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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

G. D. Morgan, Judge

Appellate Case No. 2024-000727

Letchworth Properties, LLC ……... Appellant,

v.

City of Greer and City of Greer
Board of Zoning Appeals ……..... Respondents.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This case originated with an appeal from a decision rendered by the Greer Board of Zoning Appeals ("Board") denying Appellant, Letchworth Properties, LLC's request for a variance from fence regulations that required a wall or fence in the Downtown Overlay District to be constructed of masonry or wrought iron. Following the denial of the variance, the Board issued a document entitled "Official Action" which was served on Appellant by certified mail on September 15, 2022. Appellant served and filed its Notice of Appeal to the Greenville County Circuit Court on September 28, 2022. The Board's final decision, "Findings of Fact and Conclusions of Law" was filed with the court on February 8, 2023.

The matter was heard by the Honorable G. D. Morgan in the Greenville County Circuit Court on January 10, 2024. Present before the Court were Daniel R. Hughes, Attorney for the Respondents, City of Greer ("City") and City of Greer Board of Zoning Appeals ("Board") and J. Marshall Lawson, attorney for the Appellant. The Court denied the Appeal by issuing a Form 4 Order, filed January 22, 2024, and by formal Order, filed February 5, 2024. Appellant filed a Motion to Reconsider Judgement and Alter or Amend on February 12, 2024 which the court also denied by Form 4 Order, filed April 3, 2024.

STANDARD OF REVIEW

The South Carolina Local Government Comprehensive Planning Enabling Act of 1994 ("1994 Comprehensive Act") grants a zoning Board of appeals the power "to hear and decide appeals for a variance from … the zoning ordinance when strict application of the … ordinance would result in unnecessary hardship."[1]

The decision of a 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.[2] "An abuse of discretion occurs when [a decision] is based upon an error of law or, when based upon factual conclusions, is without evidentiary support."[3] When the trial judge is

[1] S.C. Code Ann. § 6-29-310 et seq.; SC Code Ann. § 6-29-800.

[2] Stevenson v. Board of Adjustment of City of Charleston, 230 S.C. 440, 96 S.E.2d 456 (1957); Hodge v. Pollock, 223 S.C. 342, 348, 75 S.E.2d 752, 754-55 (1953).

[3] Fontaine v. Peitz, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987).

vested with discretion, but his ruling reveals no discretion was, in fact, exercised, an error of law has occurred.[4] Where the judge determines the certified record is insufficient for review, the matter should be remanded to the zoning board of appeals for rehearing.[5]

FACTS

1. In 2017, Appellant, Letchworth Properties, LLC, purchased a former railroad depot in downtown Greer, with the initial goal of transforming the badly aging structure into combination event rental space and corporate office suites.

2. The Deed to the property came with a restrictive covenant requiring public parking on Appellant's property, effectively barring Appellant from constructing security fencing in the east parking lot abutting the neighboring railroad right of way.[6]

3. The two-story, west wing houses the corporate office suites. The remaining area of the building was transformed from several small retail suites to a large venue space for a variety of rental events, e.g., meetings, weddings and reunions.

4. As the result of Appellant's efforts, the newly christened, "Historic Greer Depot" became the appealing centerpiece for the City of Greer with attendant benefits to the City's tax base, neighboring businesses and overall esthetics of the downtown business district.

5. CSX Transportation ("CSXT") maintains an active railroad track/right of way that

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[4] Fontaine, 291 S.C. at 53-539, 354 S.E.2d at 566.

[5] Massey v. City of Greenville Bd., 341 S.C. 193, 202, 532 S.E.2d 885 (Ct. App. 2000) (citing S.C. Code Section 6-29-840).

[6] Deed into Appellant's Grantor, Station One Partnership, LLC (the restriction contained in the Deed runs with the land); Appellant's Supp. Mot., Part B, p. 10.

abuts Appellant's property a mere 15 feet from the back of the Depot building's property. The track also abuts the public parking on the wings of Appellant's property.

6. Notwithstanding the ultrahazardous nature of an active rail corridor, no public security fencing was in place to protect the public in the downtown business district from the active rail line.

