opposition and objections to the Wallaces' application and evidence submitted in support thereof. They were afforded even more time to present their argument for reconsideration. In sum, Appellants were provided reasonable notice and an opportunity to be heard, which is all that due process requires.

Turning to the merits, Appellants provided no basis for the circuit court to reverse the BZA's decision. The Wallaces, other neighbors, and the Historic Charleston Foundation submitted competent evidence in support of the modest adjustment of the side lot line and the modest increase in the percentage of total lot coverage. The BZA evaluated the application under the proper standards, considered the relevant facts (including the potential impacts on Appellants' property), and spent more than an hour on the matter.

The BZA's decision is correct as a matter of law and fully supported by the record. The BZA did not act arbitrarily or capriciously, nor did it abuse its discretion. The circuit court was correct to find the record sufficient for review and to not disturb the judgment of the BZA. The BZA's decision is supported by competent evidence and this Court should affirm the circuit court's

decisions upholding the BZA's grant of the Wallaces' application and denial of Appellants' petition for reconsideration.

I. APPELLANTS WERE AFFORDED THE OPPORTUNITY TO PRESENT OBJECTIONS DURING THE BZA MEETING. THE BZA CONDUCTED ITS MEETINGS IN A MANNER CONSISTENT WITH ITS ORDINANCES AND CONSTITUTIONAL DUE PROCESS REQUIREMENTS.

Appellants are at no loss for hyperbole. They have repeatedly complained the BZA "gagged" and "ousted" them from the BZA hearing on Respondents' application. *See* **(App. Br. at p. 3); (R. pp. 21-24, 44-47)**. They launch similar over-the-top terminology in this appeal, asserting the BZA "abruptly 'disabled'" their attorney before they "had a chance to step in front of the computer's camera and offer testimony themselves," such that they "never got to say a word during the entire public hearing . . . [and] as if they had been locked out of a city hall." *See* **(App. Br. at 3-4)**. Of course, the record shows their portrayal of abuse is false and unfounded.[7]

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[7] While the focus of Appellants' arguments in this appeal is primarily that the BZA curtailed their ability to make certain objections, Appellants' representations that their counsel was cut-off during his presentation and that they were prevented from offering their own testimony are inaccurate.

The BZA's Rules and Regulations provide opponents of an application 10 minutes for their opposition presentation. *See* City of Charleston Zoning Ordinances at App'x. C, Art. IV, § 4 ("Conduct of Hearing") (emphasis added). At the outset of the September 7, 2021 meeting, BZA Chairman Robinson made it clear that the 10 minute limitation per side was cumulative, not 10 minutes per speaker. **(R. p. 106:6-7)** ("Mr. Wallace, you and anyone else in favor have a total of 10 minutes to make your presentation."). Parties were also informed that their microphone would be disabled after they finished presenting. **(R. p. 167)**.

At the beginning of Appellants' opposition presentation, their lawyer, Brian Hellman, introduced them and indicated they were present with him at his office at 105 Broad Street. **(R. p. 113:11-13)**. Mr. Hellman began Appellants' presentation at 37:15 and ended the presentation at 48:04. **(R. p. 200)**. He had 10.817 minutes to speak. **(R. pp. 112-118, 200)**. He was not cut-off or "abruptly disabled" at the 10-minute mark, but instead closed his remarks in conclusory form. **(R. pp. 112-118, 200)**. There was no restriction on his ability to share the microphone or screen with his clients *who were sitting right next to him.*

The circuit court was correct in finding this situation of Appellants' own making. As is set out herein, Appellants *chose* to allocate their entire presentation time to their attorney, who, in turn, focused on certain arguments and objections. Appellants should not be afforded another opportunity to raise or reassert arguments and objections they could have raised (or, on some objections, did in fact already raise) in the BZA proceedings below.

A. Appellants were not prevented from making evidentiary objections.

Appellants claim these Respondents submitted "new, objectionable evidence during the time for reply and during a question-and-answer session with members of the board of the BZA" that they were not able to object to because they were not enabled as panelists on Zoom®. **(App. Br. at 3-4)**. For the first time, in their Brief,[8] Appellants identify this so-called "new, objectionable evidence" and articulate specific objections to such evidence. *See* **(App. Br. at 20-21)**.

Simple reference to the record shows this information was not *new* evidence, but rather information that was already incorporated into the record at the time Appellants' attorney presented their opposition. Appellants' attorney had ample opportunity to lodge objections to these written comments during his presentation. Appellants would have also had an opportunity to make any such objections to the circuit court. Appellants' procedural due process argument can be resolved on purely a factual basis.

