THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
JUN 22 2011
S C. Supreme Court

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 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) 722-3300Attorneys for Appellant
Historic Charleston Foundation

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

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 11)** 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 requires! 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)

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 11)** 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

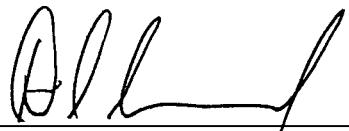
The Downtown Plan is relevant on appeal, however, because, even if the BZA-Z had considered it, they would have been compelled to reject the variance application As discussed by Appellants in their initial brief, the Developer's variance application (and the BZA-Z's variance decision) are completely 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

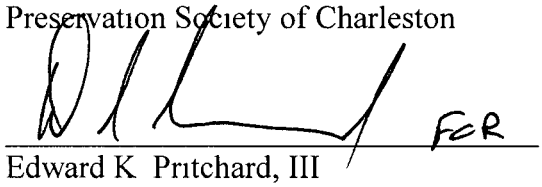
The Developer failed to establish each of the factors necessary to justify a variance for 404 King The Developer sought relief, not from a particularized physical burden of the property, but from the zoning ordinance itself Because the BZA-Z failed to utilize the proper

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
June 20, 2011

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

CERTIFICATE OF COUNSEL

The undersigned certifies that Apellants' Joint Reply Brief complies with Rule 211(b), SCACR

June 20, 2011

Daniel S McQueeney, Jr.
Pratt-Thomas Walker, P A
P O Drawer 22247
Charleston, SC 29413-2247
Attorney for Appellant Preservation
Society of Charleston

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 Appellants' Joint Reply Brief was served on this 20th day of June, 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 29492-8144

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