7. Recognizing the need for security fencing on its property, Appellant offered the City a permanent easement for parking in 2018 in exchange for the City's construction of protective fencing and signage in the public parking lot which the City, for unknown reasons, summarily rejected.[7]

8. In order to protect guests and the public, Appellant hired a contractor to construct what it believed to be an esthetically pleasing (powered coated, chain link) security fence, 4 feet in height, between Appellant's property and the railroad. (Figure 1, below).

9. With the permission of CSXT and in furtherance of rail safety, a section of the fence was constructed on the CSXT right of way to avoid violating the deed restriction pertaining to the public parking lot.

10. Prior to construction, the fence contractor erroneously informed Appellant it did not need a construction permit for this type of fence. The contractor's erroneous belief was seemingly confirmed after Appellant consulted what it believed to be the applicable building code,

[7] Email to City Attorney, Daniel Hughes, dated March 30, 2018 proposing an Easement for Public Parking Agreement (requiring the City erect "signage and fencing necessary to warn the public and prevent trespassing onto the railroad track/right-of-way from the parking area.").

published online, which stated no permit was required for fencing under 7 feet in height.[8] Appellant failed to realize the code pertained to residential and not commercial properties.

Figure 1 (showing Appellant's fence relative to the Depot building, the east [public] parking lot, and CSXT right of way)

11. There was no mention of fence regulations in the table of contents of the City's zoning ordinance. Someone searching for fence design regulations would have had to read through 135 pages of the ordinance to find them mentioned in Section 5.18 DT of the Downtown Overlay District regulations.

12. Had the contractor sought a construction permit, Appellant would have been alerted both to the need for a construction permit and to the applicable fence ordinance. The ordinance,

[8] Letchworth mistakenly consulted an online building code for the City of Greer [2015 IRC, Section R105.2 Number 2], which stated "[p]ermits shall not be required for fences not over 7 feet (2,134 millimeters) high."

which is purely esthetic in nature, makes fencing optional but requires fencing constructed in the Downtown Overlay District be composed of wrought iron or masonry.

13. Appellant's contractor began construction of the fence on July 19, 2022. On August 2, 2022, 15 days after starting construction and on the final day of fence construction, Petitioner received a text notification from the planning department stating the fence failed to comply with regulations and would have to come down.

14. Facing the prospects of removing and replacing the fence it had already paid for with a conforming fence costing roughly three times that of the fence constructed or having no security fence at all, Petitioner filed a request for a hardship variance with the Greer Board of Zoning Appeals ("Board") on August 19, 2022.[9]

15. The Board conducted a hearing on the matter on September 12, 2022, in which Petitioner argued it satisfied each element required for a hardship variance and additionally the fence, as constructed, was consistent with the public purpose of the City's zoning code in promoting the safety, health and the general welfare. At least 25 residents appeared in support of Petitioner's request for the variance; no member of the public expressed opposition thereto.

16. The Board denied the variance and thereafter published a decision entitled "Official Action", dated September 14, 2022, which was delivered to Appellant by certified mail on September 15, 2022.

17. Appellant served and filed its Notice of Appeal to the Greenville County Circuit

[9] Transcript Board Hearing, p. 12, ll. 21-23, p. 1-15; Appellant's Supp. Brief, Part A, p. 18.

Court on September 28, 2022.

18. The Board filed its undated final decision, "Findings of Fact and Conclusions of Law", with the lower court under the heading "Record on Appeal" on February 8, 2023.

ARGUMENTS

Ordinances in derogation of natural rights of persons over their property are to be strictly construed as they impact the owner's right to use private property so as to realize its highest utility. As the Supreme Court of our sister state, North Carolina, has held, "[t]he plain intent and purpose of a [variance] statute is to permit, through the Board of Adjustment, the amelioration of the rigors of necessarily general zoning regulations by eliminating the necessity for a slavish adherence to the precise letter of the regulations where, in a given case, little or no good on the one side and undue hardship on the other would result from a literal enforcement.[10]

Here, little or no good would be obtained from adherence to the precise letter of regulations requiring removal of the security fencing. Removal would simply recreate the ultrahazardous condition that existed prior to fence construction or in the alternative compel construction of ornate fencing on Appellant's property of dubious esthetic benefit to the industrial rail corridor. By contrast, a variance from the zoning ordinance would do substantial good in promoting the health, safety and general welfare of the neighborhood by providing a much-needed and cost-effective barrier between Appellant's property, including the public parking lot on the property, and the active rail line.