The first piece of "evidence" Appellants object to is a letter submitted in support of these Respondents' application by the owners of 69 East Bay Street, Michael and Alison Brewer. **(App. Br. at 20); (R. p. 199)**. Appellants claim the Brewers' letter is irrelevant because they live a block away from 62 Church Street. **(App. Br. at 19-20)**. As the record will show, this letter was submitted in advance of the meeting and presented to the Board as part of the meeting materials

[8] Appellants' failure to preserve certain evidentiary objections is addressed further *infra*.

druring the Zoning Administrator's slideshow presentation. **(R. p. 199)**. Mr. Batchelder even discussed the letter before Appellants' attorney spoke in opposition. **(R. p. 112:12-13)**. So did Respondent Skip Wallace. **(R. p. 108:11-12)**. The letter and Mr. Batchelder's comments make clear the Brewers live a block away. The opening of their letter states as follows:

> We are the property owners of 69 East Bay St at the end of Longitude Lane. This Lane connects us to Church Street five houses North of where the Wallaces home is located at 62 Church St.

(R. p. 199). Mr. Batchelder expanded on the spatial distance in his comments: "68 Church Street and 69 East Bay Street [are in support and] this is a property a block away." **(R. p. 112:12-13)**.

Appellants could have asked Chairman Robinson to exclude this letter or noted a relevancy objection on the record during their presentation time. The letter was entered into the record prior to their presentation and the facts bearing on the potential objection were apparent. Appellants simply chose not to further address the letter.

The same is true of Appellants' other so-called evidentiary objections. Apart from the Brewers' letter, Appellants identify the view angle study Skip Wallace prepared and submitted with Respondents' application. *See* **(App. Br. at 20); (R. p. 325)**. The view angle study was introduced during Respondents' presentation to show that in the most restrictive position on Appellants' second-story balcony, there would be "some minimal impact on the light" as a result of the addition. **(R. pp. 111:19-23, 200, 325)**. In their Brief, Appellants argue Skip Wallace did not have a proper foundation for the study, was not qualified to prepare it, and that it is inaccurate. **(App. Br. at 20)**. Skip Wallace discussed his professional background and qualifications *in advance* of Appellants' presentation, testifying as follows:

> [A]s a way of introduction, my name is Skip Wallace. This is my wife Erica (sic.). We've been here at 62 Church Street for nine years. I'm an architect registered in the State of South Carolina for 37 years. I have a studio on Broad Street that, that I occupy daily. My home quarters, my headquarters for my firm is up in Richmond,

> Virginia and I have nine people up there and a partner up there. So, it's just me down here, and my wife.
>
> So, we've been working on this for about four years and we, just as an introduction, I was on the preservation committee for my local county in Virginia for 26 years, so I take historic properties very seriously. I love them. That's why I'm here.

(R. pp. 106:22-107:6).

Based upon this information – again, all presented *prior to* Appellants' presentation – Appellants were in a position where they could have asserted every objection they now raise; i.e., that Mr. Wallace was unqualified to prepare this document; that Mr. Wallace lacked foundation, personal knowledge, or expertise as to Appellants' view, their porch, their bedroom, and where they sit; or that it is false or tainted evidence.[9]

Beyond lodging these objections, Appellants could have conducted their own study. They could have testified as to the view off their master bedroom porch.[10] They could have submitted affidavits. The BZA's procedures and its employment of Zoom® technology did not prevent them from exercising any of these options. At each of the two meetings of the BZA, they had the opportunity to fold into their ten minutes of opposition their comments on these materials and their reasons the BZA should not consider them but chose otherwise.

B. Appellants have already raised other objections to the BZA.

Further undermining Appellants' due process argument is the fact that Appellants actually raised several of the objections they now claim they were prevented from raising. In their Brief, Appellants claim they would have further objected to the view angle study and certain aspects of

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[9] Likewise, while such arguments lack any merit, Appellants could have argued against Skip Wallace's qualifications to opine on noise impacts and mitigation measures.

[10] Ironically, the porch that is the subject of the view angle study, is the same porch that the prior owners of 60 Church Street added-on through this same BZA process and with the Wallaces' support. **(R. p. 111:1-4)**.

Respondent Skip Wallace's testimony on the basis that such evidence omits the potential impacts to Appellants' "house to the rear" (i.e., their pool house) and their yard. **(App. Br. at 20-21)**. It is not necessary for the BZA to rehear the Wallaces' application on these grounds, as this objection was clearly articulated to the Board at the initial meeting on September 7, 2021. At the meeting, Appellants counsel argued:

> The height of the proposed addition will also negatively impact 60 Church by obstruction of light and airflow on 60 Church Street, ***its pool, its rear yard***. This can be seen in drawing A-0.2 and on the aesthetic character of the environs. . . . The last part of the test is really the most important that, that there can't be a substantial detriment to an adjacent property, and there is here a substantial detriment to adjacent property and the public good. First, our client is going to be harmed because of the location of the compressors, the generator, the effect of light and air on its backyard because of the nature of Church Street being an L-shaped lot for the, both the sound and to the, to the rear of 62 Church.

