

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Mikell R. Scarborough, Master-In-Equity

Case No. 2007-CP-10-451

RECEIVED

MAR 31 2011

SC Court of Appeals

HISTORIC CHARLESTON FOUNDATION and
PRESERVATION SOCIETY OF CHARLESTON

Appellants,

v

THE CITY OF CHARLESTON, THE CITY OF CHARLESTON
BOARD OF ZONING APPEALS – ZONING and LIBRARY
ASSOCIATES, LLC

Respondents

APPELLANTS' JOINT INITIAL REPLY BRIEF

G. Trenholm Walker
Lindsay K. Smith-Yancey
Daniel S. McQueeney, Jr.
Katie F. Monoc
Pratt-Thomas Walker, P.A.
P.O. Drawer 22247
Charleston, SC 29413-2247
(843) 727-2208
Attorneys for Appellant
Preservation Society of Charleston

Edward K. Pritchard, III
Samia H. Nettles, Esquire
Pritchard & Elliott, LLC
129 Broad Street
Charleston, SC 29401
(843) 722-3300
Attorneys for Appellant
Historic Charleston Foundation

TABLE OF CONTENTS

Table of Authorities	11
Summary of Argument	1
Argument	3
I As a matter of law, there are no “extraordinary and exceptional conditions” on the property giving rise to an unnecessary hardship	3
A A finding of “unnecessary hardship” may not rest upon the beneficial location or other <i>advantages</i> of the property for which the variance is sought, but must instead rest upon a <i>physical burden</i> to such property	3
B As a matter of law, the split-zoning of 404 King cannot constitute an “extraordinary and exceptional condition” justifying a finding of “unnecessary hardship”	5
C As a matter of law, the “prior knowledge rule” prohibits the variance requested for 404 King	5
II As a matter of law, there are no “extraordinary and exceptional conditions” which uniquely burden 404 King	6
III As a matter of law, there are no “extraordinary and exceptional conditions” which unreasonably restrict the use of 404 King	7
IV As a matter of law, the variance fails to comply with the Downtown Plan and constitutes a substantial detriment to adjacent property, the public good, and the character of the district	9
Conclusion	9

TABLE OF AUTHORITIES

CASES

<u>Application of Groves</u> , 226 S C 459, 85 S E 2d 708 (1955)	4
<u>Liberty Mut Ins Co v S C Second Injury Fund</u> , 363 S C 612, 611 S E 2d 297 (Ct App 2005)	3-4
<u>Rush v City of Greenville</u> , 246 S C 268, 143 S E 2d 527 (1965)	5-6
<u>Santos v Zoning Bd of Appeals of Town of Stratford</u> , 918 A 2d 303 (Conn App Ct 2007)	6
<u>Town of Indialantic v Nance</u> , 485 So 2d 1318 (Fla Dist Ct App 1986)	8

STATUTES

S C Code Ann § 6-29-800	3-9
-------------------------	-----

OTHER AUTHORITIES

101A C J S <u>Zoning & Land Planning</u> § 314	4
8 McQuillin Mun Corp § 25 179 37 (3rd ed)	7, 9

SUMMARY OF ARGUMENT

As a matter of law, Respondent Library Associates, LLC (the “Developer”) suffers no “unnecessary hardship” arising from “extraordinary and exceptional conditions” on the property located at 404 King Street in Charleston, South Carolina (“404 King”). The conditions that the Developer contends create such a hardship include a “prominent” location and high visibility from surrounding areas. These are benefits to, not hardships on, the property. There are no physical characteristics of the property that create a hardship.

As Respondents’ brief confirms, the Developer’s “hardship” is not associated with the physical characteristics of 404 King, but rather with the underlying zoning itself—the Developer does not want to have to comply with the underlying zoning, so the Developer argues that it has an “important” or “prominent” piece of property that deserves special attention. This is not what a variance does—a variance provides the property owner a “break” from the restrictions applicable to other, similarly situated properties when the property owner has a parcel with unique physical burdens that totally prohibit or unreasonably restrict the property owner’s use of the property. There are no such unique physical burdens in this case, as a matter of law. Nothing about the property’s location or visibility restricts its use—only the zoning ordinance does.

Even if there were physical characteristics of 404 King which create a hardship, there is no showing that the property is “uniquely burdened.” While the Developer contends the split-zoning of the property creates a unique burden because it prohibits a 105-foot tall hotel across the entire parcel, this split zoning would have the same effect *if applied to any other property in the vicinity*. This is particularly important where, as here, other properties in the vicinity *are also* subject to such split-zoning.

Even if there were physical characteristics of 404 King which uniquely burdened the property, there is no showing that such burdens unreasonably restrict its use. As Respondents explain, “Here, Library Associates sought relief from a dimensional aspect of development, that being height. Height is not a ‘use’ or ‘activity’ or ‘purpose’ for which land or buildings are occupied. Library Associates did not seek to put the property to a use not authorized at the time it purchased the property. It merely sought relief from the application of a dimensional regulation that unreasonably restricted the utilization of its property.” (**Resps’ Br.** p. 12). Respondents have not shown that there is no other reasonable use of the property. In fact, Respondents have not even shown that the property could not be used for a hotel consistently with the underlying zoning. As a result, the BZA-Z committed an error of law in granting the Developer a variance.

Finally, Respondents contend that the Downtown Plan was not considered at the BZA-Z hearing granting a variance and that any reference to such plan should be ignored. This argument ignores well-settled law that the *proponent* of a variance bears the burden of showing compliance with the local government’s comprehensive plan. If the Developer failed to produce evidence that the variance complied with the Downtown Plan, then the variance should have been denied, as a matter of law.

The Developer was required to produce evidence supporting each of the four “prongs” of the statutory test applicable to variances. The Developer failed to produce such evidence with respect to each prong and, even where it did, the BZA-Z’s findings rested upon the incorrect legal assumption that the beneficial location or visibility of the property could give rise to an undue hardship or that the underlying zoning itself could create a hardship. Because the BZA-

Z's decision was unsupported by the evidence and premised on several errors of law, the master's order affirming the BZA-Z's decision should be REVERSED

ARGUMENT

I As a matter of law, there are no “extraordinary and exceptional conditions” on the property giving rise to an unnecessary hardship

A A finding of “unnecessary hardship” may not rest upon the beneficial location or other *advantages* of the property for which the variance is sought, but must instead rest upon a *physical burden* to such property

Respondents contend that, due to a change in the language of the state zoning enabling legislation in 1999, the Developer is no longer required to show that the extraordinary and exceptional conditions on the property giving rise to an “unnecessary hardship” operate as physical disadvantages to the property, but that, to the contrary, a finding that the particular property is exceptional and extraordinary due to its advantageous location or visibility from surrounding areas may be considered. Respondents fail to cite a single case in support of this novel proposition, but instead rely generally on the rules of statutory construction.

Respondents' statutory construction argument focuses on only a portion of the pertinent statute, ignoring the remaining provisions. In pertinent part, section 6-29-800 of the South Carolina Code provides “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.” (emphasis added). As subsections (b) and (c) of section 6-29-800 clarify, any extraordinary and exceptional conditions creating such a hardship on the property must uniquely burden the property and unreasonably restrict the use of the property under the existing zoning regulations.

“A statute should be given a reasonable and practical construction consistent with the purpose and policy expressed in the statute.” Liberty Mut. Ins. Co. v. S.C. Second Injury Fund,

363 S C 612, 621, 611 S E 2d 297, 301 (Ct App 2005) “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” Id at 622, 611 S E 2d at 302 “Statutes must be read as a whole and sections which are part of the same general statutory scheme must be construed together and given effect, if it can be done by any reasonable construction” Id

Section 6-29-800 plainly requires that the “extraordinary and exceptional conditions” on the property support a finding of hardship not, as Respondents contend, a finding that the property has an advantageous location or visibility Moreover, this interpretation of section 6-29-800 is consistent with the general interpretation of similar statutes in other jurisdictions “Generally, the *hardship* relied on as grounds for a variance must be peculiar, singular, unique, or exceptional in nature, and must relate to the particular property for which the variance is sought” 101A C J S Zoning & Land Planning § 314 (emphasis added), see also Application of Groves, 226 S C 459, 463, 85 S E 2d 708, 710 (1955) (“It is generally held that before a variance can be allowed on the ground of ‘unnecessary hardship’, there must at least be proof that a particular property suffers a singular disadvantage through the operation of a zoning regulation ”)

With respect to 404 King, Respondents, like the master and the BZA-Z, rely on the “prominent location” of the property, its visibility, and its “physical location on Marion Square” to support a finding of an extraordinary and exceptional condition giving rise to an unnecessary hardship Respectfully, these advantageous characteristics of 404 King are not properly considerable in determining whether to grant a variance Moreover, these characteristics do not burden the property, as required in section 6-29-800(b), nor do they render the property

practically useless, taking into consideration the underlying zoning, as required in section 6-29-800(c) As a result, the master erred in upholding the BZA-Z's decision, and the master's ruling should be reversed

B As a matter of law, the split-zoning of 404 King cannot constitute an “extraordinary and exceptional condition” justifying a finding of “unnecessary hardship ”

Respondents contend that the split-zoning of 404 King itself constitutes an “extraordinary and exceptional condition ” Such an interpretation, however, again ignores the plain language of section 6-29-800 of the South Carolina Code, which requires that *the extraordinary and exceptional condition gives rise to an unnecessary hardship when the underlying zoning is applied* “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 [and] (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 ” (emphasis added) Pursuant to the statute, the underlying zoning alone is not enough—it is the extraordinary and exceptional condition on the property which must cause the unnecessary hardship when the underlying zoning is applied Consequently, the BZA-Z committed legal error in granting a variance

C As a matter of law, the “prior knowledge rule” prohibits the variance requested for 404 King

Without citing a single case in any jurisdiction, Respondents contend that the so-called “prior knowledge rule” applies only to “use” variances, not to “non-use” or “area” variances In Rush v City of Greenville, 246 S C 268, 278-79, 143 S E 2d 527, 532 (1965), the Supreme Court of South Carolina clearly recognized that the prior knowledge rule applies to zoning

restrictions, not simply uses “Where one purchases realty with intention to apply for variance, he cannot contend that *restrictions* caused him such peculiar hardship that entitles him to special privileges which he seeks ” (emphasis added)

This rule is consistent with other jurisdictions In Santos v Zoning Bd of Appeals of Town of Stratford, 918 A 2d 303, 309-10 (Conn App Ct 2007), for example, the Appellate Court of Connecticut recognized that “at the time that the plaintiff’s predecessor in title, Fennell, created parcel B, it did not conform to the lot width requirement under regulation 4 12 ” As a result, the Court held that “in this type of situation, the claimed hardship is self-created ” Id

Thus, notwithstanding the definition of the term “use,” the BZA-Z committed an error of law in granting a height variance to the Developer when it is undisputed that the Developer purchased 404 King with actual or constructive knowledge of the relevant height restriction Accordingly, the master’s order should be reversed on this ground alone

II As a matter of law, there are no “extraordinary and exceptional conditions” which uniquely burden 404 King

In support of their contention that 404 King is “uniquely burdened,” Respondents contend that “no other property in the vicinity of 404 King Street faces a major park (Marion Square), a major retail corridor (King Street) or would house a building with visibility from all sides,” referring to testimony that 404 King is “one of the most important sites in the city of Charleston ” (Resps ’ Br p 13) This argument proves exactly the point that Appellants have been making since the beginning of this process—none of these characteristics constitute *burdens* to the property If anything, the prominent and important location and visibility of 404 King call for greater restrictions on its development, not lesser ones

Moreover, none of these attributes have any relevance to the underlying zoning ordinance There is no showing, for instance, that the split-height zoning of the property,

combined with its location on Marion Square, effectively prohibits the utilization of 404 King or unreasonably restricts it. The underlying zoning, if applied to any other parcel in downtown Charleston, would prohibit the construction of a 105-foot tall hotel across the entire property. This result occurs not because of the conditions of each of these properties, but instead because that's what the zoning ordinance requires¹. In essence, the Developer simply wants to be able to build a 105 foot tall hotel at 404 King despite the restrictions that prohibit such a hotel, not due to any physical limitations associated with this specific property.

Respondents have advocated and applied a test which separately addresses all subsections of the enabling legislation and zoning ordinance, permitting a finding that an "important" or "prominent" location, combined with an undesirable (from the standpoint of the owner) dimensional restriction, creates an "unnecessary hardship." The underlying zoning cannot be the hardship, rather, it is only when the underlying zoning restrictions applied to the peculiar physical characteristics of the property in question essentially eradicate any reasonable use of the property that an "unnecessary hardship" may be found. There is no showing that this statutorily-required scenario occurs here. Accordingly, the master's decision should be reversed.

III As a matter of law, there are no "extraordinary and exceptional conditions" which unreasonably restrict the use of 404 King

Respondents contend that they met their burden of proving that the alleged extraordinary and exceptional conditions at 404 King "would effectively prohibit or unreasonably restrict the utilization of the property." Cf. S.C. Code Ann. § 6-29-800(c) "Although economic hardship alone is usually not enough, the landowner must show factually, by dollars and cents proof, that all uses permitted on the land under the existing zoning regulations are economically unfeasible before a use variance may be granted." 8 McQuillin Mun. Corp. § 25.179.37 (3rd ed.)

J

In Town of Indialantic v Nance, 485 So 2d 1318, 1320 (Fla Dist Ct App 1986), for instance, the applicant's only basis for his allegation of a hardship was that "it would not be economically feasible to build a motel on lots 14 and 15 under the present restrictions " While the applicant "gave his opinion that the variances granted were the minimum necessary to build an economically feasible motel, he did not define what he considered economically feasible or offer any evidence in support of his position " Id As a result, the appellate court held that the applicant failed to show an "unnecessary hardship" sufficient to support the grant of a variance Id

In the present case, the Developer failed to show the lack of any other feasible use for the property permitted by the underlying zoning ordinance Moreover, Respondents confirm that the variance was not sought to change the permitted *use* of the property, but was instead sought to allow greater *dimensions* for this use "Here, Library Associates sought relief from a dimensional aspect of development, that being height Height is not a "use" or "activity" or "purpose" for which land or buildings are occupied Library Associates did not seek to put the property to a use not authorized at the time it purchased the property It merely sought relief from the application of a dimensional regulation that unreasonably restricted the utilization of its property " (**Resps ' Br p 12**) Respondents don't seek a variance in order to build a hotel on the property—they seek a variance in order to build a *bigger* hotel on the property than they could under existing zoning

Because Respondents failed to produce evidence that the alleged extraordinary and exceptional conditions on the property unreasonably restrict its use, the BZA-Z's decision is unsupported and based on an error of law

IV As a matter of law, the variance fails to comply with the Downtown Plan and constitutes a substantial detriment to adjacent property, the public good, and the character of the district

Respondents finally contend that the Downtown Plan should not be considered on appeal. Initially, the Downtown Plan was admitted in evidence at the consolidated hearing before the master. The master also referenced the Downtown Plan in his final order in the spot zoning portion of this case, showing that the Downtown Plan was presented to him and that he relied upon it.

More importantly, it is incumbent upon the applicant, not the respondents, to a variance application, to show that the variance will not substantially affect the comprehensive zoning plan of the local government. “[I]t must be shown that the variance will not substantially affect the comprehensive zoning plan.” 8 McQuillin Mun. Corp. § 25.179.37 (3rd ed.). Under these circumstances, if the BZA-Z failed to consider the Downtown Plan, then the Appellants should prevail, not the Respondents.

The Downtown Plan is relevant on appeal, however, because, even if the BZA-Z had considered it, they would have been compelled to reject the variance application. As discussed by Appellants in their initial brief, the Developer’s variance application (and the BZA-Z’s variance decision) are completely inconsistent with the Downtown Plan, which calls for greater height restrictions, not lesser ones, and the curtailment of the 3X height district, not its expansion. Accordingly, for this additional reason, the master’s decision should be reversed.

CONCLUSION

The Developer failed to establish each of the factors necessary to justify a variance for 404 King. The Developer sought relief, not from a particularized physical burden of the property, but from the zoning ordinance itself. Because the BZA-Z failed to utilize the proper

analysis in determining whether to grant the Developer a variance, the BZA-Z's decision should have been reversed by the master. Consequently, the master's decision should be REVERSED.

Respectfully submitted,



G. Trenholm Walker
Lindsay K. Smith-Yancey
Daniel S. McQueeney, Jr.
Katie F. Monoc
Pratt-Thomas Walker, P.A.
P.O. Drawer 22247
Charleston, SC 29413-2247
(843) 727-2208
Attorneys for Appellant
Preservation Society of Charleston



Edward K. Pritchard, III
Samia H. Nettles
Pritchard & Elliott, LLC
129 Broad Street
Charleston, SC 29401
(843) 722-3300
Attorneys for Appellant
Historic Charleston Foundation

Charleston, South Carolina
March 29, 2011

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Hon Mikell R Scarborough, Master-in-Equity

Case No 2007-CP-10-00451

RECEIVED

MAR 08 2011

SC Court of Appeals

Historic Charleston Foundation and
Preservation Society of Charleston

v

The City of Charleston, The City of Charleston
Board of Zoning Appeals - Zoning
and Library Associates, LLC

Respondents

RESPONDENTS' JOINT INITIAL BRIEF

Frances I Cantwell, Esq
Regan and Cantwell, LLC
105 Wappoo Creek Drive, Suite 1-A
Charleston, South Carolina 29412
Tel 843-762-8282
Fax 843-762-8284

Attorney for Respondent
Library Associates, LLC

Timothy A. Domin, Esq
Clawson & Staubes, LLC
126 Seven Farms Drive, Suite 200
Charleston, South Carolina 29492-8144
Tel 577-2026
Fax 722-2867

Attorney for Respondents
The City of Charleston, The City of
Charleston Board of Zoning Appeals –
Zoning

INDEX

	PAGE
TABLE OF CONTENTS	1
TABLE OF AUTHORITIES	11
STATEMENT OF ISSUES ON APPEAL	1
STATEMENT OF THE CASE	1
STATEMENT OF FACTS	2
STANDARD OF REVIEW	5
ARGUMENT	6
I THE TRIAL COURT DID NOT ERR IN AFFIRMING THE BOARD’S DECISION BECAUSE THERE IS EVIDENCE IN THE RECORD SUPPORTING THE BOARD’S FACTUAL FINDINGS AND ITS DECISION IS CORRECT AS A MATTER OF LAW	6
1 Physical disadvantage is not the sole criterion upon which necessary hardship is based	7
2 The variance was not bottomed on a development plan	9
3 The split zoning as applied to 404 King Street was an exceptional condition	10
4 Evidence demonstrates that a building at 404 King Street would be visible from all sides	11
5 Library Associates is not precluded from seeking a variance due to the prior knowledge rule	11
6 The trial court did not hold that the variance should be affirmed because a hotel is a permitted use at 404 King Street	12

II	404 KING STREET IS UNIQUELY BURDENED	13
III	THE MANNER IN WHICH SPLIT HEIGHT DISTRICTS WERE APPLIED TO 404 KING STREET UNREASONABLY RESTRICTED ITS USE	14
IV	THE EVIDENCE DEMONSTRATED THAT THE AWARD OF THE VARIANCE DID NOT POSE SUBSTANTIAL DETRIMENT TO ADJACENT PROPERTY OR THE PUBLIC GOOD, OR HARM THE CHARACTER OF THE DISTRICT	15
	CONCLUSION	18

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<u>Austin v Board of Zoning Appeals,</u> 362 S C 29, 505 S E 2d 209 (Ct App 2004)	6, 18
<u>Bennett v Town of Sullivan’s Island,</u> 313 S C 445, 438 S E 2d 278 (1993)	7
<u>Burton v County of Abbeville,</u> 312 S C 359, 440 S E 2d 396 (Ct App 1994), rehearing denied	6
<u>Citizens Committee for Johns Island v Office of Secretary of of South Carolina,</u> 290 S C 465, 351 S E 2d 342 (1986)	8
<u>Cullen v McNeal</u> 390 S C 470, 702 S E 2d 378 (Ct App 2010)	16
<u>Heilker v Board of Zoning Appeals,</u> 346 S C 401, 556 S E 2d 42 (Ct App 2000)	11, 12, 13
<u>Hodge v Pollock,</u> 223 S C 342, 75 S E 2d 752 (1953)	9
<u>Johnston v City of Myrtle Beach,</u> 283 S C 288, 321 S E 2d 627 (1984)	7
<u>Peterson v City of Clemson,</u> 312 S C 162, 439 S E 2d 317 (1993)	16
<u>Restaurant Row Associates v Horry County,</u> 335 S C 209, 516 S E 2d 442 (1999)	14
<u>Talbot v Myrtle Beach Board of Adjustment,</u> 222 S C 165, 72 S E 2d 66 (1952)	6

STATUTES

S C Code Ann § 5-23-100 (1976)	7
S S Code Ann § 6-7-740 (1976)	7
S C Code Ann § 6-29-800 (Cum Supp 2009)	8
S C Code Ann § 6-29-800 (A)(2)(a) – (d) (Cum Supp 2009)	7, 14
S C Code Ann § 6-29-840 (Rev 2004)	6
1994 Act 355	8
1999 Act 37	8

OTHER

3 <u>Rathkops</u> ' The Law of Zoning and Planning, 858 22 (4 th Ed)	11
83 <u>Am Jur</u> 2 nd Zoning and Planning § 957	16

STATEMENT OF ISSUE ON APPEAL

- 1 Did the trial court err in affirming the decision of the City of Charleston Board of Zoning Appeals – Zoning to award a variance to Library Associates, LLC when there was evidence supporting the Board’s findings and conclusions?
- 2 Can Appellants’ argue in this appeal that the variance is inconsistent with the Downtown Plan when that issue was not argued to the Board of Zoning Appeals – Zoning or addressed by the trial court?