[10] Lee v. Board of Adjustment of City of Rocky Mount, 226 N.C. 107, 111, 37 S.E.2d 128, 132 (N.C. 1946).

Appellant argues it satisfied each of the requirements necessary for granting a hardship variance under South Carolina law and that the Board's denial was arbitrary and capricious. Appellant further argues the circuit court abused its discretion in upholding the Board's denial by (a) failing to ensure the Board's decision was supported by competent, material and competent evidence as to each element of the 1994 Comprehensive Act; (b) going outside the Board's Conclusions of Law to uphold the Board's decision based on the arbitrary and capricious opinions of staff that were not discussed in any substantive detail by the Board, if at all; (c) arbitrarily finding the Board did not deny Appellant's constitutional right to due process; and (d) failing to exercise any discretion whatsoever concerning Appellant's specific requests for relief regarding the deed restriction prohibiting fencing of any type in the public parking lot on Appellant's property.

I. THE CIRCUIT COURT ABUSED ITS DISCRETION IN AFFIRMING THE BOARD'S ARBITRARY AND CAPRICIOUS FINDINGS OF FACT AND LAW REGARDING EACH OF THE FOUR REQUIREMENTS FOR GRANTING A HARDSHIP VARIANCE UNDER THE SOUTH CAROLINA COMPREHENSIVE PLANNING AND ENABLING ACT.

A. Unnecessary Hardship.

Both counties and municipalities are authorized to adopt zoning and land development ordinances by the Local Government Comprehensive Planning and Enabling act of 1994.[11] Section 6-29-800(A)(2) of the Act enables the zoning board of appeals to hear and decide appeals for a variance from the requirements of the zoning ordinance when strict application of the provisions

[11] S.C. Code Ann. § 6-29-310, et seq.

of the ordinance would result in "unnecessary hardship".[12]

South Carolina courts have not derived an all-inclusive definition of unnecessary hardship, finding the term does not lend itself to precise definitions automatically resolving every case.[13] But the unnecessary hardship standard is not as demanding as a takings analysis and variance applicants are not required to prove there is no feasible conforming use for the property without the variance in order to show unnecessary hardship."[14] A variance can be allowed on the ground of unnecessary hardship where there is at least proof that a particular property suffers a singular disadvantage through the operation of a zoning regulation.[15] Situations where a literal enforcement of the provisions might result in serious injustice to a particular individual or practical difficulties are sufficient to support a variance.[16]

Here, an unnecessary hardship arises in the form of (a) the exorbitant cost of removing the current security fence and either having no security fence or replacing it with an even more costly fence; (b) the aforementioned deed restriction on Appellant's property prohibiting the construction of any type of fencing in the public parking lot; (c), city-sponsored trespass on private property, exacerbating the need for security fencing; and (d) the City's negligent delay in notifying Appellant

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[12] S.C. Code Ann. § 6-29-800(A)(2).

[13] Stevenson, 230 S.C. at 448, 96 S.E.2d at 460.

[14] Restaurant Row Associates v. Horry County, 335 S.C. 209, 217, 516 S.E.2d 442 (1999).

[15] Stevenson, 230 S.C. at 449, 96 S.E.2d at 460.

[16] Id.

the fence was nonconforming.[17] The resulting practical difficulties constitute a serous injustice to Appellant that is not shared with other properties in the Downtown Overlay District.

B. Elements Required to Show Unnecessary Hardship.

Pursuant to Section 6-29-800 of the 1994 Comprehensive Act, a board of zoning appeals may grant a variance from zoning regulations in an individual case of unnecessary hardship provided the Board makes the following findings: (a) There are extraordinary and exceptional conditions peculiar to the piece of property; (b) these conditions do not generally apply to other property in the vicinity; (c) because of these conditions, the application of the ordinance to the particular piece of property would effectively prohibit or unreasonably restrict the utilization of the property; and (d) the authorization of 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 the granting of the variance.[18]

1. There are Extraordinary and Exceptional Conditions Peculiar to the Property.

In its Findings of Fact and Conclusions of Law, the Board found Appellant's property did not meet the requirements for a variance because the property "is of similar shape and size of the surrounding properties, which have complied with this fencing requirements [sic] established by the zoning ordinance."[19] The Board's Conclusion of Law, however, misconstrues the applicable legal standard. The term "extraordinary and exceptional conditions" is not limited to the shape and

[17] Appellant's Supp. Mot., Part B, p. 10; Circuit Court Transcript, p. 5, ll. 7-10.