(R. pp. 116:2-5, 117:8-18) (emphasis added). Appellants' counsel expanded on these objections at the hearing on Appellants' petition for reconsideration:

> We believe the Board was confused as to the extent of Ms. Melhado's property the impact, and the impact with the Wallaces' request would have on the rear of 60 Church Street. Ms. Melhado and Mr. Neller were unable to testify. . . . The Board, we believe, was again confused as to the ownership of this rear property, the rear property and that's significant, because as to the impacts on light, air, noise and fumes, all specific elements of 54-110.f ***are most damaging to 60 Church Street along the rear of the property, where their pool and pool house is located***.

(R. p. 131:10-17) (emphasis added).

The Board made its decision to approve the Wallaces' application fully aware of the potential impacts to this portion of Appellants' property. This is confirmed by the transcript of the October 19, 2021 BZA meeting on Appellants' petition for reconsideration:

Robben Richards:	I believe that we did discuss, correct me if I'm wrong the, the impacts to the rear of the property, did we not? I mean was that discussion omitted from our, from that meeting?
Chairman Robinson:	Would you please repeat that Ms. Richards.
Robben Richards:	I thought I remember that we did discuss the, the effects to the rear of the property.

Geiza Vargas-Vargas: I thought we did also, and I do recall that there was a slide that had an extensive drawing of how the light would fall. I don't know.
Robben Richards: Right.
Geiza Vargas-Vargas: I don't know if the Board remembers that, but I do believe it was for this application.
Howell Morrison: I, I certainly realized it was an L-shaped lot next door.
Robben Richards: Yeah, I realized that too and I thought that we were discussed the effects on both, on the entire property not just to the south, north, south.

(R. p. 139:7-18).

The procedural deprivations Appellants complain of simply did not occur. Appellants cannot show they were prejudiced in any manner by the conduct of the meeting. *See Tall Tower, Inc. v. South Carolina Procurement Review Panel*, 294 S.C. 225, 233, 363 S.E.2d 683, 687 (1987) (holding that demonstration of substantial prejudice is required to establish a due process claim). Appellants had a meaningful opportunity to participate in the BZA proceedings, including the opportunity to sound their objections to the evidence submitted in support of the Wallaces' application. The circuit court's ruling that Appellants were afforded a meaningful opportunity to assert their opposition and objections to the Wallaces' application should be affirmed on this ground alone.

C. The BZA conducted its meetings in conformity with its procedural ordinances.

Within the BZA's Rules and Regulations are two ordinances bearing on this appeal: (1) City of Charleston Zoning Ordinances at App'x. C, Art. IV, § 4 ("Conduct of Hearing"); and (2) City of Charleston Zoning Ordinances at App'x. C, Art. IV, § 3 ("Evidence"). Appellants make reference solely to a portion of the rule on evidence in their Brief, claiming it is the procedural ordinance that governs how the BZA must conduct its hearings. *See* **(App. Br. at Table of Authorities & 18)** (void of any citations to City of Charleston Zoning Ordinances at App'x. C, Art. IV, § 4). This is improper and the circuit court was correct in finding an opponent's

opportunity to present evidentiary objections is limited to its presentation time under the BZA's Rule and Regulation governing the "Conduct of Hearings." **(R. p. 10)**. Under this Rule and Regulation, BZA hearings are normally ordered as follows:

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

City of Charleston Zoning Ordinances at App'x. C, Art. IV, § 4 (emphasis added).

The BZA conducted its September 7, 2021 meeting on Respondents' application in accordance with this regulation. All other attendees at ***both*** meetings understood the guidelines and protocols and all other attendees abided by those protocols without issue. As previously outlined, Mr. Hellman had 10.817 minutes to present Appellants' opposition and focused his presentation on the Wallaces' alleged "illegal use of their home" as a home office. **(R. pp. 112-118, 200)**. At the close of the parties' presentations, Chairman Robinson ruled on the evidence Appellants submitted relating to Respondents' use of their home. **(R. p. 120:2-6)** ("Mr. Batchelder, it seems to me that the contention on the uses that are occurring in the building [are] 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."). Mr. Hellman did not ask

Chairman Robinson to make any other evidentiary rulings, nor were the objections discussed above lodged. **(R. pp. 112-118)**.