STATEMENT OF THE CASE

Respondent Library Associates, LLC (herein “Library Associates”) is the owner of a parcel of property located at 404 King Street in downtown Charleston. At times pertinent to this case, the zoning ordinance of the City of Charleston applied two height districts to the parcel. One height district (3X) applied to roughly 60% of the site, and the other (55/30) applied to the remainder.

On December 4, 2006, Library Associates applied to the City of Charleston Board of Zoning Appeals – Zoning (herein “Board”) for a variance to allow the height permitted by the 3X district to extend across the entire parcel.

The matter came before the Board on January 2, 2007. After a hearing, the Board determined to grant the variance. Appellant Historic Charleston Foundation (herein “Foundation”) moved to have the Board reconsider its decision. That motion was denied. Thereafter, the Foundation and Appellant Preservation Society of Charleston (herein “Preservation Society”) (collectively “Appellants”) appealed the Board’s decision to the Court of Common Pleas for Charleston County. By consent, the matter was referred to the Honorable Mikell R. Scarborough, Master-In-Equity.

Judge Scarborough held a hearing on March 10, 2009. On June 9, 2009, Judge Scarborough issued an Order remanding the matter to the Board, his having determined its Order did not articulate findings of fact or conclusions of law. After a motion to reconsider was filed and heard, Judge Scarborough issued a subsequent Order on September 23, 2009 to clarify that his Order of Remand was intended to allow the Board to determine whether to conduct a hearing de novo or issue an Order on the record of its proceedings.

On October 20, 2009, the Board determined to issue an Order on the basis of the record of its proceedings. On April 13, 2010, the Board filed an Order awarding the variance, articulating findings of fact and conclusions of law.

On June 24, 2010, Judge Scarborough issued an Order affirming the Order of the Board. This appeal followed.

STATEMENT OF FACTS

At the outset, note must be made that, in their Statement of Facts, Appellants make reference to a document known as the Downtown Plan and assert the Board failed to take this plan into consideration in its deliberations. Appellants' reference to the Downtown Plan in this appeal is improper, because the Downtown Plan was not introduced as evidence or as an exhibit to the Board, and its provisions were neither mentioned nor argued to the Board by these Appellants or by any other person appearing before the Board. Reference to the transcript of the Board's hearing on January 2, 2007 is conclusive proof on this point, as it is devoid of any mention of the Downtown Plan (R , Tr BZA, 1/2/07). Consequently, this Court should disregard any reference to the Downtown Plan in Appellants' Statement of Facts, and as hereinafter argued, in their Argument in chief.

The parcel of property at issue in this case is located at 404 King Street, in downtown Charleston. The context of the parcel's location and its relationship to the public realm is of significance and substantiates the necessity for the variance and the Board's decision to award it.

Marion Square is a five acre park located in the heart of historic downtown Charleston. Formerly the site of the Old Citadel parade grounds, the Square in recent times has served as a park and a special events venue. The Old Citadel building (now an Embassy Suites) directly faces the Square from its northern end. Immediately adjacent to the Old Citadel (to the west) is 404 King Street. It, too, directly faces the Square from the northern end. Directly across King Street are the historic properties of St. Matthew's German Lutheran Church. (R, Variance application, pictures, Tr. BZA, 1/2/07, p. 28, lines 2 -20)

404 King Street is the site of the old Charleston County Library. Library Associates purchased 404 King from the County in the 1990's. After considering various potential development scenarios for the site, Library Associates settled on a hotel. To construct a hotel in Charleston, the zoning ordinance requires that the property be within the Accommodations Overlay Zone, and that the hotel be approved by the Board by way of special exception. In 2004, Library Associates applied for and received a special exception to construct a 185 room hotel on the site. In 2005, the City's Board of Architectural Review (herein "BAR") gave conceptual approval to the height, scale and mass of the proposed hotel. (R, Tr. BZA, 1/2/07 p. 39, lines 7 – 10, p. 69, line 15 – p. 70, line 4)

At times pertinent to this action, there were two height districts applicable to 404 King. The 3X district applied to 60% of the site. Under the 3X district, a height of 105' was allowed. The remainder of the site was subject to the 55/30 height district. In this district, height could

not exceed 50', or be less than 30' As applied to 404 King Street, these districts resulted in an awkward L-shaped building envelope, with the generous height being massed along King Street (R Zoning Height Map, Tr BZA, 1/2/07, p 28, line 21 – p 29, line 13)

In January 2007, Library Associates applied for a variance to allow the height already permitted by the 3X district on the majority of the site to be extended across the entire site The requested variance was consistent with the parameters of the BAR's conceptual approval

The evidence demonstrated that, regardless of use, any building constructed at 404 King Street, will be publicly visible from all sides, as the parcel has frontage on King Street is bordered to the north by Hutson Street, and its location on Marion Square enables expansive views from the east and the south The zoning administrator described the site as having no "backside" The evidence demonstrated this circumstance applied only to 404 King Street and to no other property in the vicinity (R , Tr BZA, 1/2/07, p 28, lines 7 – 14, p 30, lines 19 – 27)

The evidence also demonstrated that the manner that split height districts were applied to 404 King Street was completely out of step with how split height districts were applied to other properties in the vicinity On virtually all other properties, the lower height was along the street frontage, with the more generous height being stepped back to the interior of the site Just the opposite occurred at 404 King Street, and the evidence on this point is unrefuted (R , Zoning Height Map)

The variance approved by the Board extended the height authorized by the 3X district across the entire site The evidence revealed that a uniform height district accommodated a better, more symmetrical design for a building at this important location The evidence revealed that extending the height as authorized by the variance maintained the same volume of building

as allowed by the split height districts. The evidence further revealed that the height authorized by the variance was in keeping with the nearby buildings and the tradition of the neighborhood (R Application for Variance, drawings, Tr BZA, 1/2/07, p 42, line 20 – p 53, line 24)

In awarding the variance, the Board noted the exceptional conditions pertaining to 404 King, those being its location on Marion Square and its visibility from all sides, and the fact that these conditions were singular to 404 King and not applicable to any other properties in its vicinity (R , BZA Order on Remand, p 2, Findings 1 – 4, pp 8-9, Tr BZA, 1/2/07, p 70, line 9 – p 75, line 21)

In awarding the variance, the Board made note that while split height districts were not unusual, what made that circumstance unusual at 404 King Street was that the manner in which the districts were applied, resulting in a generous height along King Street, out of kilter with neighboring properties to the north and south (R , BZA Order on Remand, pp 3 – 4 Findings 7, 8, 9, 12 and 13, p 9, Tr BZA, 1/2/07, p 70, line 9 – p 75, line 21)

In awarding the variance, the Board made note that buildings adjacent to 404 King Street, those being the properties of St. Matthew's German Lutheran Church, were tall, substantial buildings consistent with the tradition of the neighborhood (R , BZA Order on Remand, p 5, Finding 21., p 10, Tr BZA, 1/2/07, p 70, line 9 – p 75, line 21)

The Board did not address the specifics of the Downtown Plan cited by Appellants, the reason being no issue with respect to the Downtown Plan was raised

STANDARD OF REVIEW

In its review of decisions of the boards of zoning appeals, the appellate court applies the

same standard of review as the circuit court Austin v Board of Zoning Appeals, 362 S C 29, 33, 505 S E 2d 209, 211 (Ct App 2004)

In its review of decisions of boards of zoning appeals, the circuit court is constrained to review only if the decision is correct as a matter of law The Board's factual findings are treated in the same manner as factual findings of a jury The circuit court cannot admit additional evidence S C Code Ann § 6-29-840 (Rev 2004)

The circuit court, and this Court, cannot substitute its judgment for that of a zoning board, even if it disagrees with the Board's reasoning Talbot v Myrtle Beach Board of Adjustment, 222 S C 165, 72 S E 2d 66 (1952)

The decision of a zoning board must be upheld if there is any evidence to support it Austin v Board of Zoning Appeals, *supra* Burton v County of Abbeville, 312 S C 359, 440 S E 2d 396 (Ct App 1994), rehearing denied

ARGUMENT

I THE TRIAL COURT DID NOT ERR IN AFFIRMING THE BOARD'S DECISION BECAUSE THERE IS EVIDENCE IN THE RECORD SUPPORTING THE BOARD'S FACTUAL FINDINGS AND ITS DECISION IS CORRECT AS A MATTER OF LAW

To grant a variance , the Board must find (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 that particular piece of property would effectively prohibit or unreasonably restrict the utilization of the property, and (d) the authorization of the variance will not be of substantial detriment to adjacent property or to the public good, and that the character of the district will not

be harmed by the granting of the variance S C Code Ann § 6-29-800 (A)(2)(a) – (d) (Cum Supp 2009)

The Order of the Board and the record of its proceedings demonstrate that the Board considered each of these criteria and that evidence existed in support of each

- 1 Physical disadvantage is not the sole criterion upon which unnecessary hardship is based

Appellants contend the first prong of the variance test pertaining to extraordinary or exceptional conditions relates solely to physical conditions of property, such as size, shape or topography Such is not the case

Prior to the enactment of the South Carolina Local Government Comprehensive Planning Enabling Act of 1994 (herein “Enabling Act”), municipal zoning was governed by Chapter 23 of Title 5 and Chapter 7 of Title 6 of the Code of Laws of South Carolina A municipality had the option of exercising zoning authority under either Title Johnston v City of Myrtle Beach, 283 S C 288, 292, 321 S E 2d 627, 629 (1984) (*Not only do we hold the two Chapters to be consistent with one another but we also hold that the legislature in enacting ch 7 of tit 6 clearly manifested its intention that tit 5 be preserved as an operative statute*)

Chapter 7 of Title 6, specifically § 6-7-740, set out the powers of zoning boards of adjustment As to variances, the statute provided that extraordinary or exceptional conditions were those related to size, shape or topography See S C Code Ann § 6-7-740 (1976), Bennett v Town of Sullivan’s Island, 313 S C 445, 438 S E 2d 278 (1993) Chapter 23 of Title 5 did not limit extraordinary or exceptional conditions to size, shape or topography Instead, variances were warranted when “owing to special conditions, a literal enforcement of the provisions of such ordinance would result in unnecessary hardship” See S C Code Ann § 5-23-100 (1976)

Assuming, however, that reading these chapters in *para materia* would impute the size, shape and topography conditions of Title 6 to Title 5, the conditions applicable under either chapter were superseded by the provisions of the Enabling Act¹ As to variances, the Enabling Act no longer limits extraordinary or exceptional conditions to size, shape or topography The language in former Title 6 tying unnecessary hardship to physical conditions of property and that of Title 5 referencing “special conditions” was replaced with language requiring a “ showing of extraordinary and exceptional conditions” that “ effectively prohibits or unreasonably restricts” the use of property See S C Code Ann § 6-29-800 (Cum Supp 2009) Appellants’ construction of § 6-29-800, would require this Court to add words to the statute Such is generally inappropriate, and particularly so when the General Assembly omitted the very words Appellants would have this Court reinsert Citizens Committee for Johns Island v Office of Secretary of South Carolina, 290 S C 465, 457, 351 S E 2d 342, 343 (1986) (*In construing a statute the language must be given its plain and ordinary meaning Where there is no ambiguity words should not be added to or taken from the statute (citations omitted)*)

The law requires a showing of an extraordinary or exceptional condition applicable to the property Here, the record of the Board’s proceedings clearly demonstrates that 404 King Street is different and exceptional Its prominent location and the fact that all facades of any building constructed there being readily visible are singular and unique to this property Because of bordering King Street and the Square, any building constructed there will have to have two front

¹ Chapters 23 of Title 5 and Chapter 7 of Title 6 were repealed by the Enabling Act See Act No 355, § 2 1994 S C Acts 4036 as amended by Act No 15 §1 1999 S C Acts 37

facades, a circumstance singular and unique to this property. Even if the physical condition of property was still relevant, this property by virtue of its physical location on Marion Square is like no other in the vicinity. The Board's finding that extraordinary or exceptional conditions apply to 404 King Street is amply supported by evidence in the record, and the law

2 The variance was not bottomed on a development plan

The design of any building constructed at 404 King Street will have to respect and address neighboring properties on all four sides. The design of any building constructed at 404 King Street will have to address the admitted awkward L-shape building envelope resulting because of how the split height districts were applied to 404 King Street prior to the variance. These Appellants would be the first to object to any building so designed in downtown Charleston, but particularly at this location.

The whole purpose of a variance is to provide relief from regulations which unreasonably restrict the use of property. Here, City Council acknowledged the propriety of 3X height at this site. Without relief from how the height is applied, however, Library Associates is denied the ability to avail itself of a dimensional aspect of development that is specifically authorized by law. Hodge v. Pollock, 223 S.C. 342, 75 S.E.2d 752 (1953), cited by Appellants, is inapposite. There, a side setback variance was at issue. The evidence demonstrated the particular development plan contemplated by the owner could have been sited on the property without a setback variance. The Hodge court iterated that "mere inconvenience" would not suffice to support a finding of unnecessary hardship. This is not a case of "mere inconvenience." How the height districts applied to 404 King Street rendered the ability to ever achieve any portion of the

height allowed by the 3X zoning district impossible, despite the fact that 3X was deemed appropriate for the site

- 3 The split zoning as applied to 404 King Street was an extraordinary and exceptional condition

Appellants misconstrue the argument of Respondents and the finding of the Board, as affirmed by the trial court, pertaining to split height districts at 404 King Street Respondents have never contended that split zoning districts are unusual, exceptional or extraordinary What has been contended, and what the evidence indisputably shows, is that the application and effect of split districts at 404 King Street completely differed from the application and effect of split districts to other properties nearby Reference need only be made to the Height District Map All properties shown thereon with split height districts have lower height at the street, with more generous height being stepped back to the interior of the site At 404 King Street, the opposite holds true The generous height is amassed along the street (R , Height District Map)

Appellants' argument that "almost" every other corner lot in the vicinity is burdened with the awkward L-shaped building envelope and that buildings on these sites would be as visible as that at 404 King Street is not supported by the Exhibit upon which they rely As to corner lots with split height districts, the Height District Map shows, with the exception of 404 King Street, the generous height being setback from the street As to corner lots with split height districts, the Height District Map demonstrates none have visibility from all sides, except for 404 King Street As to corner lots with split height districts, the Height District Map demonstrates no buildings constructed there would have to incorporate two front facades The effect of the split height districts at 404 King Street differed, and significantly so, from the effect of split districts to other properties in the vicinity

- 4 Evidence demonstrates that a building at 404 King Street would be visible from all sides

Appellants' reliance on the Height District Map to support its contention that a building constructed at 404 King Street would not be visible from all sides is again misplaced. While it is true that the Old Citadel site adjoins 404 King Street, the Old Citadel building is setback from its western line, making the eastern façade of a building at 404 King visible. Additionally, because 404 King Street fronts on Marion Square, its east and south elevations will be visible from the park, in addition to their visibility from the Old Citadel. The Zoning Administrator's description of the site as having "no backside" is cogent, as is the Board's finding with respect to the visibility of a building at this location.

- 5 Library Associates is not precluded from seeking a variance due to the prior knowledge rule

The so-called "prior knowledge rule" essentially precludes a property owner from seeking relief from a situation he created or that existed at the time of his acquisition of property. The rule was adopted in response to the situations where a speculator paid a premium for land with the intention of seeking a variance for an unauthorized use to justify the investment. 3 Rathkops' The Law of Zoning and Planning, 858 22 (4th Ed). Appellants contend this rule precludes Library Associates from seeking a variance because split height districts were in place when it purchased the property.

Precedent addressing this rule has generally included situations where a property owner sought to establish, by variance, a use not authorized by zoning in place at the time of purchase. Library Associates did not seek to establish an unauthorized use. Heilker v Board of Zoning Appeals, 346 S C 401, 556 S E 2d 42 (Ct App 2000) is relevant to the issue. In Heilker, for the

first time, the term “use” was defined in the context of zoning. This Court of Appeals held

A “use” in the zoning context is the “purpose or activity for which land or buildings are designed, arranged, or intended, or for which land or buildings are occupied or maintained”

552 S.E.2d at 48

Here, Library Associates sought relief from a dimensional aspect of development, that being height. Height is not a “use” or “activity” or “purpose” for which land or buildings are occupied. Library Associates did not seek to put the property to a use not authorized at the time it purchased the property. It merely sought relief from the application of a dimensional regulation that unreasonably restricted the utilization of its property.

Note must be taken of the practical application of Appellants’ urged construction of the prior knowledge rule. If no dimensional aspect of development in existence at the time of purchase could ever be varied, then commonplace variances, such as parking, would be rendered illegal. If no dimensional aspect of development in existence at the time of purchase could ever be varied, then a variance to allow encroachment into a setback to preserve a tree or to accommodate handicapped access, or the like, would be rendered illegal. Such is hardly the purpose of the prior knowledge rule. As found by the trial court, the prior knowledge rule applies to variances for uses not authorized by zoning, not variances from dimensional or site development regulations.

6 The trial court did not hold that the variance should be affirmed because a hotel is a permitted use at 404 King Street.

Appellants misconstrue the trial court’s Order with respect to a hotel being a permitted use at 404 King Street. The trial court did not hold that, because the hotel was a permitted use, the variance should be affirmed. The trial court’s citation to the Heilker decision was in relation

to whether or not the prior knowledge rule applied to dimensional or site development regulations. The trial court noted, and rightfully so, that the prior knowledge rule was designed to fend off variances for uses which were not authorized by zoning at the time land was purchased. The trial court noted, and rightfully so, that the Heilker decision defined “use” in the context of zoning, and that definition did not reach dimensional or site development standards. The trial court held, and rightfully so, that because Library Associates was not requesting a variance as to use as defined in Heilker, the prior knowledge rule did not apply.