[18] S.C. Code Ann. § 6-29-800.

[19] Board's Final Decision "Findings of Fact and Conclusions of Law", p. 2.

size of a property but includes any condition that would make it difficult to make reasonable use of the property.[20] "Moreover, while 'peculiar' may mean 'unique' or 'exclusive,' it also may mean 'unusual,' 'odd,' 'rare,' or 'strongly deviating from the norm."[21]

In addition to misconstruing the correct legal standard, the Board's Conclusion of Law conflicts with the facts. Appellant owns and operates the only venue facility within the Downtown Overlay District abutting an active rail line, a facility that prior to Appellant's security fencing, allowed unrestricted access to the active rail line via large doors in the back of the building and from the wings to the property, including the east parking lot on Appellant's property. This extraordinary set of conditions is compounded by public parking on Appellant's property, again with no security barrier between the parking lot and rail line prior to fencing. None of the other properties in the City's Downtown Overlay District exhibit the singular conditions and disadvantages applicable to Appellant's property.

Instead of addressing the Board's actual Conclusion of Law, the court adopted the planning director's conclusory opinion expressed at the hearing that "[a]appellant fails to present sufficient evident that its property suffers a singular disadvantage through the operating of the zoning regulations".[22] The staff director grounded her opinion on the premise that Appellant's property is

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[20] Grays Hill Baptist Church v. Beaufort Cnty., 427 S.C. 57, 71, 828 S.E.2d 234, 242 (Ct. App. 2019) (*rev'd on other grounds by* Grays Hill Baptist Church v. Beaufort Cnty. 431 S.C. 630, 850 S.E.2d 29 (2020) ("Extraordinary conditions could exist due to topography, street widening, beachfront setback lines *or other conditions* which make it difficult or impossible to make reasonable use of the property...") (*emphasis added*).

[21] Bennett v. Sullivan's Island Bd. of Adjustment, 313 S.C. 455, 458, 438 S.E.2d 273, 274 (Ct. App. 1993).

[22] Order, p. 7.

no different from other properties within the Downtown Overlay District abutting the rail corridor.[23] But as stated above, none of the other abutting properties in the rail corridor shared Appellant's peculiar and extraordinary features and there is nothing in the transcript indicating the Board even discussed or considered staff's opinion at the hearing.

In addition to upholding a decision without factual support, the circuit court exceeded its scope of review by going outside the Board's Conclusion of Law. Section 6-29-800(F) of the 1994 Comprehensive Act which requires a Board to make written Findings of Fact and Written Conclusions of Law in support of its decision to grant or deny a variance.[24] In the absence of such written conclusions, courts reviewing the decisions of zoning boards may look to written documents as well as records of proceedings as sufficient formats for rendering final decisions, but the court should not simply disregard the Board's written Conclusions of Law and substitute its own conclusions of law, especially where as here, such conclusion is devoid of factual support.[25] Otherwise, Appellant is forced to address two separate and potentially contradictory rulings, one by the Board and one by the court adopting an opinion of staff.

In summary, the circuit court's Order conflicts with the facts, does not address the Board's

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[23] Board Transcript p. 29, ll. 17-23, p. 30, ll. 1-5) ("… there are many properties that have a boundary with the railroad. This is not unique in that factor.").

[24] S.C. Code Ann. § 6-29-800(F) (requiring [a]ll final decisions and orders of the board must be in writing and that [a]ll findings of fact and conclusions of law must be separately stated . . . .").

[25] See Austin v. Board of Zoning Appeals, 362 S.C. 29, 35, 606 S.E.2d 209 (Ct. App. 2004) (municipalities are not free to ignore "the mandate of section 6-29-800 and other statutory provisions requiring fully formed written final decisions."); see also, Massey, 341 S.C. at 200 (citing S.C. Code Ann. § 6-7-740).