After Chairman Robinson's rulings, the Board then posed certain questions to Mr. Batchelder during their discussion of the application, and when Mr. Batchelder could not answer the questions, they asked Respondent Skip Wallace to answer. **(R. pp. 120-126)**. The Board was permitted to pose these questions to Mr. Wallace, and to rely on his sworn testimony in response. *See* City of Charleston Zoning Ordinances at App'x. C, Art. IV, § 4(e) ("The Board may question participants at any point in the hearing").

Appellants request for this Court to read part of the evidence rule in isolation[11] and to the exclusion of the remainder of the BZA's Rules and Regulations, is inconsistent with principles of statutory interpretation and must be rejected. The BZA's Rules and Regulations must be read as a whole, and its subparts must be construed together and given effect, if it can be done by any reasonable construction. *See Higgins v. State*, 307 S.C. 446, 415 S.E.2d 799, 415 S.E.2d 799 (1992); *see also Georgia-Carolina Bail Bonds, Inc. v. County of Aiken*, 354 S.C. 18, 24, 579 S.E.2d 334, 337 (Ct. App. 2003) ("Courts should consider not merely the language of the particular clause being construed, but the word and its meaning in conjunction with the purpose of the whole statute and the policy of the law."); *Stephen v. Avins Constr. Co.*, 324 S.C. 334, 340, 478 S.E.2d 74, 77 (Ct. App. 1996) ("Statutory provisions should be given reasonable and practical construction

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[11] Appellants only cite to a portion of the BZA rule on evidence. *See* **(App. Br. at 18)**. The full text of the rule is as follows: "Relevant documents, photographs, maps, plans, drawings, etc. will be received in the record without authentication in the form of legible copies. Relevant testimony, which is not cumulative, or hearsay will be received. The chairman will rule on all evidentiary matters. Evidence may be placed on the record with an objection noted." *See* City of Charleston Ordinance, Appendix C, Article IV, § 3.

As shown by this rule, procedural and evidentiary standards in this context are more relaxed than in an adjudicatory setting.

consistent with the purpose of the entire act."); *State v. Sweat*, 379 S.C. 367, 377, 665 S.E.2d 645, 650 (Ct. App. 2008) ("A court should not consider a particular clause in a statute as being construed in isolation, but should read it in conjunction with the purpose of the whole statute and the policy of the law."). The practical and reasonable construction of the BZA's Rules and Regulations is that participants have the opportunity to object to evidence placed on the record during their presentation time.

If participants could chime in and object during any portion of the meeting, the Rules and Regulations governing the conduct of hearings would be rendered useless. The BZA would not be able to efficiently consider matters on its docket and would not be able to keep order of its meetings. It would lead to an absurd result and defeat the intent to provide flexible rules and time limits. *See Sweat*, 379 S.C. at 377 ("Courts will reject a statutory interpretation which lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention."). This Court, like the circuit court, should read the BZA's Rules and Regulations as a whole and interpret them in a practical and reasonable manner that harmonizes the various rules and regulations and gives them effect. A BZA meeting considering an application is ***not a trial***.

D. The BZA's Rules and Regulations, as applied at these meetings, satisfied constitutional due process requirements. Appellants are not entitled to the full gamut of rules and procedures they seek.

The circuit court also correctly analyzed Appellants' constitutional due process arguments. The circuit court orders should be affirmed because Appellants had the opportunity to be heard in a meaningful way at the initial BZA meeting, during the second BZA meeting on reconsideration, and on appeal before the circuit court.

The fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review. *Kurschner v. City of Camden Planning Com'n*, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008); S.C. Const. art. 1, § 22. "Due process does not require a trial-type hearing in every conceivable case of government impairment of a private interest." *Kurschner v. City of Camden Planning Com'n*, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008), (citing *First Fed. Sav. Loan Ass'n of Walterboro v. Bd. of Bank Control*, 263 S.C. 59, 65, 207 S.E.2d 801, 804 (1974)). "Rather, due process is flexible and calls for such procedural protections as the particular situation demands." *Kurschner*, 376 S.C. at 172, 656 S.E.2d at 350. "[I]n determining the process which is due, a court will consider the private interest affected by the proceeding, the risk of error created by the chosen procedure, and the countervailing government interest supporting challenged procedure." *Id.* (citing *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L.Ed.2d 18 (1976)).