II 404 KING STREET IS UNIQUELY BURDENED

As previously set out, 404 King Street is uniquely burdened because how split districts were applied there was opposite to how split districts were applied to other properties in the vicinity, resulting in the ability of the owner of 404 King Street to utilize any meaningful height affirmatively permitted by its 3X zoning being rendered a practical nullity. Split districts applied to other corner lots results in buildings with height stepped back from the street. That is not the case with 404 King Street. Finally, and perhaps most significantly, no other property in the vicinity of 404 King Street faces a major park (Marion Square), a major retail corridor (King Street) or would house a building with visibility from all sides.

404 King Street is, in the words of Board chairman Lenny Krawcheck, “one of the most important sites in the city of Charleston, one of the most important zoning variance requests that I ever recall coming before this Board” (R , Tr BZA, 1/2/07, p 73, lines 23-27). The site is important because of its relationship to Marion Square, the Old Citadel, the German Lutheran Church properties and users of Hutson Street. That situation is unique to 404 King Street, and

because of it, the construction of a signature building that is respectful to neighboring properties on each of its four sides is demanded. No other property in the vicinity is similarly situated or burdened.

III THE MANNER IN WHICH SPLIT HEIGHT DISTRICTS WERE APPLIED TO 404 KING STREET UNREASONABLY RESTRICTED ITS USE

The hardship test requires demonstration that, without a variance, use of property would be effectively prohibited or unreasonably restricted. S.C. Ann. § 6-29-800(A)(2)(c). Here, the evidence reveals the manner in which height districts were applied to 404 King Street resulted in an unreasonable restriction on its use.

The zoning ordinance, a legislative enactment of City Council, applied the 3X height district across 60% of the site. Because, however, the zoning ordinance allocated the height as it did, it rendered it difficult, if not impossible, for the owner to take advantage of the height. An ordinance that gives a benefit on the one hand, but takes it away on the other is, perhaps, the quintessential example of an unreasonable restriction. The Board recognized this fact, and awarded a variance that allowed for the 3X height to be distributed more symmetrically across the site. The variance not only accommodated a better design for this prominently located property, but also furthered the intent of Council to allow a taller building there.

That a building could be constructed at 404 King Street without a variance is not dispositive. The Supreme Court has held that such a circumstance does not disqualify a property owner from qualifying for a variance. Restaurant Row Associates v. Horry County, 335 S.C. 209, 217, 516 S.E.2d 442, 446 (1999) (*Variance applicants are not required to prove that*

without the variance there exists no feasible conforming use for the property in question in order to show unnecessary hardship)

Economic considerations did not play a role in the decision of the Board. The evidence on this issue could not be clearer. When the property owner mentioned the economics of the project, he was immediately told such was not a proper consideration for the Board. (R , Tr BZA, 1/2/07, p 68, line 9 through p 69, line 1) The discussion among the board members reflected in the transcript of its proceedings is devoid of any mention of finances on the part of any board member. (R , Tr BZA, 1/2/07, pp 70 – 76) And, this issue was specifically addressed by the Board on the Foundation's motion to reconsider the variance (R , Tr BZA, 2/20/07)

IV THE EVIDENCE DEMONSTRATED THAT THE AWARD OF THE VARIANCE DID NOT POSE SUBSTANTIAL DETRIMENT TO ADJACENT PROPERTY OR THE PUBLIC GOOD, OR HARM THE CHARACTER OF THE DISTRICT

As an initial matter, Appellants' argument on this issue must be disregarded in its entirety because it is based solely on portions of the Downtown Plan. The Downtown Plan is not part of this Record. When Appellants attempted to introduce the Downtown Plan in the hearing before the trial court, an objection was timely made. (R , Tr Hearing 3/10/09, p 20, lines 5-19) The transcript does not reflect the judge's ruling, but as his Order sets forth that the standard of review does not allow him to take additional evidence (R , Order Affirming Variance, p 4), the clear implication is that the Downtown Plan was not admitted.

Even if, however, the Downtown Plan could be deemed part of this Record, it was error for the trial court to admit it. S.C. Code Ann. § 6-29-840 specifically precludes a circuit court

from taking additional evidence *(The findings of fact by the board of appeals shall be treated in the same manner as findings of fact by a jury and the court may not take additional evidence)*

More fundamentally, Appellants are precluded from arguing the variance is inconsistent with the Downtown Plan, because they never raised this issue to the Board and never requested the trial judge to rule on it. A reviewing court will not decide an issue that was not raised to the zoning board from which an appeal has been taken. 83 Am Jur 2nd Zoning and Planning § 957. A reviewing court will not consider an issue on appeal that was not ruled on by the trial court either in its order or by way of a Rule 59(e) motion. Cullen v McNeal, 390 S C 470, 490, 702 S E 2d 378, 390 (Ct App 2010) *(In order for an issue to be preserved for appellate review it must have been raised to and ruled upon by the trial court. Therefore because the circuit court did not rule on these arguments and the Developers failed to file a Rule 59(e) motion requesting a ruling from the circuit court these arguments are not preserved for our review (citations omitted))*. The efficacy of the Downtown Plan has not been preserved for review.

Even if the Downtown Plan is in play, precedent clearly holds that a plan serves as but a guide to future development. Peterson v City of Clemson, 312 S C 162, 170, 439 S E 2d 317, 322 (1993) *(The plan does not establish zoning for the property. It merely provides a general direction for considering future rezoning which is a legislative process)*

The Downtown Plan is in accord

The Downtown Plan establishes parameters to guide future development, anticipating both private sector and public investment in infrastructure. The Plan does not make rigid recommendations for specific uses and buildings. Rather than being a regulatory document, it aims to produce an interpretive framework within which individual decisions can be made, allowing for flexibility and creativity.

Similarly, the plans and drawings show intent and overall objectives, rather than hard and fast requirements

(R , Downtown Plan, Introduction (Approach), p 2)

And, the Downtown Plan does not call for the wholesale abandonment of the 3X district, as Appellants suggest The Plan provides

In those areas where the height limits are based on the lot size or setback (the 3X and W zones), the heights are potentially too high to be compatible with the existing city fabric and may be inappropriate

(R , Downtown Plan, p 62)

The tenor of these provisions clearly contemplates height being viewed in context Such is exactly what the Board did, viewing the height at 404 King Street in the context of its environs

Notably, the Downtown Plan identifies Marion Square as a development node, where intense, active uses are to be pursued, and endorses the locations of hotels north of Calhoun Street, as is the case with 404 King (R , Downtown Plan, pp 41, 51,53 - 56) If the Downtown Plan is deemed to be properly before this Court, provisions of that Plan support the actions of the Board

As to the evidence actually presented to the Board, the record of its proceedings include testimony and letters in support of the variance from people living, working or owning property nearby (R , Tr BZA, 1/2/07, p 46, line 13 through p 48, line 12, p 49, line 10 through p 50, line 4) Its proceedings also include testimony that taller buildings in this area of the City was in keeping with the tradition of the area (R , Tr BZA, 1/2/07, p 42, line 22 through p 43, line 17) This evidence belies the contention that the variance posed a substantial detriment to adjacent properties or the public good or does harm to the district

The record of its proceedings and its Order reveal that the Board gave careful consideration to every prong of the variance test. The record of its proceedings contains evidentiary support for each of the Board's findings. As appellate courts must defer to decisions of local boards where there is any evidence to support their decisions, Austin v Board of Zoning Appeals, *supra*, the decision of the Board, and that of the trial court in upholding it, should be affirmed.

CONCLUSION

For reasons set forth, it is submitted that the trial court's Order Affirming Variance should be affirmed, and this appeal dismissed.

Respectfully submitted,

Charleston, South Carolina

March 7, 2011



Frances I. Cantwell, Esq.
Regan and Cantwell, LLC
105 Wappoo Creek Drive, Suite 1-A
Charleston, South Carolina 29412
Tel 843-762-8282
Fax 843-762-8284

Attorney for Respondent
Library Associates, LLC



Timothy A. Domin, Esq.
Clawson & Staubes, LLC
126 Seven Farms Drive, Suite 200
Charleston, South Carolina 29492-8144
Tel 577-2026
Fax 722-2867

Attorney for Respondents The City of
Charleston, The City of Charleston Board
of Zoning Appeals – Zoning

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Mikell R. Scarborough, Master-In-Equity

Case No. 2007-CP-10-451

HISTORIC CHARLESTON FOUNDATION and
PRESERVATION SOCIETY OF CHARLESTON,

Appellants,

v

THE CITY OF CHARLESTON, THE CITY OF CHARLESTON
BOARD OF ZONING APPEALS – ZONING and LIBRARY
ASSOCIATES, LLC,

Respondents

APPELLANTS' JOINT INITIAL BRIEF

RECEIVED
JAN 12 2011
SC Court of Appeals

G. Trenholm Walker
Lindsay K. Smith-Yancey
Daniel S. McQueeney, Jr.
Katie F. Monoc
Pratt-Thomas Walker, P.A.
P.O. Drawer 22247
Charleston, SC 29413-2247
(843) 727-2208
Attorneys for Appellant
Preservation Society of Charleston

Edward K. Pritchard, III
Samia H. Nettles, Esquire
Pritchard & Elliott, LLC
129 Broad Street
Charleston, SC 29401
(843) 722-3300
Attorneys for Appellant
Historic Charleston Foundation

TABLE OF CONTENTS

Table of Authorities	111
Statement of the Issues on Appeal	1
I DID THE MASTER ERR IN AFFIRMING THE VARIANCE GRANTED BY RESPONDENT CITY OF CHARLESTON BOARD OF ZONING APPEALS-ZONING GRANTING A HEIGHT VARIANCE TO RESPONDENT LIBRARY ASSOCIATES, LLC, BECAUSE THERE IS NO EVIDENCE REASONABLY SUPPORTING A STATUTORILY-REQUIRED FINDING THAT THE PROVISIONS OF THE ZONING ORDINANCE WOULD OTHERWISE RESULT IN AN UNNECESSARY HARDSHIP?	
Statement of the Case	1
Facts	2
Standard of Review	6
Argument	7
I The master erred in affirming the BZA-Z's decision granting a height variance to Developer because there is no evidence reasonably supporting a statutorily-required finding that the provisions of the zoning ordinance would otherwise result in an unnecessary hardship	7
A The record and law do not support a finding that 404 King's conditions are extraordinary or exceptional, and the BZA's finding in this respect was premised on legal error	9
1 The physical disadvantage of the property alone must establish the "unnecessary hardship" necessary to support a variance	9
2 Mere adjustment of the owner's development plans does not establish the unnecessary hardship sufficient to support a variance	10
3 There is no evidence supporting a finding that the split-zoning of 404 King was an exceptional or extraordinary condition	11
4 There is no evidence supporting the BZA-Z's conclusion that 404 King is visible on all four sides	12

5 The Developer may not raise conditions existing at the time it purchased the property as supporting an unnecessary hardship 12

6 The master's ruling that the variance should be upheld because building a hotel is a proper "use" is an error of law 13

B There is no evidence to support a finding that 404 King is uniquely burdened 14

C There is no evidence which supports a conclusion that applying the City's zoning ordinance to 404 King effectively prohibits or unreasonably restricts the use of the site 15

D There is no evidence which supports a finding that granting the variance to Developer will not be of substantial detriment to adjacent property or to the public good, or that the character of the district will not be harmed by the granting of the variance 16

Conclusion 18

TABLE OF AUTHORITIES

CASES

<i>Austin v Board of Zoning Appeals</i> , 362 S C 29, 606 S E 2d 209 (Ct App 2004)	6
<i>Application of Groves</i> , 226 S C 459, 85 S E 2d 708 (S C 1955)	8
<i>Clear Channel Outdoor v City of Myrtle Beach</i> , 372 S C 230, 642 S E 2d 565 (2007)	7
<i>Colbert v Krawcheck</i> , 299 S C 299, 384 S E 2d 710 (1989)	9
<i>Georgetown County Bldg Official v Lewis</i> 290 S C 513, 351 S E 2d 584 (Ct App 1986)	12, 13
<i>Heilker v Zoning Board of Appeals</i> , 346 S C 401, 552 S E 2d 42 (Ct App 2000)	13
<i>Hodge v Pollock</i> , 223 S C 342, 75 S E 2d 752 (S C 1953)	7, 9, 10, 11, 13, 14
<i>La Quinta Motor Inns, Inc v Greenville County Bd of Zoning Appeals</i> , 279 S C 598, 310 S E 2d 438 (Ct App 1983)	13
<i>Rest Row Assocs v Horry County</i> , 335 S C 209, 516 S E 2d 442 (1999)	7, 8, 16
<i>Rush v City of Greenville</i> , 246 S C 268, 143 S E 2d 527 (S C 1965)	12

STATUTES

S C Code of Laws § 6-29-800	5, 7, 8, 9, 15, 16, 18
S C Code of Laws § 6-29-820	4
S C Code of Laws § 6-29-840	7
City of Charleston Zoning Ordinance § 54-306	3
City of Charleston Zoning Ordinance §§ 54-923 & -924	5, 7, 8, 18

OTHER AUTHORITIES

83 AM JUR 2D <u>ZONING & PLANNING</u> § 818 (2010)	10
--	----

STATEMENT OF THE ISSUES ON APPEAL

I DID THE MASTER ERR IN AFFIRMING THE VARIANCE GRANTED BY RESPONDENT CITY OF CHARLESTON BOARD OF ZONING APPEALS-ZONING GRANTING A HEIGHT VARIANCE TO RESPONDENT LIBRARY ASSOCIATES, LLC, BECAUSE THERE IS NO EVIDENCE REASONABLY SUPPORTING A STATUTORILY-REQUIRED FINDING THAT THE PROVISIONS OF THE ZONING ORDINANCE WOULD OTHERWISE RESULT IN AN UNNECESSARY HARDSHIP?

STATEMENT OF THE CASE

On December 4, 2006, Respondent Library Associates, LLC, (“Developer”) applied to Respondent City of Charleston Board of Zoning Appeals-Zoning (“BZA-Z”) for a height variance increasing the permissible height of the eastern portion of the property known as 404 King Street in Charleston, South Carolina, from 55 feet to 105 feet **(Height Variance Application)** The BZA-Z granted the height variance after a hearing on January 2, 2007 **(Jan 2, 2007 Hr’g Tr , Form Order)**

Appellant Historic Charleston Foundation (“Historic Charleston”) filed an application to reconsider the BZA-Z’s decision, which the BZA-Z denied **(Application to Reconsid , Order Denying Application to Reconsid)** On February 1, 2007, Appellants Historic Charleston and the Preservation Society of Charleston (collectively “Appellants”) filed an appeal of the BZA-Z’s decision to the Court of Common Pleas **(Complaint, Petition and Notice of Intent to Appeal)** On appeal, Appellants contended that the order granting the height variance was not sufficiently detailed and that the Developer failed to meet its burden establishing unnecessary hardship from the application of the zoning ordinance **(Complaint, Petition and Notice of Intent to Appeal)**

The Honorable Mikell R Scarborough, the Charleston County Master-in-Equity, held a hearing on Appellants’ appeal and remanded the matter to the BZA-Z to issue more specific

findings of fact and conclusions of law **(Order filed June 11, 2009)** Upon remand, the BZA-Z issued a more detailed order on April 13, 2010 **(Order filed April 13, 2010)** The BZA-Z's order was initially entered as a final judgment of the master but, upon the motion of Appellant Preservation Society, this mistake was corrected **(Mot to Alter or Amend)**

On June 29, 2010, the master issued a final order affirming the BZA-Z's order on remand **(Order filed June 29, 2010)** Appellants received written notice of entry of the master's order on July 12, 2010 and served their notice of appeal on August 11, 2010 **(Notice of Appeal)**

FACTS

The present appeal involves a challenge to the decision of the BZA-Z granting a height variance increasing the permissible height of the eastern portion of the property known as 404 King Street in Charleston, South Carolina ("404 King") from 55 feet to 105 feet

404 King was the site of the former main branch of the Charleston County Public Library before being purchased by Developer in the 1990s **(Height Variance Application, Hr'g Tr dated 03/10/2009, p 6, l 3-15)** 404 King Street is located on the southeast corner of the intersection of King and Hutson Streets, adjacent to the historic Old Citadel building and Marion Square, across the street from St Matthews Lutheran Church and the historic Aimar Building at 409 King Street, and within Charleston's Old and Historic District, which is also listed as a National Historic Landmark by the U S Department of Interior **(Zoning Map, BZA file on 404 King Street)**

404 King is split-zoned, with the western portion fronting King Street zoned 3X as to height and the eastern portion zoned 55/30 as to height **(Zoning Map, BZA file on 404 King Street)** 3X is a height district that allows the maximum height of a building to be three times

the distance from the front of the building to the center line of the street it fronts (**City of Charleston Zoning Ordinance § 54-306(a)**) 55/30 is a height district with a fifty-five foot maximum and a thirty foot minimum (**City of Charleston Ordinance § 54-306(d)**) Almost all properties on the east side of King Street from George Street to Line Street were split zoned as to height (**Zoning Map**) Similarly, the parcels on Meeting Street, which runs parallel to King Street one block to the east, were also split zoned as to height (**Zoning Map**)

In 1999, the City of Charleston adopted the Downtown Plan as the land use element of the Comprehensive Plan for the City of Charleston (**Downtown Plan**) The Downtown Plan states that a goal of the plan is to preserve downtown's existing skyline, and that only slight increases to the existing skyline of one story should be permitted (**Downtown Plan §8 4**) The Downtown Plan also disfavors tall buildings, which detract from historic sites (**Downtown Plan §8 4**) In fact, section 8 4 of the Downtown Plan specifically states that 3X is an overly permissive height zone that should be replaced (**Downtown Plan §8 4**)

Section 9 2 of the Downtown Plan addresses 404 King and refers to it as the "old library site " (**Downtown Plan §9 2**) New development on the site should take into consideration the the prominence of the church steeples, the Old Citadel and the "Calhoun column" on the skyline, all in the immediate vicinity (**Downtown Plan §9 2**) The Downtown Plan also expressly emphasizes "In short, the city is comprised of buildings that occupy much of the lot, frame the streets and parks, and remain at a relatively consistent, low height " (**Downtown Plan §8 1**)

Developer seeks to build a nine-story, 185-room hotel with a rooftop bar at 404 King (**Height Variance Application, BZA file on 404 King Street**) On December 4, 2006, Developer applied to the BZA-Z for a height variance in order to facilitate the construction of the proposed hotel (**Complaint, Petition and Notice of Intent to Appeal, Height Variance**)

Application, BZA file on 404 King Street) Developer supported its application by contending that the split-zoning would otherwise result in an L-shaped building and that the zoning would prohibit the particular hotel Developer anticipated building at 404 King **(Height Variance Application, Jan 2, 2007 Hr’g Tr)**

On January 2, 2007, the BZA-Z conducted a hearing on the variance request **(Jan 2, 2007 Hr’g Tr)** Members and representatives of Appellants attended the BZA-Z’s January 2, 2007 public meeting and addressed and opposed the variance **(Jan 2, 2007 Hr’g Tr , Complaint, Petition and Notice of Intent to Appeal, Height Variance Application, BZA file on 404 King Street)** The BZA-Z granted Developer the requested variance in a form order **(Hr’g Tr pp 70-76, Form Order)**

On January 9, 2007, Historic Charleston filed an application to reconsider the BZA-Z’s decision **(Application for Reconsid)** The BZA-Z held a hearing on the application for reconsideration and upheld the variance **(Feb 20, 2007 Hr’g Tr)** As a result, pursuant to section 6-29-820(A) of the South Carolina Code, Appellants appealed the BZA-Z’s decision to the Court of Common Pleas **(Complaint, Petition and Notice of Intent to Appeal)**

On March 10, 2009, the master held a hearing on the appeal **(March 10, 2009 Hr’g Tr)** On June 11, 2009, the master issued an order finding that the BZA-Z failed to adequately set forth its findings of facts and conclusions of law supporting the variance and remanded the matter to the BZA-Z for a rehearing **(Order filed June 11, 2009)** Developer filed a motion to alter or amend this order and, in an order filed September 28, 2009, the master ruled that he was not ordering a rehearing and that, upon remand, the BZA-Z should decide whether it would rehear the matter or issue written findings and conclusions based on the existing record **(Mot to Alter or Amend, Order filed Sept 28, 2009)**