Conclusion of Law and instead adopts a clearly erroneous and conclusory opinion of staff that was not discussed by the Board in any meaningful way at the Hearing. The circuit court, accordingly, abused its discretion in upholding the Board's finding of no extraordinary and exceptional conditions under Section 6-29-800(A)(2)(a) of the 1994 Comprehensive Act.

2. These Conditions do not Generally Apply to other Property in the Vicinity.

In the Board's Conclusions of Law, the Board found "(t]he variance request does not meet this requirement. The requirements of the Downtown Overlay District are enforced on all properties within the overlay."[26]

The proper analysis under South Carolina law, however, is not whether zoning regulations are uniformly enforced, but whether a particular hardship is shared with properties throughout the zoned area.[27] This Court has held "peculiar" does not mean "unique," but rather describes a situation that is unusual, odd, rare, or strongly deviating from the norm.[28] Here, the exceptional conditions applicable to Appellant's property are certainly unusual if not unique among properties in the Downtown Overlay District, even among those abutting the rail corridor.

The Board failed to discuss or even enquire about evidence of another property or properties in the applicable zoning district with the special security features applicable to Appellant's property as referred to above. Accordingly, the circuit court abused its discretion by upholding the Board's arbitrary and clearly erroneous Conclusion of Law under 6-29-800(A)(2)(b)

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[26] Board's Findings of Fact and Conclusions of Law, p. 2.

[27] SC Code § 6–29–800(A)(2)(a)–(b).

[28] Bennett, 313 S.C. at 458, 438 S.E.2d at 275.

of the 1994 Comprehensive Act.

3. Because of these Conditions, the Application of the Ordinance to the particular Piece of Property would Prohibit or Unreasonably Restrict Utilization of the Property.

In its Conclusions of Law under this Section 6-29-800(A)(2)(c) of the 1994 Comprehensive Act, the Board found "[t]he property was used as both commercial retail space and an event space without a fence [thus] the requirement of not allowing a chain link fence will not prohibit or restrict the utilization of the property."[29] The Board's meaning is not entirely clear but appears to suggest security fencing was unnecessary.[30] The capricious argument implicit in the Board's conclusion that no one has been injured and therefore no one will be injured without fencing exemplifies the City's pro forma consideration of Appellant's variance request and cavalier attitude toward public safety in the rail corridor in general.

Trespassing is the leading cause of rail-related deaths in the United States nationally with more than 500 trespass fatalities occurring each year.[31] An active rail corridor, such as the one in the heart of Greer's Downtown Overlay District, deserves more than a capricious dismissal by the

[29] Board's Findings of Fact and Conclusions of Law, p. 2; Board Transcript p. 30, ll. 18-20.

[30] Mot. to Reconsider, p. 6 (Use of the property as a venue only commenced after Appellant finalized the extensive renovations which transformed the structure from retail suites to venue space and received its occupancy permit on August 3, 2021. Prior to that, the building housed several small business suites, but invitees had at most, limited access to the railroad from fire doors in the back of the suites. That exposure was in sharp contrast to the current use wherein scores and in some case hundreds of invitees had direct exposure to the rail line from the venue building and parking lot prior to fencing.).

[31] See Federal Railroad Administration (2018), National Strategy to Prevent Trespassing on Railroad Property, Washington, DC: USDOT (citing 1,100 pedestrian deaths from trespassing in 2017, alone.).

Board. In light of the very real danger posed by active rail lines in urban areas, the U.S. Department of Transportation (USDOT) published a white paper in 2015 with case studies and examples of various security fencing between the railroad right-of-way and abutting properties.[32]

The hazards of trespass in the Greer rail corridor are heightened by the City's encouragement and direction of scores and sometimes hundreds of people to trespass on neighboring CSXT property by parking their vehicles en masse in the railroad right of way. (Figure 2, below).[33] Many of these vehicles are parked in extremely close proximity to the active CSXT track.[34] Appellant is aware of at least one instance where a CSXT train had to come to a complete stop to avoid striking a vehicle or vehicles parked in the right of way.

[32] U.S. Department of Transportation, Federal Railroad Administration (October, 2015) High-Security Fencing for Rail Right-of-way Applications: Current Use and Best Practices, Washington, DC: USDOT.