Our Supreme Court has recognized procedural safeguards due in exercise of discretionary authority, as opposed to adjudicatory power, are more flexible and less exacting. *Kurschner v. City of Camden Planning Com'n*, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008). *Kurschner* involved an applicant's appeal of a City of Camden Planning Commission's decision denying their request to subdivide their property. *Id.* at 169, 348. The Kurschners claimed they were not informed of opposing evidence prior to the hearing, complained the Commission received hearsay evidence, and did not allow them to cross-examine adverse witnesses or conduct questioning of the members of the Commission. *Id.* at 171, 349. The Supreme Court opined as follows:

> In our view, due process does not require the full gamut of rules and procedures to which the Kurschners claim they were entitled. While due process may require a trial-type hearing in fact-specific, adjudicatory decisions of an administrative body, the power exercised by this Commission and the individual interests at stake in this case are very different. . . . Specifically, the decision to deny the Kurschner's application to subdivide their land was an exercise of discretionary authority, as

> opposed to adjudicatory power. The legislature expressly granted this discretionary authority in the area of local planning to the Commission. *See* S.C. Code Ann. § 6-29-340 (2005) (conferring municipal planning commissions with the power to implement and oversee the administration of regulations for the growth and development of land).
>
> Regarding the requested procedural safeguards in this case, the Kurschners point to no authority for excluding hearsay evidence in planning commission decisions, nor do they provide any authority holding that individuals are entitled to conduct *voir dire* in land-use planning hearings. In our view, the additional procedures that the Kurschners request would not aid the Commission in making its decision, but would greatly hinder its ability to make an informed and reasoned decision, as well as intrude upon a municipality's statutorily-granted legislative authority. Accordingly, we hold that due process does not require the Commission to employ these rules and procedural safeguards in making these types of discretionary decisions.

Id. at 172, 350.

In keeping with the Supreme Court's holding in *Kurschner*, the circuit court was correct to find "due process does not require the full gamut of rules and procedures" to which the Appellants claim they were entitled to, specifically the right to object outside of their presentation time and to participate in the Board's question-and-answer session. *See* **(R. pp. 12-13)**. Appellants are part-time residents of 60 Church Street, whose view from their pool, pool house, and added-on master balcony, will view slightly more of the Wallaces' home.[12] They are the objectors, not the applicant or party whose property rights are subject to regulation. This is not an adjudicatory proceeding. The additional procedures Appellants request are not mandated, would require a rewriting of the BZA's Rules and Regulations, would actually hinder, not aid, the ability of the BZA to make an informed and reasoned decision, and would intrude into the BZA's statutorily granted discretionary authority. *Id.* at 172, 350.

[12] It must be kept in context that the subject plans are for an addition to an existing property, not for the construction of a new property. Appellants' view from their pool, pool house, yard, and other areas of their property is already of the Wallaces' house.

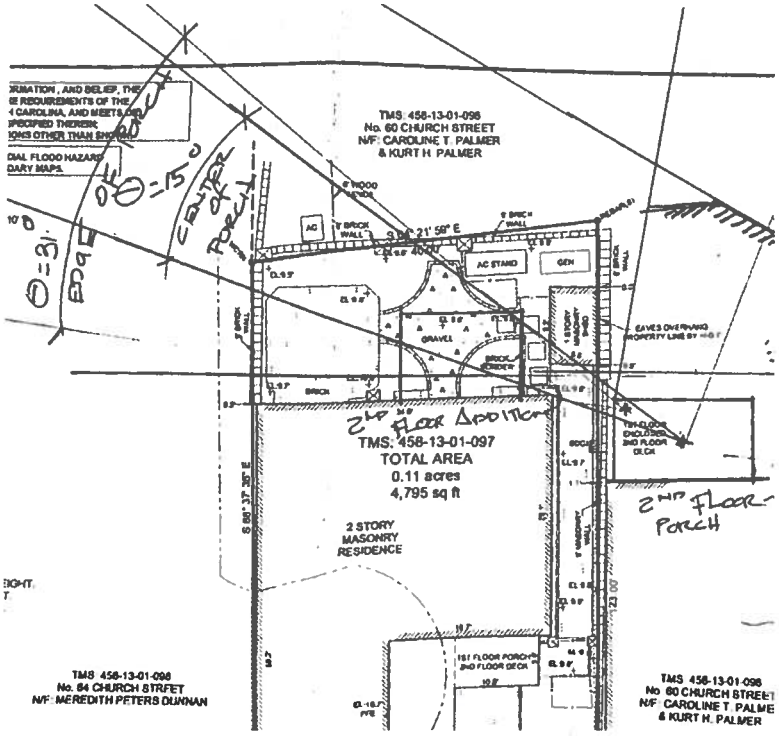
This Court has further recognized that where a party does not have an opportunity to participate in an initial proceeding but has an opportunity to file a motion for reconsideration or to file a direct appeal, its due process rights are protected. *See Belle Hall Plantation Homeowner's Assoc., Inc. v. Murray*, 419 S.C. 605, 618, 799 S.E.2d 310, 316-17 (Ct. App. 2017) ("Because Universal had the ability to file a motion for reconsideration or file a direct appeal but did not, it had sufficient opportunity to be heard and its due process rights were protected.").

Appellants had an opportunity to file a reconsideration with the BZA and exercised their right, providing them another opportunity to expand on their opposition. They were provided due process in this local planning proceeding.