On October 20, 2009, the BZA-Z determined that it would issue its decision based on the record of its previous hearing on January 2, 2007, rather than conduct a new hearing **(BZA-Z Order filed April 13, 2010)** As a result, Susan Herdina, an attorney for the City, drafted a proposed order, which the BZA-Z adopted after an executive session with Ms Herdina at its April 6, 2010 meeting **(BZA-Z Order filed April 13, 2010)** The order was adopted by the BZA-Z on April 13, 2010, and the BZA-Z specifically refused to accept public comment on the order **(BZA-Z Order filed April 13, 2010)**

Section 6-29-800(A)(2) of the South Carolina Code and section 54-924 of the Zoning Ordinances of the City of Charleston set forth the four-pronged test for determining whether a variance may be granted in a case of unnecessary hardship The first prong requires a showing that “there are extraordinary and exceptional conditions pertaining to the particular piece of property ” Id In this respect, the BZA-Z held

[W]hat makes this property exceptional is the fact that this is a single piece of property and a single development split by two different height districts which restrict the property, coupled with the unique physical characteristics of the property This is the only property that is on Marion Square, is in a highly visible location in the heart of the city, and exposed to the public on all four sides

(Order filed April 13, 2010) The BZA-Z failed to address any specific physical characteristics of 404 King, caused by the underlying zoning, which necessitate a variance

The second prong requires the applicant establish that “these [extraordinary and exceptional] conditions do not generally apply to other property in the vicinity ” Id In addressing this factor, the BZA-Z held that “it is the combination of the two different height ordinances, the physical characteristics of this property, and the location of the property in the heart of the city that makes this property unique ” **(Order filed April 13, 2010)** The BZA-Z

ignored that many other properties in the vicinity are split-zoned, as contemplated in the Downtown Plan

The third factor required the Developer to establish that “because of these [extraordinary and exceptional] conditions, the application of the ordinance to the particular piece of property would effectively prohibit or unreasonably restrict the utilization of the property” Id. The BZA-Z found that “[t]he evidence showed that if both the 3X and the 55/30 height district were applied to this property, the owners could build up to 105 feet on King Street, but be severely limited in the back of the property [T]his situation unreasonably restricts the utilization of the property” **(Order filed April 13, 2010)** The BZA-Z did not consider that a smaller-scale hotel or other use permitted in the zoning district could be utilized without the variance

Finally, to warrant a variance, an applicant must establish that the 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 granting the variance” Id. As to this prong, the BZA-Z held that the project “will greatly benefit the Upper King Street/Marion Square area and its surrounding neighborhood” **(Order filed April 13, 2010)** The BZA-Z failed to address the Downtown Plan, which calls for smaller, not larger, building heights in the vicinity to protect surrounding historical areas

On June 29, 2010, the master entered an order upholding the BZA-Z’s decision **(Order filed June 29, 2010)** This appeal followed

STANDARD OF REVIEW

In reviewing the decision of a board of zoning appeals, an appellate court applies the same standard of review as the circuit court Austin v Board of Zoning Appeals, 362 S C 29, 33, 606 S E 2d 209, 211 (Ct App 2004) “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 ” S C Code Ann §6-29-840(a) “In reviewing questions presented on appeal, the court must determine only whether the decision of the board is correct as a matter of law ” Clear Channel Outdoor v City of Myrtle Beach, 372 S C 230, 234, 642 S E 2d 565, 567 (2007) “However, the decision of the zoning board will not be upheld where it is based on errors of law, or fraud, or where there is no legal evidence to support it, or where the board acts arbitrarily or unreasonably, or in a discriminatory manner or where, in general, the board has abused its discretion ” Hodge v Pollock, 223 S C 342, 348, 75 S E 2d 752, 754-55 (1953)

ARGUMENT

I The master erred in affirming the BZA-Z’s decision granting a height variance to Developer because there is no evidence reasonably supporting a statutorily-required finding that the provisions of the zoning ordinance would otherwise result in an unnecessary hardship

The BZA-Z has the power to grant a variance from the requirements of a zoning ordinance only when strict application of the provisions of the ordinance would result in an unnecessary hardship S C Code Ann § 6-29-800(A)(2), see also City of Charleston Zoning Ordinance §§ 54-923 & -924 “Granting a variance is an exceptional power to be sparingly exercised, and such power can be validly used only where a situation falls fully within the specified conditions ” Rest Row Assocs v Horry County, 335 S C 209, 215, 516 S E 2d 442, 445- 46 (1999)

A variance may only be granted in an individual case of “unnecessary hardship ” Both section 54-924 of the Zoning Ordinances of the City of Charleston and section 6-29-800(A)(2) of the South Carolina Code provide the “unnecessary hardship” test for granting a variance The four statutory elements of “unnecessary hardship” are

(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) 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

S C Code Ann § 6-29-800(2), City of Charleston Zoning Ordinance § 54-924

“In order to grant a variance, the Board must make the factual determination that each of the four elements above favor granting the variance ” Rest Row Assocs., 335 S C at 215, 516 S E 2d at 445 The applicant for a variance from the BZA-Z has the burden of proving each of the four elements of unnecessary hardship enumerated in section 6-29-800(2) of the South Carolina Code See id at 216, 516 S E 2d at 446 (“As the variance applicant in this case, Thee DollHouse bore the burden of proving its entitlement to a variance ”), Application of Groves, 226 S C 459, 466, 85 S E 2d 708, 711 (1955)

In this appeal, Appellants contend that the BZA-Z committed an error of law in granting a height variance to Developer and that the BZA-Z’s decision was unsupported by the evidence in four essential respects

- 1 The record and the law do not support a conclusion that 404 King’s conditions are extraordinary or exceptional, and the BZA-Z’s finding in this respect was premised on legal error
- 2 There is no evidence to support a finding that 404 King is uniquely burdened
- 3 There is no evidence which supports a conclusion that applying the City’s zoning ordinance to 404 King effectively prohibits or unreasonably restricts the use of the site
- 4 There is no evidence which supports a finding that granting the variance to Developer will not be of substantial detriment to adjacent property or to the public good, or that the character of the district will not be harmed by the granting of the variance

Based on the foregoing, as further developed herein, the master's decision affirming the BZA's grant of a height variance to Developer should be reversed

A The record and the law do not support a finding that 404 King's conditions are extraordinary and exceptional, and the BZA-Z's finding in this respect was premised on legal error

The BZA-Z essentially held that 404 King is an exceptional *piece of property* because of its location, its proximity to historic areas, and its split-zoning. The BZA-Z failed to address any exceptional or extraordinary *physical conditions on the property* that warranted a variance. No law exists supporting a conclusion that a corner location, close proximity to historical districts, or split zoning¹ constitutes evidence of extraordinary and exceptional *conditions* required by section 6-29-800 of the South Carolina Code. Instead, case law establishes that the *physical disadvantage of the property*, not its location or its general character, must be considered in determining whether the property is subject to exceptional conditions warranting a variance. In addition, even if the BZA-Z's findings supported a legal conclusion that 404 King suffered from exceptional or extraordinary conditions, the evidence does not support these findings.

1 The physical disadvantage of the property alone must establish the "unnecessary hardship" necessary to support a variance

Initially, well-recognized case law establishes that the first element of the unnecessary hardship test requires a showing that the hardship results from the *physical disadvantage* the property *suffers*. See, e.g. Colbert v. Krawcheck, 299 S.C. 299, 303, 384 S.E.2d 710, 712-13 (1989) ("The particular property, because of size, shape, topography or other physical conditions, suffers singular disadvantage through the operation of this chapter, which disadvantage does not apply to other properties in the vicinity"), Hodge v. Pollock, 223 S.C. 342, 348, 75 S.E.2d 752, 754 (1953) ("It is generally held that before a variance can be allowed

¹ BZA-Z Chairman Krawcheck acknowledged at the hearing that split zoning is not "in of itself" an exceptional or extraordinary condition. (Hr'g Tr. dated Jan. 2, 2007, p. 74-6-11)

on the ground of ‘unnecessary hardship’, there must at least be proof that a particular property suffers a singular disadvantage through the operation of a zoning regulation ”)

In this case, the attributes of 404 King that the BZA-Z relied upon to grant a zoning variance do not demonstrate a *physical disadvantage* of the site. Rather, they attempt to establish that 404 King lies in a unique location or enjoys a unique character. These are not physical disadvantages, but are, instead, locational advantages that do not bear on the “unnecessary hardship” analysis. The BZA-Z committed an error of law in failing to base its finding of unnecessary hardship on a physical disadvantage of the property. Accordingly, the master erred in failing to reverse its decision in this respect.

2 Mere adjustment of the owner’s development plans does not establish the unnecessary hardship sufficient to support a variance

Moreover, the alleged zoning disadvantage in this case relates entirely to the size of, and design for, the *particular hotel* desired by Developer. However, a finding of hardship may not rest upon a mere finding that, without the variance, the owner’s building plans would have to be adjusted. “A variance will be disapproved where the applicant proves no more than that his building plans will have to be adjusted if the variance is not granted.” 83 Am. Jur. 2d Zoning & Planning § 818 (2010). For example, in Hodge, the South Carolina Supreme Court overturned the granting of a variance to the city’s setback requirement because the evidence showed that the developer could simply redesign the building.

There is no showing that the side yard requirement, when applied to respondents’ property, becomes arbitrary, confiscatory, or unduly oppressive because of conditions of the property distinguishing it from other properties similarly restricted. Indeed, it does not appear that the plans for the proposed building cannot be satisfactorily rearranged so as to conform to the zoning regulations.

Id. at 349, 75 S E 2d at 755 Here, the BZA-Z based its decision solely on the fact that the building the Developer anticipated constructing on the site could not be built This is insufficient to establish an “unnecessary hardship,” as a matter of law The master should therefore have reversed the BZA-Z’s decision

3 There is no evidence supporting a finding that the split-zoning of 404 King was an exceptional or extraordinary condition

Further, the split zoning as to height is not arbitrary, confiscatory, or unduly oppressive as to this site when compared to other properties similarly restricted in the vicinity At the time of the variance application, almost all properties on the east side of King Street from George Street to Line Street were split zoned as to height **(Zoning Map)** Similarly, the parcels on Meeting Street, which runs parallel to King Street one block to the east, were split zoned as to height **(Zoning Map)**

As the zoning map indicates, the “condition” cited by the BZA-Z imposed by split height zoning, the visibility of the so-called “L” shape (more accurately a reclining “L”)² of the maximum-height envelope, occurs multiple times in the immediate vicinity, at almost every corner property that is split-zoned as to height **(Zoning Map)** This L-shaped zoning ceiling profile for these other corner lots would be visible from the street and other public areas, the same as would occur for the corner lot of 404 King

The zoning map undermines the BZA-Z’s finding that the split height zoning creates an exceptional and extraordinary condition in that the L height zoning profile would be visible on

² The BZA-Z cites to evidence of “the impact of the current zoning on the property” – “if the two different height districts are applied to the property, the property will be restricted to an odd L-shaped building with 105 feet of height of the proposed structure located on King Street” **(Order filed April 13, 2010, p 3)** According to the BZA-Z, the L-shaped building was the “only design presented at the hearing that showed the impact of the height limitations on the property if the 55/30 district were followed in this matter ” **(Order filed April 13, 2010, p 4)**

this site alone and would be invisible on other split-zoned sites. Since the BZA-Z's decision is therefore without evidentiary support, it is erroneous as a matter of law.

4 There is no evidence supporting the BZA-Z's conclusion that 404 King is visible on all four sides

The record reflects that the Old Citadel building is located immediately adjacent to the eastern boundary of 404 King. **(BZA file on 404 King)** Therefore, the BZA's finding that the building is fully visible from all four sides is not accurate. **(Order filed on April 13, 2010, p 2)** Even if it were accurate, however, the visibility of the roof profile is not an unusual, much less unique, site-specific condition, as is plainly evident from the zoning map and as previously explained. **(Zoning Map, BZA file on 404 King)**

5 The Developer may not raise conditions existing at the time it purchased the property as supporting an unnecessary hardship

Additionally, it is undisputed that Developer had actual or constructive knowledge of the split zoning as to height districts at the time it acquired the property. "Ordinarily, a claim of unnecessary hardship cannot be based upon conditions created by the owner nor can one who purchases property after the enactment of a zoning regulation complain that a nonconforming use would work an unnecessary hardship upon him." Rush v. City of Greenville, 246 S. C. 268, 278-79, 143 S. E. 2d 527, 532 (S. C. 1965) (internal citations omitted). "A self-created or self-inflicted hardship intentionally created by an owner of premises for the purpose of laying a basis for an application for a variance cannot be considered for such purpose." Id. "Where one purchases realty with intention to apply for variance, he cannot contend that restrictions caused him such peculiar hardship that entitles him to special privileges which he seeks." Id., see also Georgetown County Bldg. Official v. Lewis, 290 S. C. 513, 515, 351 S. E. 2d 584, 585 (Ct. App. 1986) (reversing the grant of a variance where the property owner created his own hardship).

because he knew or should have known the law when purchasing the property), La Quinta Motor Inns, Inc., 279 S C at 600 (holding the applicant's conditions and circumstances resulted from its own actions) As a matter of law, because Developer moved to the "hardship," Developer is estopped from now claiming extraordinary and exceptional circumstances worthy of a variance

In short, Developer's claim of unnecessary hardship is based on conditions it created namely, its desire for a full service hotel of 185 rooms that is nine stories tall Since the alleged hardship stems from the particular large hotel the Developer wants to build and the Developer had knowledge of the zoning at the time it acquired the site, the split height zoning does not impose extraordinary and exceptional conditions establishing unnecessary hardship, as a matter of law

6 The master's ruling that the variance should be upheld because building a hotel is a proper "use" is an error of law

Finally, the master held that the variance should be upheld because building a hotel is a proper "use" as defined by Heilker v Zoning Bd of Appeals for City of Beaufort, 346 S C 401, 407-10, 552 S E 2d 42, 45-47 (Ct App 2001) However, "use" is not at issue in the present case, as a matter of law Heilker did not discuss, much less reverse, the settled legal principles expressed in Georgetown County Bldg Official v Lewis, 290 S C 513, 351 S E 2d 584 (Ct App 1986) and Hodge v Pollock, 223 S C 342, 75 S E 2d 752 (1953) Furthermore, these two cases dealt with requests for dimensional variances

For all these reasons, this Court should find the BZA-Z abused its discretion in finding that Developer's application met the first element of unnecessary hardship The BZA-Z's finding of an exceptional and extraordinary condition due to visibility is unsupported and relates to the zoning envelope, rather than a physical characteristic of the site Additionally, the BZA-Z's conclusion and finding to this effect are based on errors of law

B There is no evidence to support a finding that 404 King is uniquely burdened

The second element of unnecessary hardship requires that the extraordinary and exceptional conditions not generally apply to other property in the vicinity. In other words, the property must be subject to a *singular* disadvantage. See Hodge v Pollock, 223 S C 342, 348, 75 S E 2d 752, 754 (1953) (“It is generally held that before a variance can be allowed on the ground of ‘unnecessary hardship’, there must at least be proof that a particular property suffers a singular disadvantage through the operation of a zoning regulation.”)

In its April 13, 2010 order granting the variance, the BZA-Z held that “it is the combination of the two different height ordinances, the physical characteristics of this property, and the location of the property in the heart of the city that makes this property unique.” (**Order filed April 13, 2010, p 9**) However, the majority of properties fronting on King Street and Meeting Street in the immediate vicinity are split zoned as to height (**Zoning Map**). As previously explained, the zoning map establishes that there are numerous split zoned corner lots in the immediate vicinity where an “L” roof profile would be visible from the street and other public areas if a new building were constructed on these corner lots to the maximum elevation allowed by the split zoning. As also previously discussed, these other corner locations in the Old and Historic District of the City of Charleston are also in the midst of historic structures, including the lot on the northwest corner of Hutson and Meeting Streets across from the Old Citadel building (**Zoning Map**).

Stated another way, this zoning condition that would result in the perceived aesthetically undesirable “L” roof profile if a building were to use the maximum height allowed by the zoning is by no means confined to this site. As a result, the BZA-Z committed an error of law in granting the variance, and the master’s decision affirming the BZA-Z should be reversed.

C There is no evidence which supports a conclusion that applying the City's zoning ordinance to 404 King effectively prohibits or unreasonably restricts the use of the site

The BZA-Z also committed legal error as to the third essential element of the unnecessary hardship test, and its findings as to this element are unsupported by the record. The BZA-Z held that enforcement of the 3X district and the 55/30 height district unreasonably restricts the use of the property because a building could be up to 105 feet along King Street but no more than 55 feet in elevation on its opposite side. **(Order filed April 13, 2010, p 9)** While Developer attested that the enforcement of the split-height zoning would unreasonably restrict the Developer's ability to build a 185-room hotel on the site as they want to do, the third prong is not analyzed from the perspective of whether the site unreasonably restricts the design desired by the owner. The issue is whether the "the application of the ordinance to the particular piece of property would effectively prohibit or unreasonably restrict the utilization of the property." S.C. Code Ann. §6-2-800(2)

As pointed out at the BZA-Z hearing, the split height zoning could accommodate a smaller hotel or a myriad of other building shapes and uses. A 185-room hotel is not the only use permissible on this site. In fact, hotel use is not allowed as a matter of right and is only permitted upon obtaining a special exception. The record does not contain facts that establish that there is no reasonable building configuration that could fit within the existing height zoning, nor does it contain facts that any building design for the site must occupy the maximum volumetric dimensions of the permissible building envelope.

The findings of the BZA-Z were premised entirely on whether the imposition of the 55/30 height district unreasonably restricted the owner's desire for a *specific* building design for a 185-room full-service hotel. According to the BZA-Z's order, the L-shaped building was the "only design presented at the hearing that showed the impact of the height limitations on the

property if the 55/30 district were followed in this matter ” **(Order filed April 13, 2010, p 4)**

The BZA-Z failed to consider the numerous other buildings and uses, or even that a hotel use could be accomplished on the site in an aesthetic and reasonable manner if a smaller structure were constructed

In addition, Developer argued that a smaller hotel was not economically viable The BZA-Z appears to have considered this economic factor in presuming, for purposes of the third element, that the only reasonable use was a hotel of the size and design that Developer finds economically attractive As a matter of law, the BZA-Z is not permitted to consider the fact that property may be utilized more profitably with a variance as a ground for the variance S C Code Ann § 6-29-800(A)(2)(d)(i), Rest Row Assocs v Horry County, 335 S C 209, 217, 516 S E 2d 442, 447 (1999) Since the BZA-Z’s findings and conclusions as to the third element were premised in part on the economic viability of the hotel as related by Developer, its findings and conclusions on this third element are erroneous as a matter of law and constitutes an abuse of discretion

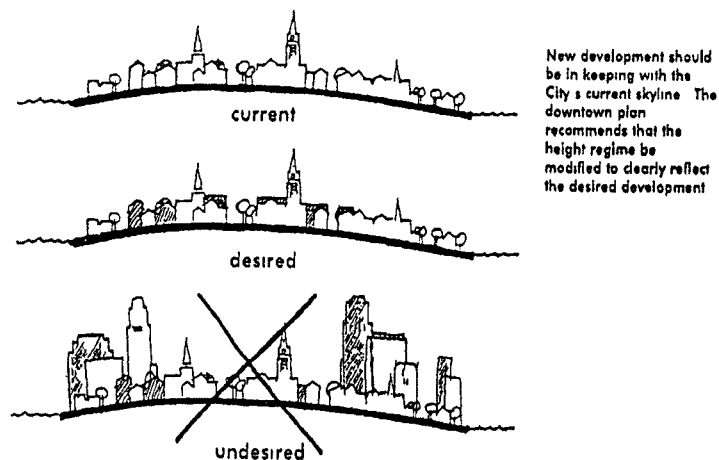
D There is no evidence which supports a finding that granting the variance to Developer will not be of substantial detriment to adjacent property or to the public good, or that the character of the district will not be harmed by the granting of the variance

The BZA-Z held that the variance will be a substantial benefit to the public and the proposed use of the property is consistent with the neighborhood and the historic fabric of the area **(Order filed April 13, 2010, p 10)** This finding flies in the face of the Downtown Plan adopted by the City of Charleston in 1999

It is undisputed that City Council adopted the Downtown Plan in 1999 as the land use element of the Comprehensive Plan for the City of Charleston **(Downtown Plan)** Section 8 4 of the Downtown Plan states that a goal of the plan is to preserve downtown’s existing skyline

(Downtown Plan) The Downtown Plan allows for only slight increases to the existing skyline of one story and disfavors tall buildings that detract from historic sites **(Downtown Plan)** Section 8.4 of the Downtown Plan specifically states that 3X is an overly permissive height zone that should be replaced **(Downtown Plan)**

Section 8.4 further illustrates



(Downtown Plan) Section 9.2 of the Downtown Plan refers to 404 King as the “old library site” and states that new development on this parcel should pay particular attention to preserving the prominence of the church steeples, the Old Citadel and the “Calhoun column” on the skyline, all in the immediate vicinity **(Downtown Plan)** A 105 foot building at 404 King would be fifty feet taller than the adjacent historic Old Citadel **(Downtown Plan)** The Downtown Plan states

The city's character can be reinforced by ensuring the integrity of each new building. Buildings that fit into the historic city fabric have a number of specific characteristics. While there are exceptions, structures are relatively small in scale. Heights are relatively low. In short, the city is comprised of buildings that occupy much of the lot, frame the streets and parks, and remain at a relatively consistent, low height. The effect is an intimate, pedestrian scale and unique environment.