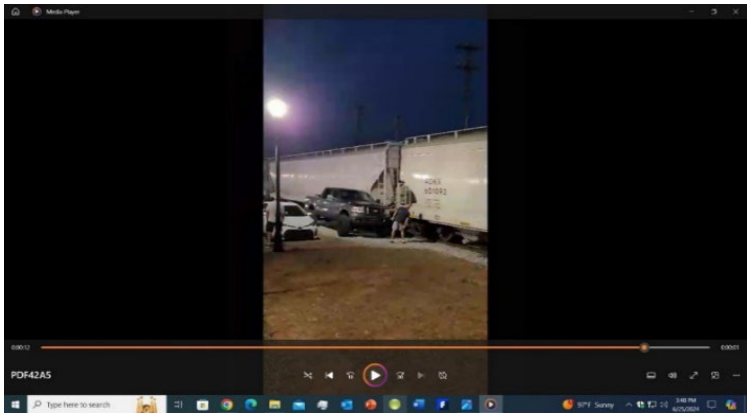
[33] Board Transcript, p. 10, ll. 2-23 (referring to a video showing an individual trespassing onto the CSXT right of way from Appellant's public parking lot); Appellant's Supp. Brief, Part A, p. 8, pp. 10-13 (showing the dramatic extent of trespass, where hundreds of cars and trucks are directed to park in the railroad right of way, sometimes inches from the active track); Email from Kim Rice Bongiovanni, Assistant General Counsel for CSXT, dated January 8, 2024 (stating "CSXT has not granted the City the right to use CSXT railroad ROW for parking. Likewise, we have not granted the City jurisdiction over our rail operations.").

[34] Board Transcript, p. 14, ll. 15-23, p. 15, ll. 1-8; Appellant's Supp. Brief, Part A, p. 7-13, Circuit Court Hearing Transcript, p. 5, ll. 2-25, p. 6, 1-19.

Figure 2 (vehicles parked on CSXT right of way directly across from Appellant's property)

Prior to security fencing, City directed trespass routinely spilled over onto Appellant's property. Moreover, the public parking lot on Appellant's property acted as a conduit to life-endangering trespass onto the abutting track, as shown in Figure 3. [35]

Figure 3 (Showing truck parked over the curb in the public parking lot and its owner walking in the railroad ballast, inches from a moving train, prior to fencing).



In addition to the City's critical role in creating Appellant's need for security fencing, the

[35] Board Transcript, p. 10, ll. 7-10; Record on Appeal to Circuit Court (video from Appellant's PPT shown and provided to the Board at the Hearing), pp. 14, 18, 19; Appellant's Supp. Brief, Part A, p. 17.

restrictive covenant precludes Appellant from constructing any type of fencing in the critical section between the public parking lot and the rail line.[36] Moreover, South Carolina Code Section 6-29-1145 precludes a local planning agency from issuing a permit that would violate a private restrictive covenant which the agency has actual knowledge of.[37]

The City's refusal to accept Appellant's offer to release the property from the deed restriction in exchange for a permanent parking easement (wherein the City would erect its own security fencing in the parking lot), forced Appellant to construct a section of the fencing on neighboring CSXT property. Thus, the staff director's claim as embodied in the court's Order, "… the City is not prohibiting the Appellant from having a fence", is clearly erroneous.[38] Staff also erroneously informed the board Appellant could place a fence anywhere on its property.[39]

The issues cited above impact safety, liability and insurance coverage, any or all of which would make Appellant's continued use of the property untenable without cost-effective security fencing. The circuit court abused its discretion by in upholding the Board's clearly erroneous

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[36] Appellant's Supp. Brief, Part B, pp.10, 27; Circuit Court Transcript, p. 5, ll. 5-10.

[37] See Scott Y. Barnes et al., Practical Guide to Commercial Real Estate in South Carolina 197 (citing Section 6-29-1145 of the 1994 Comprehensive Act).

[38] Board Transcript, p. 28, ll. 8-10 ("That is not saying they cannot have a fence."); Order, p. 8, ll. 6-8 ("And the City is not prohibiting the Appellant from having a fence. Rather, the City is merely regulating the type of fence.").