II. APPELLANTS HAVE NOT SHOWN THAT ANY OF THE EVIDENCE PRESENTED TO THE BZA WAS "TAINTED" OR "FAULTY" AND FAILED TO PRESERVE THEIR SPECIFIC OBJECTIONS BY FAILING TO RAISE SUCH ARGUMENTS TO THE CIRCUIT COURT.

Appellants' arguments further fail because the evidence that they point to as "tainted" and "faulty" is competent evidence and Appellants have failed to show how the BZA's consideration of these objections would have made a difference in the result.

Consider, first, Appellants' objections to the view angle study prepared by Respondent Skip Wallace. Appellants claim that this is a hand-drawn illustration that inaccurately and misleadingly depicts structures on the subject property. **(App. Br. at 20).** While the angles are overlayed by pencil, the document is prepared on a plat, as shown below:



(R. p. 325).

Mr. Wallace testified that he is an architect, licensed in the State of South Carolina, for more than 37 years, who has served on a local preservation committee for more than 26 years. **(R. pp. 106:22-107:6)**. Angles are absolute, as are the locations of the various structures and planned improvements; it is an objective calculation. Appellants did not then, and do not now, present any evidence demonstrating the view angles are miscalculated[13] and yet they continue to boldly assert scurrilous allegations in their filings, including their Brief in this case. *See* **(App. Br. at 19)** (alleging Mr. Wallace, a licensed professional, of submitting "incompetent, unqualified, and false testimonial and documentary evidence" without any referencing *any* proof within the record supporting such allegations).

[13] It is worth note that the Wallaces submitted this document *to acknowledge* there will be a potential impact, but it will be minimal. They did not submit this document to claim that their small, rear addition will have no impact on Appellants' view off their master bedroom balcony.

Appellants further attack Mr. Wallace on the grounds that he was not qualified to express his opinion on how the potential noise from the relocated compressors can be baffled. **(App. Br. at 21)**. Appellants presented no evidence on reconsideration, by way of affidavit or otherwise, undermining Mr. Wallace's qualifications or opinions as to this subject. *See* **(R. pp. 128-142, 201-208)**. The record's reflection of his qualifications and experience suggests only the contrary: i.e., that he is qualified to opine on such matters.

As the circuit court found, Appellants have also failed to show how the exclusion of any of the evidence it objects to would have affected the outcome. **(R. p. 11)**. Using the letter from the Brewers of 69 East Bay Street as an example, there are three Church Street neighbors who offered letters in support of Respondents' application, including the neighbors immediately north at 64 Church Street, and 66 Church Street, and 68 Church Street, as well as the request for approval from the Historic Charleston Foundation. Even if the 69 East Bay Street letter of support was excluded from consideration, these non-objectionable letters of support would remain in the record and independently support the Board's decision.[14] There is no evidence in the record that the Board misunderstood the relation of this property vis-à-vis 62 Church Street or that the Board was persuaded to make its decision based upon the existence of this particular letter in support.

Even though this was not a trial and the South Carolina Rules of Evidence do not apply, the law of South Carolina is clear that questions of evidence are peculiarly within the discretion of the trial judge. *State v. Haselden*, 353 S.C. 190, 199, 577 S.E.2d 445, 450 (2003) ("The relevance,

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[14] Appellants contend the adverse impact of the Wallaces' addition will be "felt doubly and entirely" by them and be of "no real relevance to others." **(App. Br. at 5)**. The Historic Charleston Foundation – who holds a preservation easement on the property at 62 Church Street – certainly considers the renovation of relevance to their property interest. **(R. p. 196)** ("Historic Charleston Foundation has a preservation easement on the property at 62 Church Street *and has met with the applicant multiple times to review the proposed alterations to confirm that the work complies with the terms of the easement.*") (emphasis added).

materiality, and admissibility of photographs are matters within the sound discretion of the trial court."). Any such error would be harmless in the absence of showing that the exclusion of such proof did not affect the outcome of the matter. *State v. Jackson*, 364 S.C. 329, 334, 613 S.E.2d 374, 376 (2005) ("Even if the evidence was irrelevant and thus wrongly admitted by the trial judge, its admission may constitute harmless error if the irrelevant evidence did not affect the outcome of the trial.").