(Downtown Plan, Section 8 1)

The undisputed law and clear statement of public policy found in the Downtown Plan undermines the BZA-Z's aforementioned findings as to the fourth element and, for the reasons stated in the Downtown Plan, the BZA-Z's findings as to the fourth element are without evidentiary support. Without evidentiary support, the BZA-Z's conclusion that the fourth element is met is erroneous and constituted an abuse of discretion.

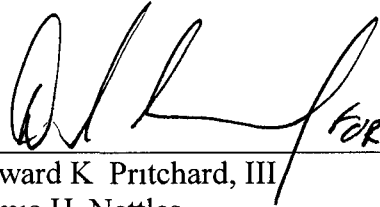
CONCLUSION

The BZA-Z's findings as to each of the essential factors to establish unnecessary hardship are without evidentiary support, and the BZA-Z committed legal errors in its analysis of the four factors. Therefore, the BZA-Z's decision to grant a variance to the Developer from the 55/30 height district to allow Developer to build to an elevation of 105 feet should be reversed for being in violation of section 6-29-800 of the South Carolina Code and City of Charleston Zoning Ordinance §§ 54-923 and 54-924 for the reasons set forth herein.

Respectfully submitted,

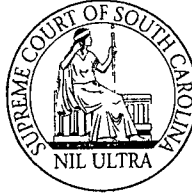


G. Trenholm Walker
Lindsay K. Smith-Yancey
Daniel S. McQueeney, Jr.
Katie F. Monoc
Pratt-Thomas Walker, P.A.
P.O. Drawer 22247
Charleston, SC 29413-2247
(843) 727-2208
Attorneys for Appellant
Preservation Society of Charleston

A handwritten signature in black ink, appearing to read 'E. K. Pritchard, III', is written over a horizontal line.

Edward K Pritchard, III
Samia H Nettles
Pritchard & Elliott, LLC
129 Broad Street
Charleston, SC 29401
(843) 722-3300
Attorneys for Appellant
Historic Charleston Foundation

Charleston, South Carolina
January 7, 2011



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734 1080

FAX (803) 734 1499

October 25, 2011

Edward K. Pritchard, III, Esquire
Samia H. Nettles, Esquire
Pritchard & Elliott, LLC
129 Broad Street
Charleston, SC 29401

G. Trenholm Walker, Esquire
Lindsay K. Smith-Yancey, Esquire
Daniel S. McQueeney, Jr., Esquire
Katie F. Monoc, Esquire
Pratt-Thomas & Walker, PA
P.O. Drawer 22247
Charleston, SC 29413-2247

Frances I. Cantwell, Esquire
Regan & Cantwell
105 Wappoo Creek Drive, Suite 1-A
Charleston, SC 29412

Timothy A. Domin, Esquire
Clawson & Staubes, LLC
126 Seven Farms Drive, Suite 200
Charleston, SC 29492-7595

Re Historic Charleston (Appellants) v. City of Charleston (Respondents)

Dear Counsel

The record in the above case has been reviewed and the time allotment for oral argument for this case is as follows

Appellants 10 minutes

Respondents 10 minutes

Appellants in Reply 5 minutes

This case is scheduled for hearing on Thursday, November 3, 2011 at 10 30 a m

Very truly yours,

Daniel E Shearouse, Clerk

By Debbie M Hopkins
Administrative Assistant

DES/dmh



The South Carolina Supreme Court

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

P.O. BOX 11330
COLUMBIA, S.C. 29211
PHONE NO. 734 1080

To G. Trenholm Walker Esquire
Lindsay K. Smith-Yancey Esquire
Daniel S. McQueeney Jr. Esquire
Katie F. Monoc Esquire
From Daniel E. Shearouse
Date August 29, 2011
RE November Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the November 2011 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

Court will meet the days of November 1, 2, 3, 15, and 16. Please notify this office in writing prior to September 6, 2011, as to any scheduling conflicts for the November term and any changes or additions of counsel that should be made to the record for the purpose of argument. If you do have a scheduling conflict, please advise as to the specific nature of the conflict.

Historic Charleston v. City of Charleston



The South Carolina Supreme Court

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

P.O. BOX 11330
COLUMBIA, S.C. 29211
PHONE NO. 734 1080

To Frances I. Cantwell Esquire
From Daniel E. Shearouse
Date August 29, 2011
RE November Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the November 2011 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

Court will meet the days of November 1, 2, 3, 15, and 16. Please notify this office in writing prior to September 6, 2011, as to any scheduling conflicts for the November term and any changes or additions of counsel that should be made to the record for the purpose of argument. If you do have a scheduling conflict, please advise as to the specific nature of the conflict.

Historic Charleston v. City of Charleston



The South Carolina Supreme Court

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

P.O. BOX 11330
COLUMBIA, S.C. 29211
PHONE NO. 734 1080

To Edward K. Pritchard III Esquire
Samia H. Nettles Esquire
From Daniel E. Shearouse
Date August 29, 2011
RE November Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the November 2011 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

Court will meet the days of November 1, 2, 3, 15, and 16. Please notify this office in writing prior to September 6, 2011, as to any scheduling conflicts for the November term and any changes or additions of counsel that should be made to the record for the purpose of argument. If you do have a scheduling conflict, please advise as to the specific nature of the conflict.

Historic Charleston v. City of Charleston



The South Carolina Supreme Court

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

PO BOX 11330
COLUMBIA SC 29211
PHONE NO 734 1080

To Timothy A. Domin, Esquire
From Daniel E. Shearouse
Date August 29, 2011
RE November Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the November 2011 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

Court will meet the days of November 1, 2, 3, 15, and 16. Please notify this office in writing prior to September 6, 2011, as to any scheduling conflicts for the November term and any changes or additions of counsel that should be made to the record for the purpose of argument. If you do have a scheduling conflict, please advise as to the specific nature of the conflict.

Historic Charleston v. City of Charleston

PROFESSIONAL ASSOCIATION

16 CHARLOTTE STREET
CHARLESTON SC 29403

PO DRAWER 22247
CHARLESTON SC 29413 2247

PHONE 843 727 2200
FAX 843 727 2238

WWW.PTW.COM

June 22 2011

E DOUGLAS PRATT THOMAS

G TRENHOLM WALKER

W ANDREW GOWDER JR

JON L AUSTEN

LINDSAY K SMITH YANCEY (SC NC)

CLAYTON B McCULLOUGH

THOMAS H HESSE (SC GA)

IAN W FREEMAN (SC CA)

FRANCIS M ERVIN II (SC MA)

DANIEL S McQUEENEY JR

JAMIE A KHAN

KATHLEEN FOWLER MONOC

(843) 727 2247 (direct dial)
(843) 579 4811 (fax)
js@p tw com (e mail)

Ms Debbie Hopkins
Supreme Court of South Carolina
P O Box 11330
Columbia SC 29211

RE Historic Charleston Foundation v City of Charleston

Dear Debbie

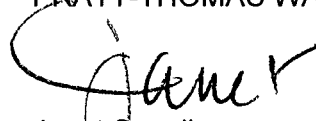
As you and I discussed over the phone today Appellants Joint Reply Brief contained an error in the caption specifically the jurisdiction was reflected incorrectly as the Court of Appeals instead of the Supreme Court

I have enclosed corrected labels to be affixed to the Court's copies of the Reply Brief and I am sending labels to all counsel of record as well

Thank you for bringing this to our attention I apologize for the confusion this must have caused

Sincerely

PRATT-THOMAS WALKER P A



Janet Segell

Paralegal to Daniel S McQueeney Jr

jas
enclosures

c Frances I Cantwell Esq
Timothy A Domin Esq

RECEIVED

JUN 24 2011

SC SUPREME COURT

PROFESSIONAL ASSOCIATION

16 CHARLOTTE STREET
CHARLESTON SC 29403

PO DRAWER 22247
CHARLESTON SC 29413 2247

PHONE 843 727 2200
FAX 843 727 2238

WWW.PTW.COM

June 20 2011

E DOUGLAS PRATT THOMAS

G TRENHOLM WALKER

W ANDREW GOWDER JR

JON L AUSTEN

LINDSAY K SMITH YANCEY (SC NC)

CLAYTON B McCULLOUGH

THOMAS H HESSE (SC GA)

IAN W FREEMAN (SC CA)

FRANCIS M ERVIN II (SC MA)

DANIEL S McQUEENEY JR

JAMIE A KHAN

KATHLEEN FOWLER MONOC

(843) 727 2247 (direct dial)
(843) 579 4811 (fax)
js@p tw com (e mail)

The Honorable Tanya A Gee
Clerk of Court
South Carolina Court of Appeals
P O Box 11629
Columbia SC 29211

RE Historic Charleston Foundation and Preservation Society of Charleston v The City of
Charleston The City of Charleston Board of Zoning Appeals – Zoning and Library
Associates LLC

Dear Ms Gee

Please find enclosed Appellants Joint Reply Brief in the above-referenced matter As
evidenced by the enclosed Proof of Service I am serving the adverse parties with copies of
same

Thank you for your assistance in this regard

Very truly yours

PRATT-THOMAS WALKER P A

Janet Segell
Paralegal to Daniel S McQueeney Jr

jas
enclosures

c Frances I Cantwell Esq
Timothy A Domin Esq

RECEIVED
JUN 21 2011
SC Court of Appeals

RECEIVED
JUN 22 2011
SC SUPREME COURT

PROFESSIONAL ASSOCIATION

16 CHARLOTTE STREET
CHARLESTON SC 29403
PO DRAWER 22247
CHARLESTON SC 29413 2247

PHONE 843 727 2200
FAX 843 727 2238

WWW.PTW.COM

E DOUGLAS PRATT THOMAS
G TRENHOLM WALKER
W ANDREW GOWDER JR
JON L AUSTEN
LINDSAY K SMITH YANCEY (SC NC)
CLAYTON B McCULLOUGH
THOMAS H HESSE (SC GA)
IAN W FREEMAN (SC CA)
FRANCIS M ERVIN II (SC MA)
DANIEL S McQUEENEY JR
JAMIE A KHAN
KATHLEEN FOWLER MONOC

June 20 2011

RECEIVED

JUN 21 2011

SC Court of Appeals

(843) 727 2247 (direct dial)
(843) 579 4811 (fax)
js@p tw com (e mail)

The Honorable Tanya A Gee
Clerk of Court
South Carolina Court of Appeals
P O Box 11629
Columbia SC 29211

RE Historic Charleston Foundation and Preservation Society of Charleston v The City of
Charleston The City of Charleston Board of Zoning Appeals – Zoning and Library
Associates LLC

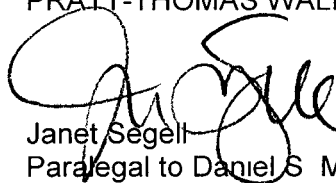
Dear Ms Gee

Please find enclosed Appellants Joint Brief in the above-referenced matter As
evidenced by the enclosed Proof of Service I am serving the adverse parties with copies of
same

Thank you for your assistance in this regard

Very truly yours

PRATT-THOMAS WALKER P A



Janet Segell
Paralegal to Daniel S McQueeney Jr

jas
enclosures

c Frances I Cantwell Esq
Timothy A Domin Esq

Law Offices
Regan and Cantwell LLC

William B Regan (Ret)

Frances I Cantwell

June 9, 2011

105 wappoo creek drive

suite 1 a

charleston sc

29412

tel 843 762 8282

fax 843 762 8284

Hon Daniel E Shearouse
South Carolina Supreme Court
1231 Gervais Street
Columbia, South Carolina 29201

Re Historic Charleston Foundation and Preservation Society of Charleston v
The City of Charleston, the City of Charleston Board of Zoning-Appeals-
Zoning and Library Associates, LLC
Civil Court Case No 2007-CP-10-451

Dear Mr Shearouse

In regard to the above, enclosed please find an original unbound and fourteen
(14) copies of Respondents' Joint Final Brief Also enclosed is a Certificate of
Service on counsel This case was transferred to the Supreme Court by Order of
the Court

Please let me know if you need anything further from me

With kind regards, I am,

Yours truly,



Frances I Cantwell

FIC/trm

Enclosures

cc Edward K Pritchard, III, Esq (w/encls)
Samia H Nettles, Esq (w/encls)
G Trenholm Walker, Esq (w/encls)
Lindsay K Smith-Yancey, Esq (w/encls)
Daniel S McQueeney, Jr , Esq (w/encls)
Katie F Monoc, Esq (w/encls)
Timothy A Domin, Esq (w/encls)

e mail fcantwell@birch net

tmonteiro@birch net

RECEIVED

JUN 16 2011

SUPREME COURT



PRITCHARD & ELLIOTT, LLC
ATTORNEYS AND COUNSELORS AT LAW

Post Office Box 630 | Charleston SC 29402
129 Broad Street | Charleston SC 29401
Tel (843) 722 3300 | Fax (843) 722 3379
snettlers@pritchard-elliott.com

May 31, 2011

RECEIVED

JUN 1 2011

SC Supreme Court

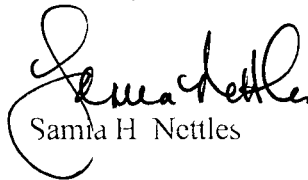
The Honorable Daniel E Shearhouse
Clerk of Court, Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

**RE Historic Charleston Foundation and Preservation Society of Charleston v
The City of Charleston, The City of Charleston Board of Zoning Appeals-
Zoning and Library Associates, LLC
Case No 2007-CP-10-4692
Case Tracking # 2010169246**

Dear Mr Shearhouse

Enclosed please find an original and fourteen (14) copies of the Record on Appeal along with the Certificate of Service of the Record on Appeal on opposing counsel. This matter has been certified from the South Carolina Court of Appeals by Order of the Supreme Court on May 5, 2011.

Sincerely



Samia H. Nettles

Enclosures

cc Timothy A. Domin, Esquire
Frances I. Cantwell, Esquire
G. Trenholm Walker, Esquire
Lindsay K. Smith-Yancey, Esquire
Daniel S. McQueeney Jr., Esquire
Katie F. Monoc, Esquire

The South Carolina Court of Appeals

Historic Charleston Foundation and
Preservation Society of Charleston, Appellants,

v

The City of Charleston, The City of
Charleston Board of Zoning Appeals-
Zoning, and Library Associates, LLC, Respondents

The Honorable Mikell R. Scarborough
Charleston County
Trial Court Case No. 2007-CP-10-00451

ORDER

For good cause having been shown, the time for the Record on Appeal to be served and filed
in the above entitled matter is hereby extended until May 31, 2011

IT IS SO ORDERED

JOHN CANNON FEW, CHIEF JUDGE
For the Court

BY V. Claire Allan, Deputy
CLERK

Columbia, South Carolina
cc Edward K. Pritchard, III, Esquire
G. Trenholm Walker, Esquire
Frances I. Cantwell, Esquire
Timothy A. Domin, Esquire

FILED
5/3/11 



PRITCHARD & ELLIOTT, LLC
ATTORNEYS AND COUNSELORS AT LAW

Post Office Box 630 | Charleston SC 29402
129 Broad Street | Charleston SC 29401
Tel (843) 722 3300 | Fax (843) 722 3379
snettles@pritchard-elliott.com

April 28, 2011

RECEIVED
APR 29 2011
SC Court of Appeals

The Honorable Jeanette F Barber
Clerk of the South Carolina Court of Appeals
P O Box 11629
Columbia, SC 29211

Re Historic Charleston Foundation, et al v The City of Charleston, et al
Case No 2007-CP-10-0451
Case Tracking # 2010169246

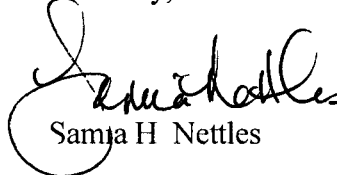
Dear Ms Barber

I am writing as counsel for the Appellant Historic Charleston Foundation to request an extension of thirty (30) days for the service and filing of the Record on Appeal in the above matter by both Appellants. With the extension, the Record on Appeal would be due on May 28, 2011. I have consulted with all counsel and am requesting this extension with the consent of counsel for Preservation Society of Charleston and Library Associates, LLC.

I am serving all counsel of record in this matter by copy of this letter.

Also enclosed is a check in the amount of \$25.00 in payment of the filing fee. If anything further must be filed with regard to this request for an extension, please contact me. Thank you for your assistance in this matter.