Appellants' argument that specific evidence was tainted and faulty must also be rejected because Appellants failed to preserve these arguments on appeal. Appellants asserted their due process arguments to the circuit court in general terms, claiming "the record does not reflect objections they would have made to the evidence offered by the applicants and counter evidence that they would have offered" and focused solely on the testimony given during the question-and-answer session. *See* **(R. pp. 41-56, 79, 82-83, 143-147, 84-91)**. 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. **(Id.)**. Appellants did not preserve these issues for review because they failed to raise these specific issues to the circuit court. *Doe v. Doe*, 370 S.C. 206, 212, 634 S.E.2d 51, 54 (Ct. App. 2006); *c.f. Newton v. Zoning Board of Appeals for Beaufort Cnty.*, 396 S.C. 112, 117, 719 S.E.2d 282, 284 (Ct. App. 2011) (differentiating the standard for a first-level appeal of a zoning board's decision).

III. THE BZA AND CIRCUIT COURT'S DECISIONS ARE SUPPORTED BY COMPETENT EVIDENCE. THE CIRCUIT COURT PROPERLY DETERMINED THAT THE BZA'S DECISIONS WERE NOT ERRONEOUS AS A MATTER OF LAW AND WERE NOT ARBITRARY OR CAPRICIOUS.

Apart from the letter, angle study, and portions of testimony Appellants claim is "objectionable," the remainder of the record consists of competent evidence, sufficient to support the BZA's decisions.

The evidence submitted into the record at the September 7, 2021 meeting substantiates the BZA's finding that there are extraordinary and exceptional conditions relating to 62 Church Street that do not generally apply to neighboring properties, including the location of the historic home on the lot (positioned well away from the street in comparison to the many houses abutting the street) and its lack of functional utilities and storage areas. *See generally* **(R. pp. 99-127, 158-199, 201-208)**. Moreover, the record evidence supports the BZA's determinations that: (a) denial of the variances would unreasonably restrict the Wallaces' utilization of their property; and (b) the small addition to the rear of 62 Church Street will not be of substantial detriment to adjacent property, the character of the neighborhood, or the public good. **(Id.)**.

The Wallaces' plans and testimony confirm they are not seeking to use the small addition to their house for any business use and that their small expansion will not cause an intensification or increase of traffic impacts, vehicular and pedestrian safety, or parking impacts. **(R. pp. 158-200)**. Respondents and Mr. Batchelder submitted that the light, view, and air impacts would be minimal. **(R. pp. 99-127)**. Mr. Wallace submitted testimony as to the ways the potential noise from the compressors could be mitigated. **(R. pp. 99-127)**.

The transcript of the two meetings, the first on September 7, 2021, to consider the original application and the second on October 19, 2021, to consider Appellants' Request for Reconsideration, amply shows the factual matters relied upon and discussed by the board members in making their decision, which includes the Wallaces' application, submissions, testimony, and letters of support from other neighbors and the Historic Charleston Foundation. **(R. pp. 99-142)**.

The Court should affirm the circuit court's decisions because Appellants have not argued – much less shown – that there is not any evidence in the record to support the BZA's findings. *Venture Eng'g v. Horry Cnty. Zoning Bd. of Appeals*, 433 S.C. 419, 426, 858 S.E.2d 638, 642 (Ct.

App. 2021); *Heilker v. Zoning Bd. of Appeals for City of Beaufort*, 346 S.C. 401, 406, 552 S.E.2d 42, 45 (Ct. App. 2001); *Sterling Dev. Co. v. Collins*, 309 S.C. 237, 240, 421 S.E.2d 402, 404 (1992). Given the deference that is to be afforded to a zoning board's decision under the any evidence standard, the circuit court properly found the record supported the BZA's decisions to grant Respondents' requests and this Court should affirm its rulings.

This Court should also reject Appellants' arguments that the BZA's decisions were based on errors of law and arbitrary and capricious findings. These arguments ignore the applicable ordinances, evidentiary standard, and record.

Appellants' first attack the fact that Zoning Administrator Lee Batchelder was not sworn in when he presented the Wallaces' application. **(App. Br. at 24)**. This is the normal course of BZA business, and the rules do not require City staff be sworn in before presenting the matter. It is not Mr. Batchelder's application. He is the City's Zoning Administrator, charged with the duties associated with that role, and has no stake in the outcome. His task is to present the application, the applicable ordinances, and depending, staff recommendation in favor or against the request. Appellants' suggestion, for the first time on this appeal, that Mr. Batchelder did not present competent evidence supported by material evidence is far-fetched and completely unsupported. *See* City of Charleston Ordinance, Appendix C, Article IV, § 3 (setting out the BZA's relaxed rule of evidence).

The BZA and the circuit court were also correct to abstain from considering the alleged "business uses" of 62 Church Street. The Wallaces did not seek a special exception from City Zoning Ordinance § 54-211 (governing home occupations) through this application. They sought a special exception from 54-110(f) (side setback requirements). Their plans clearly show that no commercial space, storefront, or parking lot is contemplated in this addition and their testimony is

that they are not seeking to use the property for business use. The use of a mailbox for mail is different from the use of a home for storefront or business space.