Sincerely,



Samia H Nettles

Enclosure

cc G Trenholm Walker, Esquire
Timothy A. Domin, Esquire
Frances I. Cantwell, Esquire

4/28/11 1st motion
5/30/11

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Mikell R. Scarborough, Master-In-Equity

Case No. 2007-CP-10-451

RECEIVED

MAR 31 2011

SC Court of Appeals

HISTORIC CHARLESTON FOUNDATION and
PRESERVATION SOCIETY OF CHARLESTON,

Appellants,

v

THE CITY OF CHARLESTON, THE CITY OF CHARLESTON
BOARD OF ZONING APPEALS – ZONING and LIBRARY
ASSOCIATES, LLC,

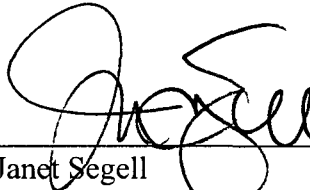
Respondents

PROOF OF SERVICE

I hereby certify that a true and correct copy of Appellants' Joint Initial Reply Brief was served on this 29th day of March, 2011 via United States Mail, postage prepaid, upon the following counsel of record

Timothy A. Domin, Esq.
Clawson & Staubes, LLC
126 Seven Farms Drive, Suite 200
Charleston, SC 29492-7595

Frances I. Cantwell, Esq.
Regan & Cantwell, LLC
105 Wappoo Creek Drive, Suite 1-A
Charleston, SC 29412



Janet Segell
Paralegal to Daniel S. McQueeney, Jr.
Pratt-Thomas Walker, P.A.
Post Office Drawer 22247
Charleston, South Carolina 29413-2247

PROFESSIONAL ASSOCIATION

16 CHARLOTTE STREET
CHARLESTON SC 29403

PO DRAWER 22247
CHARLESTON SC 29413 2247

PHONE 843 727 2200
FAX 843 727 2238

WWW.PTW.COM

E DOUGLAS PRATT THOMAS

G TRENHOLM WALKER

W ANDREW GOWDER JR

JON L AUSTEN

LINDSAY K SMITH YANCEY (SC NC)

CLAYTON B McCULLOUGH

THOMAS H HESSE (SC GA)

IAN W FREEMAN (SC CA)

FRANCIS M ERVIN II (SC MA)

DANIEL S McQUEENEY JR

JAMIE A KHAN

KATHLEEN FOWLER MONOC

March 29, 2011

(843) 727 2247 (direct dial)
(843) 579-4811 (fax)
js@p tw com (e mail)

RECEIVED

MAR 31 2011

SC Court of Appeals

The Honorable Tanya A Gee
Clerk of Court
South Carolina Court of Appeals
P O Box 11629
Columbia SC 29211

RE Historic Charleston Foundation and Preservation Society of Charleston v The City of
Charleston The City of Charleston Board of Zoning Appeals – Zoning and Library
Associates LLC

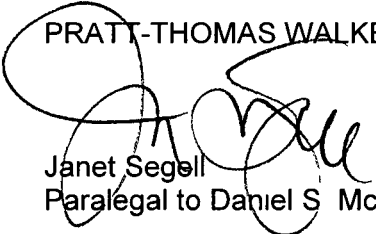
Dear Ms Gee

Please find enclosed Appellants Joint Initial Reply Brief in the above-referenced matter
As evidenced by the enclosed Proof of Service I am serving the adverse parties with copies of
same

Thank you for your assistance in this regard

Very truly yours

PRATT-THOMAS WALKER P A


Janet Segall
Paralegal to Daniel S McQueeney Jr

jas
enclosures

c Frances I Cantwell Esq
Timothy A Domin Esq

bc Edward K Pritchard III Esq
 Samia H Nettles, Esq



The South Carolina Court of Appeals

TANYA A GEE
CLERK

V CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE (803) 734 1890
FAX (803) 734 1839
www.sccourts.org

March 24, 2011

Edward K. Pritchard, III, Esquire
Pritchard & Elliott, LLC
129 Broad St
Charleston, SC 29401

G. Trenholm Walker, Esquire
Pratt-Thomas & Walker, PA
P O Drawer 22247
Charleston, SC 29413-2247

Frances I. Cantwell, Esquire
Regan & Cantwell
105 Wappoo Creek Drive
Suite 1-A
Charleston, SC 29412

Timothy A. Domin, Esquire
Clawson & Staubes, LLC
126 Seven Farms Drive
Suite 200
Charleston, SC 29492-7595

Re Historic Charleston v City of Charlst
2010169246

Dear Counsel

All parties are advised that the originals of all records on appeal and final briefs filed with the appellate courts are scanned. Therefore, in accordance with the May 1, 2008 Amendments to the South Carolina Appellate Court Rules, DO NOT staple, spiral bind, velobind, or otherwise permanently bind the ORIGINALS of these documents. The original brief(s) and record on appeal should still have front and back covers in compliance with Rule 267(e) of the South Carolina Appellate Court Rules, but should not be bound. You may secure the originals with paper clips, binder clips, rubber bands, by placing them in large envelopes, or by any other similar means that will keep the pages together without binding or hole-punching. All COPIES

of the record on appeal and final briefs should be bound as specified in the South Carolina Appellate Court Rules

If you have any questions, please do not hesitate to contact this office

Very truly yours,

V. Clare Allen, Deputy
CLERK

TAG/laf

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Hon Mikell R Scarborough, Master-in-Equity

Case No 2007-CP-10-00451

RECEIVED

MAR 08 2011

SC Court of Appeals

Historic Charleston Foundation and
Preservation Society of Charleston

Appellants,

v

The City of Charleston, The City of Charleston
Board of Zoning Appeals - Zoning
and Library Associates, LLC

Respondents

RESPONDENTS' JOINT
DESIGNATION OF MATTERS TO BE INCLUDED
IN THE RECORD ON APPEAL

Respondents hereby designate the following matters to be included in Record on Appeal

- 1 Order Affirming Variance filed June 29, 2010,
- 2 Order filed September 28, 2009, clarifying Order of Remand,
- 3 Order of Remand to Board of Zoning Appeals and Order to Deconsolidate with C/A 2007-CP-10-4692 filed June 11, 2009,
- 4 Motion to Alter, Amend or Reconsider filed May 4, 2010,
- 5 Motion to Alter, Amend or Reconsider (BZA and Library Assoc) filed July 7, 2009,
- 6 Order of BZA on Remand filed April 13, 2010,
- 7 Complaint, Petition and Notice of Intent to Appeal,

- 8 Answer/Return – Library Associates,
9 Answer/Return – Board of Zoning Appeals,
10 Form Order of BZA dated January 2, 2007,
11 Transcript of hearing before the Honorable Mikell R Scarborough, held March 10, 2009,
12 Height Variance Application, to include all attachments, documents describing the proposal
and addressing the variance test, layout of project and pictures (reproduced in color, as
applicable),
13 Transcript of hearing before the Board of Zoning Appeals held January 2, 2007,
14 Transcript of hearing before the Board of Zoning Appeals held February 20, 2007,
15 Staff Report, dated January 2, 2007 (2 pages),
16 Height Map (reproduced in color),
17 Position Statement - Preservation Society dated January 2, 2007,
18 Position Statement – Historic Charleston Foundation dated January 2, 2007,
19 Letters of support from
- a) Mayor Joseph P Riley, Jr dated December 28, 2006,
 - b) Patterson S Smith dated January 2, 2007,
 - c) J Lee Gastley, ASLA, dated December 21, 2006,
 - d) Christopher A Rose, AIA, dated December 19, 2006,
 - e) Charlie Moore, CCIM, dated December 19, 2006,
 - f) Charles S Carmody, CCIM dated December 19, 2006,
 - g) F Guilds Bennett dated December 14, 2006,
 - h) Camille Meets dated December 18, 2006,
 - i) Jason Ray dated December 14, 2006,
 - j) Henry Berlin dated December 14, 2006,

- k) Robert E Maloney dated December 14, 2006,
- l) Sallie Barnes dated December 14, 2006,
- m) Mary Cutler dated December 14, 2006,
- n) Martha Rhodes dated December 14, 2006,
- o) Kenneth R Davenport dated December 14, 2006,
- p) Thomas E Eiserhardt dated December 14, 2006,
- q) Seth Steitler dated December 14, 2006,
- r) Justine B Finch dated December 14, 2006,
- s) Cynthia M Masters dated December 18, 2006,
- t) Hope Parker dated December 14, 2006,
- u) Sadie B Maloney dated December 17, 2006,
- v) Alice Critikos dated December 6, 2006,
- w) J Miles Barkley dated December 27, 2006

I certify this Designation contains no matter which is irrelevant to this appeal

Charleston, South Carolina

March 7, 2011

Frances I Cantwell
Frances I Cantwell, Esq
Regan and Cantwell, LLC
105 Wappoo Creek Drive, Suite 1-A
Charleston, South Carolina 29412
Tel 843-762-8282
Fax 843-762-8284

Attorney for Respondent
Library Associates, LLC

Timothy A. Domin by E.O./permission

Timothy A. Domin, Esq
Clawson & Staubes, LLC
126 Seven Farms Drive, Suite 200
Charleston, South Carolina 29492-8144
Tel 577-2026
Fax 722-2867

Attorney for Respondents
City of Charleston and the City of
Charleston Board of Zoning Appeals -
Zoning

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Hon Mikell R Scarborough, Master-in-Equity

Case No 2007-CP-10-00451

Historic Charleston Foundation and
Preservation Society of Charleston,

Appellants,

v

The City of Charleston, The City of Charleston
Board of Zoning Appeals – Zoning
and Library Associates, LLC

Respondents

CERTIFICATE OF SERVICE

The undersigned certifies that on the 7th day of March, 2011 a true and correct copy of the Respondents' Joint Initial Brief was placed in an envelope with first class postage prepaid and affixed thereto and mailed to the following

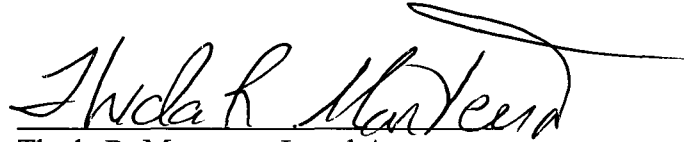
Attorneys for Historic Charleston Foundation
Edward K Pritchard, III, Esq
Samia H Nettles, Esq
Pritchard & Elliott, LLC
P O Box 630
Charleston, South Carolina 29402

Attorneys for Preservation Society of Charleston

G Trenholm Walker, Esq
Lindsay K Smith-Yancey, Esq
Daniel S McQueeney, Jr , Esq
Katie F Monoc, Esq
Pratt-Thomas Walker, PA
P O Drawer 22247
Charleston, South Carolina 29413-2247

Charleston, South Carolina

March 7, 2011

A handwritten signature in black ink, reading "Theda R. Monteiro". The signature is fluid and cursive, with a long horizontal flourish extending to the right.

Theda R Monteiro, Legal Assistant
Regan and Cantwell, LLC
105 Wappoo Creek Drive, Suite 1-A
Charleston, South Carolina 29412
Tel 843-762-8282
Fax 843-762-8284

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Hon Mikell R Scarborough, Master-in-Equity

RECEIVED
MAR 08 2011

Case No 2007-CP-10-00451

SC Court of Appeals

Historic Charleston Foundation and
Preservation Society of Charleston,

Appellants,

v

The City of Charleston, The City of Charleston
Board of Zoning Appeals – Zoning
and Library Associates, LLC

Respondents

CERTIFICATE OF SERVICE

The undersigned certifies that on the 7th day of March, 2011 a true and correct copy of the Respondents' Joint Designation of Matters to be Included in the Record on Appeal was placed in an envelope with first class postage prepaid and affixed thereto and mailed to the following

Attorneys for Historic Charleston Foundation
Edward K Pritchard, III, Esq
Samia H Nettles, Esq
Pritchard & Elliott, LLC
P O Box 630
Charleston, South Carolina 29402

Attorneys for Preservation Society of Charleston

G Trenholm Walker, Esq
Lindsay K Smith-Yancey, Esq
Daniel S McQueeney, Jr , Esq
Katie F Monoc, Esq
Pratt-Thomas Walker, PA
P O Drawer 22247
Charleston, South Carolina 29413-2247

Charleston, South Carolina

March 7, 2011

A handwritten signature in black ink, reading "Theda R. Monteiro". The signature is fluid and cursive, with a long horizontal line extending from the start of the name.

Theda R Monteiro, Legal Assistant
Regan and Cantwell, LLC
105 Wappoo Creek Drive, Suite 1-A
Charleston, South Carolina 29412
Tel 843-762-8282
Fax 843-762-8284

Law Offices
Regan and Cantwell LLC
William B Regan (Ret)
Frances I Cantwell

March 7, 2011

105 wappoo creek drive
suite 1 a
charleston sc
29412

tel 843 762 8282
fax 843 762 8284

Hon Tanya A Gee, Clerk
South Carolina Court of Appeal
P O Box 11629
Columbia, South Carolina 29211-1629

RECEIVED
MAR 08 2011
SC Court of Appeals

Re Historic Charleston Foundation and Preservation Society of Charleston v
The City of Charleston, the City of Charleston Board of Zoning-Appeals-
Zoning and Library Associates, LLC
Case Tracking No 2010169246
Civil Court Case No 2007-CP-10-451

Dear Ms Gee

In regard to the above, enclosed please find a copy of Respondents' Joint Initial
Brief and Joint Designation of Matters to be Included in the Record on Appeal
Also enclosed is a Certificate of Service on counsel

Please let me know if you need anything further from me

With kind regards, I am,

Yours truly,



Frances I Cantwell
FIC/trm
Enclosures

cc Edward K Pritchard, III, Esq (w/encls)
Samia H Nettles, Esq (w/encls)
G Trenholm Walker, Esq (w/encls)
Lindsay K Smith-Yancey, Esq (w/encls)
Daniel S McQueeney, Jr , Esq (w/encls)
Katie F Monoc, Esq (w/encls)
Timothy A Domin, Esq (w/encls)

e mail fcantwell@birch.net
tmonteiro@birch.net

The South Carolina Court of Appeals

Historic Charleston Foundation and
Preservation Society of Charleston, Appellants,

v

The City of Charleston, The City of
Charleston Board of Zoning Appeals-
Zoning, and Library Associates, LLC, Respondents

The Honorable Mikell R Scarborough
Charleston County
Trial Court Case No 2007-CP-10-00451

ORDER

For good cause having been shown, the time for the Respondents' Initial Brief and Designation of Matter to be served and filed in the above entitled matter is hereby extended until March 8, 2011. The Appellants' Initial Reply Brief shall be filed and served by March 29, 2011.

IT IS SO ORDERED

JOHN CANNON FEW, CHIEF JUDGE
For the Court

BY V. Claire Allen, Deputy
CLERK

Columbia, South Carolina
cc Edward K Pritchard, III, Esquire
G Trenholm Walker, Esquire
Frances I Cantwell, Esquire
Timothy A' Domin, Esquire

FILED
2/22/11

STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Hon Mikell R Scarborough, Master-in-Equity

Case No 2007-CP-10-00451

RECEIVED

FEB 18 2011

SC Court of Appeals

Historic Charleston Foundation and
Preservation Society of Charleston,

Appellants,

v

The City of Charleston, The City of Charleston
City Council and Library Associates, LLC

Respondents

MOTION FOR EXTENSION OF TIME TO
FILE RESPONDENTS' INITIAL BRIEF

The attorneys for the Respondents will be filing a joint brief and hereby move for
a fifteen (15) day extension, until March 8, 2011, by which to file their Initial Brief

The motion is necessitated due to counsels' workload

Respectfully submitted,

Charleston, South Carolina

February 15, 2011

Frances I Cantwell

Frances I Cantwell, Esq
Regan and Cantwell, LLC
105 Wappoo Creek Drive, Suite 1-A
Charleston, South Carolina 29412
Tel 843-762-8282
Fax 843-762-8284

Attorney for Respondent
Library Associates, LLC

2/22/11

(st)mt

3/8/11

Timothy A Domin by fe

Timothy A Domin, Esq
Clawson & Staubes, LLC
126 Seven Farms Drive, Suite 200
Charleston, South Carolina 29492-8144
Tel 577-2026
Fax 722-2867

Attorney for Respondents City of Charleston
and the City of Charleston City Council

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Hon Mikell R Scarborough, Master-in-Equity

Case No 2007-CP-10-00451

RECEIVED
FEB 18 2011
SC Court of Appeals

Historic Charleston Foundation and
Preservation Society of Charleston,

Appellants,

v

The City of Charleston, The City of Charleston
City Council and Library Associates, LLC

Respondents

CERTIFICATE OF SERVICE

The undersigned certifies that on the 15th day of February, 2011 a true and correct copy of the Respondents' Motion for Extension of Time in which to file Respondents' Initial Brief was placed in an envelope with first class postage prepaid and affixed thereto and mailed to the following

Attorneys for Historic Charleston Foundation

Edward K Pritchard, III, Esq
Samia H Nettles, Esq
Pritchard & Elliott, LLC
8 Cumberland Street, Suite 200
Charleston, South Carolina 29401

Attorneys for Preservation Society of Charleston

G Trenholm Walker, Esq
Lindsay K Smith-Yancey, Esq
Pratt-Thomas Walker, PA
P O Drawer 22247
Charleston, South Carolina 29413-2247

Charleston, South Carolina

February 15, 2011

A handwritten signature in black ink, reading "Theda R. Monteiro". The signature is fluid and cursive, with a long horizontal line extending from the end of the name.

Theda R. Monteiro, Legal Assistant
Regan and Cantwell, LLC
105 Wappoo Creek Drive, Suite 1-A
Charleston, South Carolina 29412
Tel 843-762-8282
Fax 843-762-8284

Law Offices
Regan and Cantwell LLC
William B Regan (Ret)
Frances I Cantwell

February 15, 2011

105 wappoo creek drive
suite 1 a
charleston sc
29412

tel 843 762 8282
fax 843 762 8284

Hon Tanya A Gee, Clerk
South Carolina Court of Appeal
P O Box 11629
Columbia, South Carolina 29211-1629

Re Historic Charleston Foundation and Preservation Society of Charleston v
The City of Charleston, the City of Charleston Board of Zoning-Appeals-
Zoning and Library Associates, LLC
Case Tracking No 2010169246
Civil Court Case No 2007-CP-10-451

Dear Ms Gee

In regard to the above, I am enclosing an original and six (6) copies of a Motion
for Extension of Time in which to file Respondents' Initial Brief The
Respondents will be filing a joint brief

Also enclosed is the \$25 00 filing fee, along with a Certificate of Service on
counsel

I have conferred with counsel for Appellants and they do not oppose this
motion

With kind regards, I am,

Yours truly,



Frances I Cantwell

FIC/trm

Enclosures

cc Edward K Pritchard, III, Esq (w/encls)
Samia H Nettles, Esq (w/encls)
G Trenholm Walker, Esq (w/encls)
Lindsay K Smith-Yancey, Esq (w/encls)

e mail fcantwell@birch net
tmonteiro@birch net

RECEIVED
FEB 18 2011
SC Court of Appeals

2/21/11

1st motion

Timothy A Domin, Esq (w/encls)

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Mikell R. Scarborough, Master-In-Equity

Case No. 2007-CP-10-451

RECEIVED
JAN 7 2011
SC COURT OF APPEALS

HISTORIC CHARLESTON FOUNDATION and
PRESERVATION SOCIETY OF CHARLESTON,

Appellants,

v

THE CITY OF CHARLESTON, THE CITY OF CHARLESTON
BOARD OF ZONING APPEALS – ZONING and LIBRARY
ASSOCIATES, LLC,

Respondents

APPELLENTS' JOINT DESIGNATION OF MATTER TO BE
INCLUDED IN THE RECORD ON APPEAL

Appellants hereby propose that the following be included in the Record on Appeal

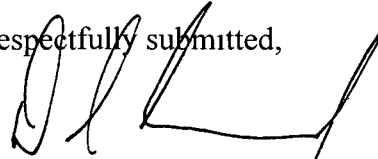
- 1 Complaint, Petition and Notice of Intent to Appeal, Civil Action No. 2007-CP-10-451, including Exhibits 1, 2 and 3,
- 2 Notice of Intent to Appeal,
- 3 Order Affirming Variance, dated June 24, 2010 and filed June 29, 2010,
- 4 Order of Judge Scarborough filed June 11, 2009,
- 5 Motion to Alter or Amend Judgment, dated May 3, 2010 and filed May 4, 2010,
- 6 Order of Judge Scarborough filed September 28, 2009,
- 7 Order on Remand of the BZA, filed April 13, 2010,
- 8 Zoning Map,

9 Transcript of BZA Meeting on January 2, 2007 (transcribed on April 25, 2007),
pp 70-76,
10 Hearing Transcript of the proceedings on March 10, 2009,
11 City of Charleston Downtown Plan,
12 BZA file on 404 King Street, filed in Civil Action No 2007-CP-10-451 on July 9,
2007,
13 Height Variance Application,
14 Form Order Granting Variance,
15 Application for Rehearing of Variance

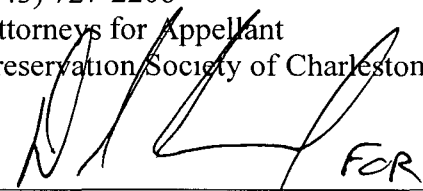
I certify that this designation contains no matter which is irrelevant to this appeal

January 7, 2011

Respectfully submitted,



G Trenholm Walker
Lindsay K Smith-Yancey
Daniel S McQueeney, Jr
Katie F Monoc
Pratt-Thomas Walker, P A
P O Drawer 22247
Charleston, SC 29413-2247
(843) 727-2208
Attorneys for Appellant
Preservation Society of Charleston



FOR
Edward K Pritchard, III, Esquire
Samia H Nettles, Esquire
Pritchard & Elliott, LLC
129 Broad Street
Charleston, SC 29401
(843) 722-3300
Attorneys for Appellant
Historic Charleston Foundation

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Mikell R Scarborough, Master-In-Equity

Case No 2007-CP-10-451

HISTORIC CHARLESTON FOUNDATION and
PRESERVATION SOCIETY OF CHARLESTON,

Appellants,

v

THE CITY OF CHARLESTON, THE CITY OF CHARLESTON
BOARD OF ZONING APPEALS – ZONING and LIBRARY
ASSOCIATES, LLC,

Respondents

PROOF OF SERVICE

I hereby certify that a true and correct copy of Appellants' Joint Initial Brief and Designation of Matter was served on this 7th day of January, 2011 via United States Mail, postage prepaid, upon the following counsel of record

Timothy A Domin, Esq
Clawson & Staubes, LLC
126 Seven Farms Drive, Suite 200
Charleston, SC 29492-7595

Frances I Cantwell, Esq
Regan & Cantwell, LLC
105 Wappoo Creek Drive, Suite 1-A
Charleston, SC 29412

RECEIVED
JAN 12 2011
SC Court of Appeals



Janet Segell
Paralegal to Daniel S McQueeney, Jr
Pratt-Thomas Walker, P A
Post Office Drawer 22247
Charleston, South Carolina 29413-2247

PROFESSIONAL ASSOCIATION

16 CHARLOTTE STREET
CHARLESTON SC 29403

PO DRAWER 22247
CHARLESTON SC 29413 2247

PHONE 843 727 2200
FAX 843 727 2238

WWW.P.TW.COM

E DOUGLAS PRATT THOMAS
G TRENHOLM WALKER
W ANDREW GOWDER JR
JON L AUSTEN
LINDSAY K SMITH YANCEY (SC NC)
CLAYTON B McCULLOUGH
THOMAS H HESSE (SC GA)
IAN W FREEMAN (SC CA)
FRANCIS M ERVIN II (SC MA)
DANIEL S McQUEENEY JR
JAMIE A KHAN
KATHLEEN FOWLER MONOC

January 7 2011

(843) 727 2247 (direct dial)
(843) 579 4811 (fax)
js@p.tw.com (e mail)

The Honorable Tanya A Gee
Clerk of Court
South Carolina Court of Appeals
P O Box 11629
Columbia SC 29211

RE Historic Charleston Foundation and Preservation Society of Charleston v The City of
Charleston The City of Charleston Board of Zoning Appeals – Zoning and Library
Associates LLC

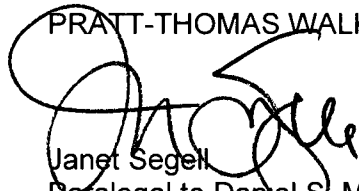
Dear Ms Gee

Please find enclosed Appellants Joint Initial Brief and Designation of Matter in the
above-referenced matter As evidenced by the enclosed Proof of Service I am serving the
adverse parties with copies of same

Thank you for your assistance in this regard

Very truly yours

RECEIVED
JAN 12 2011
SC Court of Appeals

PRATT-THOMAS WALKER, P A

Janet Segell
Paralegal to Daniel S McQueeney Jr

jas
enclosures

c Frances I Cantwell Esq
Timothy A Domin, Esq
Edward K Pritchard III Esq
Samia H Nettles Esq

The South Carolina Court of Appeals

Historic Charleston Foundation and
Preservation Society of Charleston, Appellants,

v

The City of Charleston, The City of
Charleston Board of Zoning Appeals-
Zoning, and Library Associates, LLC, Respondents

The Honorable Mikell R Scarborough
Charleston County
Trial Court Case No 2007-CP-10-00451

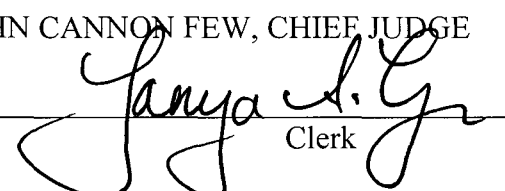
ORDER

Pursuant to a telephone conference with the parties, the due date for filing and serving the Appellants' Initial Brief and Designation of Matter has been extended until January 7, 2011. Thereafter, the Respondents' Initial Brief and Designation of Matter shall be filed and served by February 21, 2011. The Appellants' Initial Reply Brief shall be filed and served by March 14, 2011.

IT IS SO ORDERED

JOHN CANNON FEW, CHIEF JUDGE

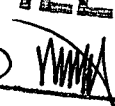
BY


Clerk

Columbia, South Carolina

cc Edward K. Pritchard, III, Esquire
G. Trenholm Walker, Esquire
Frances I. Cantwell, Esquire
Timothy A. Domin, Esquire

FILED

11/29/10 

The South Carolina Court of Appeals

Historic Charleston Foundation and
Preservation Society of Charleston, Appellants,

v

The City of Charleston, The City of
Charleston Board of Zoning Appeals-
Zoning, and Library Associates, LLC, Respondents

The Honorable Mikell R. Scarborough
Charleston County
Trial Court Case No. 2007-CP-10-00451

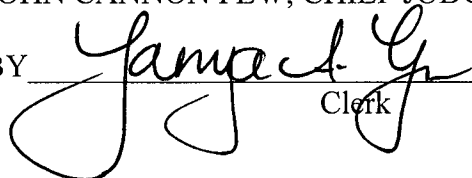
ORDER

Pursuant to a telephone conference with the parties, this appeal will be held in abeyance until Tuesday, November 23, 2010, when the Court will entertain another conference call with the parties at 9 a.m. The Appellants are responsible for initiating the call.

AND IT IS SO ORDERED

JOHN CANNON FEW, CHIEF JUDGE

BY


Clerk

Columbia, South Carolina

10/12/2010

FILED
10/12/10

cc Edward K Pritchard, III, Esquire
 G Trenholm Walker, Esquire
 Frances I Cantwell, Esquire
 Timothy A Domin, Esquire

/



The South Carolina Court of Appeals

JOHN CANNON FEW
CHIEF JUDGE

JOHN C. CALHOUN BUILDING
POST OFFICE BOX 11679
COLUMBIA, SOUTH CAROLINA 29211
TELEPHONE (803) 734 1890
FAX (803) 734 2373
E MAIL jfew@sccourts.org

September 30, 2010

Edward K. Pritchard III, Esquire
Pritchard & Elliott, LLC
129 Broad St
Charleston, SC 29401

G. Trenholm Walker, Esquire
Pratt Thomas & Walker, PA
P O Drawer 22247
Charleston SC 29413-2247

Frances I. Cantwell, Esquire
Regan & Cantwell
105 Wappoo Creek Drive
Suite 1 A
Charleston, SC 29412

Timothy A. Domin, Esquire
Clawson & Staubes, LLC
126 Seven Farms Drive
Suite 200
Charleston, SC 29492-7595

Re Historic Charleston v City of Charlst
2010169246

Dear Counsel

This letter serves as an Order granting Appellant request for an extension of time in which to file the Appellant's Initial Brief and Designation of Matter. I have extended the due date until October 27, 2010. I realize that this extension may not give you all the time you need to complete the Appellant's Initial Brief and Designation of Matter. I have set a conference call for 9:15 a.m. on Tuesday, October 12, 2010, to discuss an overall approach to setting due dates for all filings in this appeal. **The Appellant is responsible for initiating the conference call by getting all parties on the phone at the allotted time.** The call should last less than ten minutes. The participants in the call will include counsel for all parties and me. In preparation for the call, please consider the other time commitments you have in the near future so we can discuss a suitable timeframe for all parties to complete their briefs. If the time scheduled

for the conference call creates a conflict please contact the Clerk's Office at 734-1890 with all counsel on the phone We will reschedule the call to suit you

I look forward to talking to you on Tuesday, October 12, 2010

Sincerely yours,

John Cannon Few, Esq.
John Cannon Few
Janyard Gn
clerk

JCF/laf

FILED
10/1/10



September 28, 2010

Post Office Box 630 | Charleston SC 29402

129 Broad Street | Charleston, SC 29401

Tel (843) 722 3300 | Fax (843) 722 3379

Via Facsimile (803) 734-1839

The Honorable Jeanette F Barber

ATTN LAURIE FIELDS

Clerk of the South Carolina Court of Appeals

Post Office Box 11629

Columbia, SC 29211

RECEIVED

SEP 28 2010

SC Court of Appeals

RE Historic Charleston Foundation, et al v The City of Charleston, et al
Case No 2007-CP-10-0451
Case Tracking # 2010169246

Dear Ms Fields

Please be advised that Pritchard & Elliott, counsel for Historic Charleston Foundation received the transcript of hearing from the court reporter in the above matter on August 28, 2010. I inadvertently omitted that date from my transmittal letter filing Historic Charleston Foundation's motion for an extension of time to file its Initial Brief and Designation.

Sincerely,

A handwritten signature in black ink, appearing to read 'Samia H. Nettles', written over a horizontal line.

Samia H Nettles

CC G Trenholm Walker, Esq
Timothy A. Domin, Esq
Frances I. Cantwell, Esq



PRITCHARD & ELLIOTT, LLC
ATTORNEYS AND COUNSELORS AT LAW

Post Office Box 630 | Charleston SC 29402
129 Broad Street | Charleston SC 29401
Tel (843) 722 3300 | Fax (843) 722 3379
snettles@pritchard-elliott.com

September 20, 2010

RECEIVED
SEP 21 2010
SC Court of Appeals

The Honorable Jeanette F Barber
Clerk of the South Carolina Court of Appeals
P O Box 11629
Columbia, SC 29211

Re Historic Charleston Foundation, et al v The City of Charleston, et al
Case No 2007-CP-10-0451
Case Tracking # 2010169246

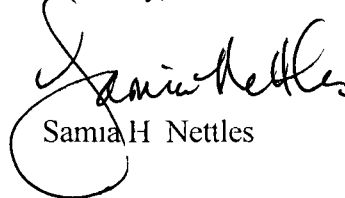
Dear Ms Barber

Enclosed herewith, please find an original and seven (7) copies of the *Notice of Motion and Motion for Extension of Time to File Appellant's Initial Brief and Designation of Matter to be Included in the Record on Appeal* in connection with the above-referenced matter. Please return a filed-stamped copy of the same to me in the enclosed self-addressed, stamped envelope.

I am serving all counsel of record in this matter by copy of this letter and its enclosure.

Also enclosed is a check in the amount of \$25.00 in payment of the motion filing fee. I thank you for your assistance in this matter.

Sincerely,



Samia H Nettles

enclosures

cc G Frenholm Walker, Esquire
Timothy A. Domin, Esquire
Frances I. Cantwell, Esquire
(w/enclosure)

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Honorable Mikell R. Scarborough, Master in Equity

Case Tracking No 2010169246

Historic Charleston Foundation and
Preservation Society of Charleston,

Appellant,

v

The City of Charleston, The City of
Charleston Board of Zoning Appeals- Zoning,
And Library Associates, LLC,

Respondent

**NOTICE OF MOTION AND MOTION FOR EXTENSION OF TIME TO
FILE APPELLANT'S INITIAL BRIEF AND DESIGNATION OF MATTER TO
BE INCLUDED IN THE RECORD ON APPEAL**

Appellant moves for a thirty (30) day extension of time to file its Initial Brief and Designation of Matter to be Included in the Record on Appeal. The Initial Brief of Appellant and Designation of Matter to be Included in the Record on Appeal are currently due on September 30, 2010.

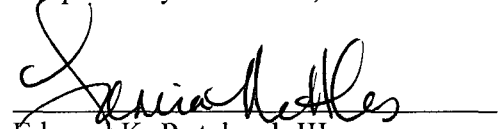
This motion is made on the grounds that this extension is in the best interests of justice and would not prejudice the Appellant.

RECEIVED
SEP 21 2010
SC Court of Appeals

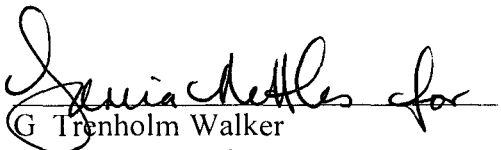
9/27/10 1st motion
10/27/10

In view of the foregoing, it is respectfully requested that Appellant be granted a thirty (30) day extension of time in which to file Appellant's Initial Brief and the Designation of Matter to be Included in the Record on Appeal

Respectfully submitted,



Edward K. Pritchard, III
Samia H. Nettles
Pritchard & Elliott, LLC
129 Broad Street
Post Office Box 630
Charleston, South Carolina 29401
(843) 722-3300
Attorney for Appellant Historic
Charleston Foundation



G. Trenholm Walker
Lindsay K. Smith-Yancey
Katie Fowler Monoc
Pratt-Thomas Walker, P.A.
Post Office Drawer 22247
Charleston, SC 29413-2247
(843) 727-2200
Attorney for Appellant Preservation
Society of Charleston

Charleston, South Carolina
September 20, 2010

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Honorable Mikell R. Scarborough, Master in Equity

Case Tracking No. 2010169246

Historic Charleston Foundation and
Preservation Society of Charleston,

Appellant,

v

The City of Charleston, The City of
Charleston Board of Zoning Appeals- Zoning,
And Library Associates, LLC,

Respondent

CERTIFICATE OF SERVICE

I hereby certify that the *Notice of Motion and Motion for Extension of Time to File Appellant's Initial Brief and Designation of Matter to be Included in the Record on Appeal* has been served on Timothy A. Domin, Esquire, and Frances I. Cantwell, Esquire, attorneys for Respondent, by depositing a copy of the same in the United States Mail, postage prepaid, on September 20, 2010, addressed follows

Timothy A. Domin, Esquire
Clawson & Staubes, LLC
126 Seven Farms Drive, Suite 200
Charleston, SC 29492-8144
Attorneys for Respondents
The City of Charleston and

RECEIVED

SEP 21 2010

SC Court of Appeals

The City of Charleston Board of
Zoning Appeals- Zoning

Frances I Cantwell, Esquire
Regan & Cantwell, LLC
105 Wappoo Creek Drive, Suite I-A
Charleston, SC 29412
Attorney for Respondent
Library Associates, LLC

A handwritten signature in cursive script, appearing to read "E. Edwards", is written over a horizontal line.

Legal Assistant
Pritchard & Elliott, LLC
129 Broad Street
Post Office Box 630
Charleston, South Carolina 29401
(843) 722-3300

Post Office Box 630 | Charleston SC 29402

129 Broad Street | Charleston SC 29401

Tel (843) 722 3300 | Fax (843) 722 3379

snettles@pritchard elliott com

August 18, 2010

Bernadette A Cali, CSR
Court Reporter
Charleston County Master In Equity
100 Broad Street, Suite 266
Charleston, SC 29401

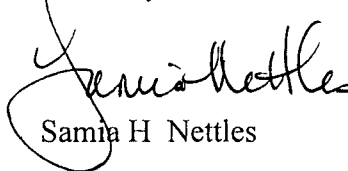
Re Historic Charleston Foundation, et al v The City of Charleston, et al
Case No 2007-CP-10-0451

Dear Ms Cali

Pursuant to South Carolina Appellate Court Rule 207, I am writing to request a transcript of the proceedings before Judge Scarborough with regard to Historic Charleston Foundation, et al v City of Charleston, et al, Case Number 2007-CP-10-0451. A Notice of Appeal was recently served and filed with the Court of Appeals, and I am requesting the transcript of the proceedings in connection with this appeal.

I greatly appreciate your time in putting together the transcript. Feel free to contact me with any questions or if I can provide you with additional information.

Sincerely,



Samia H Nettles

cc Timothy A Domin, Esquire
Frances I Cantwell, Esquire
G Trenholm Walker, Esquire
Office of Court Administration
Clerk of South Carolina Court of Appeals

RECEIVED
AUG 20 2010
SC Court of Appeals



The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11679
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE (803) 734 1890
FAX (803) 734 1839
www.sccourts.org

August 16, 2010

Edward K. Pritchard, III, Esquire
Pritchard & Elliott, LLC
129 Broad St
Charleston, SC 29401

Re Historic Charleston Foundation v City of Charleston
Case Tracking # 2010169246

Dear Mr. Pritchard

This office has received your Notice of Appeal in the above matter. It has been assigned the Case Tracking Number that appears above. Please use this number on all future correspondence relating to this matter.

I do wish to call the attention of the parties to the attached order relating to the inclusion of personal data identifiers and other sensitive information in documents filed with the Supreme Court of South Carolina and the South Carolina Court of Appeals. Please note that the responsibility for insuring that information is redacted or sealed as required by this order rests with counsel and the parties. This office will not review filings for redaction or to determine if materials should be sealed.

Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/khh

cc G. Trenholm Walker, Esquire
Frances I. Cantwell, Esquire
Timothy A. Domin, Esquire



The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE (803) 734 1890
FAX (803) 734 1839
www.sccourts.org

August 17, 2010

Edward K. Pritchard, III, Esquire
Pritchard & Elhott, LLC
129 Broad St
Charleston, SC 29401

Re Historic Charleston Foundation v City of Charleston
Case Tracking # 2010169246

Dear Mr. Pritchard:

We have received your Notice of Appeal in the case noted above. This case will be docketed in the Court of Appeals and all communications concerning this case, including motions and petitions, initial and final briefs, and the Record on Appeal, should be directed to and filed in this Court. For all filings, please note the requirements of Rule 267(a) of the South Carolina Appellate Court Rules, and be further advised that Court of Appeals policy requires the firm name of any counsel shown must be included in his or her address.

We suggest that large parcels such as copies of final briefs and the Record On Appeal be sent directly to the Court via the street address 1015 Sumter Street, Columbia, S C 29201. Thank you for your attention to this. Failure to file in the proper court may result in the dismissal of your appeal.

PLEASE BE ADVISED that, pursuant to Rule 207 of the South Carolina Appellate Court Rules, the transcript must be ordered within ten (10) days of the proof of service of the Notice of Appeal and you must provide this Court, opposing counsel, and the Office of Court Administration with all correspondence regarding the transcript. It is also Appellant's responsibility to make satisfactory arrangements (including agreement regarding payment for the transcript) with the Court Reporter for furnishing the transcript. You are reminded of the

notification requirements of Rule 207(a)(5), SCACR, also, please advise the Court in writing upon receipt of the transcript

NOTE If you believe this case has been improperly filed in the Court of Appeals, by reason of the limitations set forth in S C Code Ann Section 14-8-200(b)(1998), as amended June 1, 1999, notify the Clerk's office of the Court of Appeals immediately. The cited Code Section prohibits the Court of Appeals from hearing appeals in seven classes of cases

- 1) any final judgment from the circuit court which includes a sentence of death,
- 2) any final judgment from the circuit court setting public utility rates pursuant to Title 58,
- 3) any final judgment involving a challenge on state or federal grounds to the constitutionality of a state law or county or municipal ordinance where the principal issue is the constitutionality of the law or ordinance,
- 4) any final judgment from the circuit court involving the authorization, issuance, or proposed issuance of general obligation debt, revenue, institutional, industrial, or hospital bonds of the state, its agencies, political subdivisions, public service districts, counties, and municipalities or any other indebtedness now or hereafter authorized by Article X of the Constitution of this state,
- 5) any final judgment from the circuit court pertaining to elections and election procedure,
- 6) any order limiting an investigation by a State Grand Jury under S C Code Ann Section 14-7-1630,
- 7) any order of the family court relating to an abortion by a minor under S C Code Ann Section 44-41-33

Very truly yours,
Tanya A. Gee
CLERK

VA
TAG/khh

cc G. Trenholm Walker, Esquire
Frances I. Cantwell, Esquire
Timothy A. Domin, Esquire

POS 8/11/10
PM 8/11/10

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master-in-Equity

Case No. 2007-CP-10-0451

RECEIVED
AUG 13 2010
SC Court of Appeals

Historic Charleston Foundation and
Preservation Society of Charleston,

Appellants,

v

The City of Charleston, The City of
Charleston Board of Zoning Appeals-Zoning,
and Library Associates, LLC,

Respondents

NOTICE OF APPEAL

Appellants Historic Charleston Foundation and Preservation Society of Charleston appeal the order of the Honorable Mikell R. Scarborough filed June 29, 2010. Appellants received written notice of entry of the order on July 12, 2010.