Appellants' contention that the Wallaces failed to show there are no conditions that "prohibit or unreasonably restrict the utilization of their property" or "unnecessary hardship" ignores Skip Wallace's testimony (and also goes against Appellants' notion that the affected property owner should be the person saying how they are affected). *See* **(App. Br. at 20 & 26)**. Skip Wallace testified that prior to these Respondents' ownership of 62 Church Street, it "was never used as a fulltime residence" and that lack of these functional amenities, like a laundry room and walk-in closet in the master bedroom, has made it difficult for Respondents to use the property as a full-time residence. **(R. pp. 107:13-108:4-7)**. Appellants' efforts to characterize his testimony to the contrary should be rejected.

The last error Appellants claim relates to the platform for the emergency generator. *See* **(App. Br. at 27)**. Appellants argue the Wallaces were required to obtain a special exception to raise the platform in its existing location and that BZA erred in approving their application because it did not include such request. Appellants argument fails because City zoning ordinances only require a special exception when the non-conforming use of a building or structure is physically extended "to provide more area for the non-conforming use." City of Charleston Ordinance § 54-110(f). The Wallaces are not seeking to obtain more area within the side or rear setback to accomplish this take, but rather just elevating it higher to account for the change in flood zoning. **(R. pp. 122:4-6, 57-76)**.

The BZA's decisions were supported by evidence and not erroneous as a matter of law. Therefore, its decisions were neither arbitrary nor capricious. The circuit court's affirmance of its decisions was proper and should be upheld.

IV. THE CIRCUIT COURT PROPERLY DENIED APPELLANTS' MOTION FOR RECONSIDERATION. THE CIRCUIT COURT RULES UPON APPELLANTS' ARGUMENTS.

Appellants begin their Brief by arguing the BZA applied the improper standard of review in considering their Motion for Reconsideration under Rule 59(e) of the South Carolina Rules of Civil Procedure. **(App. Br. at 16-18)**. Appellants' argument does not address the standard for granting a motion for reconsideration under South Carolina law.

"Whether to grant a new trial is a matter within the discretion of the trial judge, and this decision will not be disturbed on appeal unless it is unsupported by the evidence or controlled by an error of law." *Daves v. Cleary*, 355 S.C. 216, 231, 584 S.E.2d 430 (Ct. App. 2003); *Vinson v. Hartley*, 324 S.C. 389, 477 S.E.2d 715 (Ct. App. 1996). Rule 59 is substantially the same as the companion Federal Rule. *See* Note, SCRCP 59 ("This Rule 59 is substantially the Federal Rule."); *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 21, 602 S.E.2d 772, 779 (2004) ("Rule 59(e) in the South Carolina and federal rules of civil procedure is practically identical."). Federal courts recognize three circumstances in which a court should grant a Rule 59(e) motion: (1) where there is an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice. *See, e.g., Hutchinson v. Stanton*, 994 F.2d 1076, 1081 (4th Cir. 1993). While motions for reconsideration must necessarily be filed in certain instances to preserve appellate arguments, they are only to be granted under highly unusual circumstances. *U.S. ex rel. Becker v. Westinghouse Savannah River Co.*, 305 F.3d 284, 290 (4th Cir. 2001).

None of the bases for granting a new trial were present here. The record evidence supports the BZA's ruling and the circuit court's affirmance thereof. The circuit court's ruling was not controlled by an error of law, nor were there any changes in the controlling law, or new evidence

presented by Appellants. To the extent it is necessary for this Court to reach a decision on the Order Denying Appellants' Motion for Reconsideration, it should be affirmed on these grounds.

CONCLUSION

The BZA applied the proper legal standards for consideration of requests for variances and special exceptions from City Zoning Ordinances. The record is replete with evidence supporting the BZA's decisions and the circuit court's affirmance thereof. Given the deferential standard of review that is to be afforded to a zoning board's decision, this Court must not substitute its or Appellants' judgment for the Board's and must affirm the BZA's decisions to grant these requests. *See* S.C. Code Ann. § 6-29-840(A); *Boehm v. Town of Sullivan's Island Bd. of Zoning Appeals*, 423 S.C. 169, 813 S.E.2d 874 (Ct. App. 2018); *see also Venture Eng'g for DT LLC v. Horry Cnty. Zoning Bd. of Appeals*, 433 S.C. 419, 426, 858 S.E.2d 638, 642 (Ct. App. 2021). Respondents ask this Court to affirm the decisions of the circuit court for the reasons stated herein and on any ground appearing in the record as provided for under Rule 220(c).

Respectfully Submitted,

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June 16, 2023
Charleston, South Carolina

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211 (b), SCACR.

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June 16, 2023
Charleston, South Carolina