G. Trenholm Walker Esq.
Lindsay K. Smith-Yancey, Esq.
Katie Fowler Monoc, Esq.
Pratt-Thomas Walker, P.A.
Post Office Drawer 22247
Charleston, SC 29413-2247
(843) 727-2200
Attorneys for Appellant Preservation Society of
Charleston



Edward K. Pritchard, III, Esq
Samia Hanafi Nettles, Esq
Pritchard & Elliott, LLC
129 Broad Street
Charleston, SC 29401
(843) 722-3300
Attorneys for Appellant Historic Charleston
Foundation

August 11, 2010

Other Counsel of Record

Timothy A. Domin, Esq
Clawson & Staubes, LLC
126 Seven Farms Drive, Suite 200
Charleston, South Carolina 29492-8144
Attorneys for Respondents
The City of Charleston and
The City of Charleston Board of
Zoning Appeals – Zoning

Frances I. Cantwell, Esq
Regan and Cantwell, LLC
105 Wappoo Creek Drive, Suite I-A
Charleston, South Carolina 29412
Attorney for Respondent
Library Associates, LLC

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master-in-Equity

Case No. 2007-CP-10-0451

Historic Charleston Foundation and
Preservation Society of Charleston,

Appellants,

v

The City of Charleston, The City of
Charleston Board of Zoning Appeals-Zoning,
and Library Associates, LLC,

Respondents

PROOF OF SERVICE

I hereby certify that a true and correct copy of the Notice of Appeal herein was served on this 11th day of August, 2010, via United States Mail, postage prepaid, upon the following counsel of record

Timothy A. Domin, Esq.
Clawson & Staubes, LLC
126 Seven Farms Drive, Suite 200
Charleston, SC 29492-8144

Frances I. Cantwell, Esq.
Regan and Cantwell, LLC
105 Wappoo Creek Drive, Suite I-A
Charleston, SC 29412



Janet Segell, Paralegal to
Daniel S. McQueeney, Jr., Esq.
Pratt-Thomas Walker, P.A.
P.O. Drawer 22247
Charleston, SC 29413-2247

RECEIVED
AUG 13 2010
SC Court of Appeals

PROFESSIONAL ASSOCIATION

16 CHARLOTTE STREET
CHARLESTON SC 29403

PO DRAWER 22247
CHARLESTON SC 29413 2247

PHONE 843 727 2200
FAX 843 727 2238

WWW.P.TW.COM

E DOUGLAS PRATT THOMAS

G TRENHOLM WALKER

W ANDREW GOWDER JR

JON L AUSTEN

LINDSAY K SMITH YANCEY (SC NC)

CLAYTON B McCULLOUGH

THOMAS H HESSE (SC GA)

IAN W FREEMAN (SC CA)

FRANCIS M ERVIN II (SC MA)

DANIEL S McQUEENEY JR

JAMIE A KHAN

KATHLEEN FOWLER MONROE

August 11 2010

(843) 727 2247 (direct dial)
(843) 579 4811 (fax)
js@p.tw.com (e mail)

RECEIVED

AUG 13 2010

SC Court of Appeals

The Honorable Tanya A Gee
Clerk of Court
South Carolina Court of Appeals
P O Box 11629
Columbia SC 29211

RE Historic Charleston Foundation and Preservation Society of Charleston v The City of
Charleston The City of Charleston Board of Zoning Appeals – Zoning and Library
Associates LLC

Dear Ms Gee

Please find enclosed a Notice of Appeal as well as the requisite filing fee in the above-
referenced matter As evidenced by the enclosed Proof of Service I am serving the parties with
a copy of the Notice through their respective attorneys

By copy of this letter I am also providing a copy of the Notice of Appeal to the
Charleston County Clerk of Court

Thank you for your assistance in this regard

Very truly yours

PRATT-THOMAS WALKER P A



Janet Segall
Paralegal to Daniel S McQueeney Jr

jas
enclosures

c Timothy A Domin Esq
Frances I Cantwell Esq

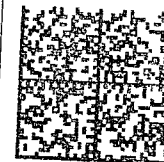
PRATT-THOMAS | WALKER

ATTORNEYS AT LAW

**16 CHARLOTTE STREET
CHARLESTON SC 29403**

**PO DRAWER 22247
CHARLESTON SC 29413 2247**

The Honorable Tanya A Gee
Clerk of Court
South Carolina Court of Appeals
P O Box 11629
Columbia, SC 29211



02 1P
0003144163 AUG 11 2010
MAILED FROM ZIP CODE 29403
\$ 001 73⁰

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

HISTORIC CHARLESTON FOUNDATION
and PRESERVATION SOCIETY OF
CHARLESTON,

Appellants,

vs

THE CITY OF CHARLESTON, THE CITY
OF CHARLESTON BOARD OF ZONING
APPEALS ZONING and LIBRARY
ASSOCIATES, LLC,

Respondents

COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO 2007-CP-10-451

ORDER
AFFIRMING VARIANCE

FILED
2010 JUN 29 PM 4 11
JULIE J ARMSTRONG
CLERK OF COURT

This case is an appeal from the determination of the City of Charleston Board of Zoning Appeals – Zoning (herein “Board”) to award a height variance to enable the construction of a 185 room hotel on property located at 404 King Street, the site of the old County Library A hearing was held on March 10, 2009

On June 9, 2009, I issued an Order remanding the matter back to the Board for rehearing as I determined the Form Order and transcript did not clearly articulate the Board’s reasoning On September 23, 2009, I issued a subsequent Order to clarify that my intent in the Order remanding the matter to the Board was to secure a written order with findings of fact and conclusions of law, leaving to the Board’s discretion whether it deemed a de novo hearing necessary or whether it wanted to issue its order based on the prior submission and transcript The Board met and has now issued a written order

After having reviewed the Board’s Order and Record and considered the argument of counsel, I find the decision of the Board should be affirmed and this appeal dismissed



In its Order, the Board made a number of findings. Among them were that all four sides of any structure built at 404 King Street would be visible to the public, 404 King is adjacent to Marion Square, a high frequency public use space, and is bordered on three sides by historic structures and spaces, any construction on the site had to address effects to nearby properties to include St. Matthews Lutheran Church, the Aimar Building and the Old Citadel, the 55/30 height district that divided the site resulted in greater massing along King Street and resulted in an L-shaped building when viewed from Marion Square, and no other site in the vicinity having these characteristics was identified. (Order on Remand, Findings 3, 4, 13, 21 and 22, Conclusions, pp 8-10) The Record supports these findings.

The Record reveals

Library Associates, LLC is the owner of a parcel of property located at 404 King Street in downtown Charleston, at the southeast corner of King and Hutson Streets. It purchased the property in the mid 1990's and in 2004, it was granted a special exception from the Board to construct a 185 room full service hotel at the site. In December 2005, the City's Board of Architectural Review gave conceptual approval to the mass, scale and height of the proposed hotel. (BZA Record, Transcript, p. 32, lines 3-5, p. 33, lines 1-10, p. 34, line 21-p. 35, line 2, BAR renderings, BZA renderings)

At times pertinent to this case, 404 King Street was subject to two (2) height districts.¹ Approximately sixty (60%) percent of the site was in the 3X height district, with the remainder being in the 55/30 district. The 3X district as applied to 404 King allows a height up to 105'. The 55/30 district sets a height ceiling of 55' and a floor of 30'. At 404 King Street, the

¹ In August 2007 the City Council of Charleston amended the height restrictions applicable to 404 King Street applying the 3X district to the entire site. Appellants have contested the amendment in a separate proceeding bearing Case No. 2007 CP 10-4692.

application of the two districts resulted in an L-shaped building envelope, with the 105' height amassed along the King Street frontage and part of the Hutson Street frontage (BZA Record, Height District Map, Tr p 29, lines 4 – 13, p 30, lines 1-7)

The Record reveals that a property having two separate height districts is not all that unusual. The Record substantiates that, in such instances, the greater height is stepped back from the street. The height districts at 404 King Street differed in this respect. There, the generous height was along the street, with the lower elevation applied to the interior of the site (BZA Record, Height District Map)

The Record reveals that 404 King Street is totally surrounded by the public realm. King Street to the west, Hutson Street to the north, the Old Citadel to the east and Marion Square to the south. Any building constructed at 404 King will have visibility on all sides. This is an unusual circumstance, as most buildings in the vicinity have visibility on but two sides.

After study, a building was designed that shifted the massing and height allowed by the 3X height district along King Street to the interior of the site. The resulting building is no larger in volume than that allowed by the two height districts, but distributes the volume across the site as opposed to having it concentrated along the King Street frontage (BZA Record, Tr p 28, lines 2-14, p 29, lines 9-13, BZA Record, hotel drawings/renderings). In December 2005, the BAR conceptually approved the design of a hotel that contemplated shifting some portion of the height allowed by the 3X height regulation back from King Street into the portion of the site zoned 55/30 (BZA Record, Tr p 34, line 8- p 35, line 2)

In December 2006, Library Associates applied for a height variance. At its meeting held on January 3, 2007, the Board approved the variance.

STANDARD OF REVIEW

In reviewing an order of a board of appeals, I must treat the Board's factual findings in the same manner as findings of fact by a jury. Additional evidence is not admissible. In determining the question presented, I am constrained to review only if the decision of the board is correct as a matter of law. S C Code Ann § 6-29-840 Austin v Board of Zoning Appeals, 362 S C 29, 606 S E 2d 209 (Ct App 2004)

Precedent is clear that I cannot substitute my judgment for that of the Board, even if I disagree with the decision of the Board. Talbot v Myrtle Beach Board of Adjustment, 222 S C 165, 72 S E 2d 66 (1952), Peterson Outdoor Advertising v City of Myrtle Beach, 327 S C 230 489 S E 2d 630 (1997), rehearing denied, Austin v Board of Zoning Appeals, *supra*. Moreover, I cannot reverse the ruling of the Board because my view of the facts is different. A zoning board should not be reversed except in a case where it has abused its discretion. Hartman v City of Columbia, 268 S C 44, 232 S E 2d 15 (1977)

The decision of the Board must be upheld if there is any evidence to support it. Burton v County of Abbeville, 312 S C 359, 440 S E 2d 396 (Ct App 1994), rehearing denied

CONCLUSIONS

Appellants contend that the variance application failed to meet the criteria of the variance test set forth in S C Code Ann § 6-29-800 (2004), that the Board gave inappropriate consideration to aesthetics and finances, that the Order of the Board fails to comply with the requirements of S C Code Ann § 6-29-800(E) (2004), that the version of the hotel presented to the Board was not that which had been conceptually approved by the BAR, and that, as a matter

of law, Library Associates is not entitled to a variance because the height restrictions were in place when it purchased the property I will address each contention separately

Appellants contend the Board erred in granting Library Associates a height variance because there are no exceptional or extraordinary circumstances applicable to 404 King Street that do not otherwise apply to properties in the vicinity They further contend there was no evidence that the application of the separate height districts unreasonably restricted the use of the site and that the award of the variance would be of detriment to adjoining properties and the character of the district The Record contains evidence to support the Board's findings to the contrary and as required by requirements of S C Code Ann § 6-29-800 (2004),

1 The Board found and the Record reveals that, as compared to other properties in its vicinity, 404 King Street is exceptional by virtue of its unique location It fronts on King Street, Marion Square and Hutson Street, and adjoins the Old Citadel All four facades of a building constructed there will be visible As found by the Board, the zoning administrator made note that the site " has no backside" (Order on Remand, Finding 21, Tr p 28, lines 2-20) This circumstance does not apply to any other property in the vicinity And as noted by Chairman Krawcheck

"So what we're here to do apply the zoning variance test The issue is whether there's a hardship The zoning variance test, the hardship test is where extraordinary and exceptional conditions pertaining to this particular piece of property I do not believe that the fact that the height ordinance divides this property is of its - - in and of itself an extraordinary exceptional condition, but I do think that this property suffers from a hardship in that its next to the old Citadel, it's surrounded on two sides by King Street and Hudson, and it's on Marion Square, and I don't think there's another piece of property that I can think of that fits this situation

(BZA Tr p 74, lines 6-15)

The Board's finding and conclusion that the location of the site on Marion Square and its being flanked on all sides by the public realm makes 404 King the exception, and not the rule, is supported by evidence in the record

2 The Board found and the Record reveals that the two height districts affect 404 King Street in a manner different from other properties with two height districts. On virtually all other properties where two height classifications apply, the greater height is stepped back from the street, distributed to the interior of the site. At 404 King, the greater height is amassed along the King Street frontage, the lower height being to the interior of the site. Applying the height districts to the site in this manner results in an awkward, L-shaped building envelope that all parties conceded would never pass design muster. The application of the height districts in this manner produces an anomaly: the zoning acknowledges the appropriateness of 3X height, yet renders it unattainable because of how the zoning distributes the height. That this circumstance constitutes an unreasonable restriction on the use of the property is unassailable.

Moreover, the height variance does not authorize a building taller than that already permitted in the 3X district. As explained by the zoning administrator:

And the request that's before you tonight seems pretty simple, but this simple explanation that is on your agenda, which really addresses the variance being requested, doesn't really accurately describe the true nature of what's being requested because we have a site that is located within two different height districts and the proposed building on this site will not exceed the maximum allowed height in the height district along King Street and that's important to understand I think because we're really not talking about a variance to allow a building taller than what is already allowed on this site.

(BZA Tr p 28, line 21- p 29, line 3)

3 Evidence demonstrated that an exceptional condition applied to 404 King Street because of its unique location on Marion Square, where a building will have visibility from all

sides Evidence demonstrated that a strict application of the height districts resulted in an impossible building envelope regardless of use While the Board evaluated the variance in terms of the contemplated hotel, its reasoning would apply to any proposal

Appellants contend there is no entitlement to "max out" under a given building standard Such may be true, but that does not render it unreasonable for a property owner to seek to avail himself of at least some portion of the benefits of his zoning The ordinance recognizes the appropriateness of the 3X height on the site making it only reasonable that use of some portion of that height be attainable Moreover, as found by the Board, the building envelope proposed did not incorporate all allowable volume and the overall mass was roughly equivalent to what would have been permitted under the split districts (Order on Remand, Finding 16)

Appellants contend that a building could be constructed at 404 King that conformed to the 55/30 height district, and thus no hardship exists The South Carolina Supreme Court has held that such a circumstance is not dispositive on the issue of hardship In Restaurant Row Associates v. Horry County 335 S C 209, 516 S E 2d 442 (1999) the Court held that a variance applicant is not required to prove that without a variance there are no feasible conforming uses for the property in question in order to demonstrate hardship

4 As for detriment to adjoining properties and the character of the district, the Record contains testimony in support of the variance from those living and working and owning property nearby (BZA Record Tr , p 46, line 13 – p 48, line 12 p 49, line 10 – p 50, line 4) As for detriment to the district, the Record contains testimony that the building is in keeping with the tradition of the district (BZA Record, Tr , p 42, line 22 – p 43, line 17) The Board s findings and conclusion that the evidence supporting the variance will foster a project that will greatly benefit Upper King Street/Marion Square and the surrounding neighborhood, and that

shifting the mass of the structure to be built on the site away from King Street accommodates a building that better relates to the Old Citadel and St Matthews Church, all to the benefit of the district, are amply supported by the Record

The Record and its Order reveals the Board gave careful consideration to each prong of the variance test, and the Record contains evidentiary support for each of the Board's findings with respect thereto

The Record does not support Appellants' assertion that the Board premised its decision on aesthetics or finances. Discussion of the Board was clear that the test before it was the variance test, independent of what the planning commission, the board of architectural review or city council deemed advisable. The discussion of the Board as reflected in the transcript is devoid of any mention of finances, a point specifically addressed on the motion to reconsider (R BZA Tr pp 70-76, R BZA Tr , Motion to Reconsider). And as noted by the Board, had finances been the driving force behind the variance request, logic would dictate that the applicant would have sought to utilize every inch of available volume, which it did not do.

Appellants' issue with the form of the Board's order is now moot. The Board's Order on Remand includes specific and articulate findings and its reasoning in making the conclusions it did. The Order on remand complies with S C Code Ann § 6-29-800 (E).

The Record does not substantiate the contention there was a misrepresentation of fact to the Board. The BAR had conceptually approved the height, scale and mass of the hotel. That conceptual approval included a hotel of eight (8) stories, with height distributed to the interior of the site. That was the exact concept presented to the Board. The drawings filed with the variance application dispel any contention to the contrary (BZA Record, hotel drawings/renderings).



Appellants' contention that, as a matter of law, Library Associates is precluded from receiving a height variance because the height regulations were in place when it purchased the property is misdirected

Cases cited by the Appellants on this issue generally include circumstances where property owners sought to establish a use not authorized by the zoning in place at the time of purchase. See Rush v. City of Greenville, 246 S.C. 268, 143 S.E.2d 527 (1965). All such precedent predates the decision rendered in Heilker v. Zoning Board of Appeals, 346 S.C. 401, 552 S.E.2d 42 (Ct. App. 2000), where for the first time, the term "use" was defined in the context of zoning. In Heilker, the Court of Appeals held

A "use" in the zoning context is the "purpose or activity for which land or buildings are designed, arranged, or intended, or for which land or buildings are occupied or maintained" 552 S.E.2d at 48

Library Associates is not seeking to establish a "use" that is prohibited by zoning. 404 King is zoned for hotel uses, and Library Associates has gotten the required special exception to construct one. The "use" to which Library Associates seeks to put the site is a hotel. Height is not a "use", or an "activity", or a "purpose" for which a building is occupied. Height is but an aspect of development.

The preexisting zoning or "prior knowledge rule" was adopted in response to those situations where a speculator paid a premium for land with the intention of getting a variance for an unauthorized use to justify his investment. 3 Rathkopf's The Law of Zoning and Planning, § 58.22 (4th ed.). That is not the fact situation here.

The application of the prior knowledge rule must be read in conjunction with Heilker. The construction of the rule urged by Appellants is inconsistent with the definition of "use" as set forth in Heilker. And, the application of the rule as urged by Appellants would render illegal

any dimensional or development standard variance, from parking to setbacks to landscaping to lighting, even when such variances are necessitated by the application of state or federal laws or regulations. The prior knowledge rule governs variances for uses not authorized by zoning when the property was purchased, not variances from dimensional or site development standards applicable to an authorized use.

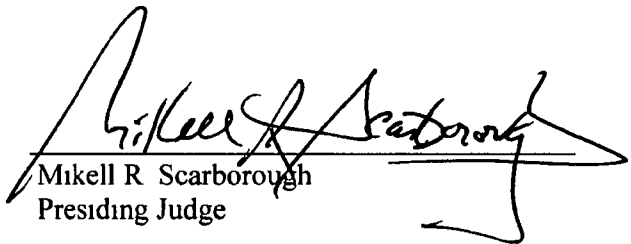
NOW, THEREFORE, in light of the foregoing, it is

ORDERED that the decision of the Board be, and hereby is, affirmed, and it is

ORDERED that this appeal be, and hereby is, dismissed, and

IT IS SO ORDERED!

June 24, 2009
Charleston, South Carolina


Mikell R. Scarborough
Presiding Judge