[39] Board Transcript p. 42, ll. 8-23 ("ASHLEY KAADE: The -- a face is not required, however, staff is fully supportive of having a fence, and it allowed -- there aren't setbacks in this district, so it could be right up on the property line. So the placement of the fence is not at issue at all. STEVE GRIFFIN: Okay. Thank you. ASHLEY KAADE: Was that your question? STEVE GRIFFIN: Yes, it was. I didn't know if we required them to have a 20 fence in certain locations.").

findings of fact and by failing to make any findings of fact or law regarding the issues surrounding the public parking lot, city directed trespassing, or fencing on neighboring property in its Order. A failure to exercise any discretion constitutes an error of law.[40]

4. *Authorization of 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.*

In its Conclusions of Law, the Board found "all the properties within the overlay district are held to the same standards to promote harmonious and compatible development within the Downtown Greer Central Business District, which protects the character and charm of this unique mixed center."[41] The Conclusion fails to address the applicable legal standard, wherein the Board is required to consider the fence relative to the character of adjacent properties and the public good.[42]

Adjacent properties include two railroad rights of way, drainage ditches, warehouses, industrial buildings, overhead power lines, a cell phone tower, and large parking lots – hardly what any reasonable person would find "charming".[43] If anything, the fence is an aesthetic improvement to the industrial rail corridor and has received widespread support from the community, including

[40] Fontaine, 291 S.C. at 538, 354 S.E.2d at 566 ("When the trial judge is vested with discretion, but his ruling reveals no discretion was, in fact, exercised, an error of law has occurred.").

[41] Board's Final Decision, p. 2.

[42] S.C. Code § 6-29-800(A)(2)(d) ("… the authorization of a variance will not be of substantial detriment to adjacent property or to the public good, and the character of the district will not be harmed by the granting of the variance.").

[43] See Appellant's Supp. Brief, Part B, p. 20.

Members of City Council, with no countervailing claim of injury to neighboring properties Appellant is aware of.

It is clear from the record, the Board never actually considered the fence relative to adjacent properties or the public good, as required by the 1994 Comprehensive Act. As such, the circuit court abused its discretion in upholding the Board's arbitrary and capricious factual and legal findings as to Section 6-29-800(A)(2)(d) of the Act.

II. THE CIRCUIT COURT ABUSED ITS DISCRETION IN RULING COST CANNOT BE CONSIDERED IN GRANTING A HARDSHIP VARIANCE.

Prior to the Board's consideration of the elements required for granting a variance under the 1994 Comprehensive Act, the planning director instructed the Board it could not, as a threshold matter, grant the variance because Letchworth allegedly argued "the property may be utilized more profitably if a variance is granted …"[44] Staff's instruction to the Board, which does not appear in the Board's Conclusions of Law but does appear in the court's Order, is neither legally nor factually sound.[45]

Financial loss can and should be considered, provided it is not the sole reason for seeking a variance.[46] Second, staff's instruction to the Board is factually incorrect. Appellant did not seek

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[44] Board Transcript p. 29, ll. 4-11.

[45] Order, p. 6; Appellant's Supp. Brief, pp. 6-9.

[46] See Rush v. City of Greenville, 246 S.C. 268, 143 S.E.2d 527 (1965) ("Although it [financial loss] is an element in the situation which is entitled to fair and careful consideration, *mere* disadvantage in property value or income, or both, to a single owner of property, resulting from application of zoning restrictions *ordinarily* does not warrant relaxation in his favor on the ground of practical difficulty or unnecessary hardship.") (*emphasis added)*, see also, Turik v. Town of Surf City, 642 S.E.2d 251, 182 N.C. App. 427 (N.C. App. 2007) (holding financial loss alone is insufficient to grant a variance, "but it is a factor or an element to be taken into consideration and

the variance to make the property more profitable or enable another use. Rather, the safety of employees, guests and the public constitute the sole reason for constructing the fencing.[47]

This Court addressed this distinction in *Black v. Lexington Cnty. Bd. of Zoning Appeals,* where the Court upheld the lower court's affirmation of a variance for a non-conforming shed, finding, *inter alia,* Black's argument the owners sought the variance to increase profitability to be without merit:

> The Board did not find that by granting the variance request, the Property could be utilized more profitably. Instead, the Board determined the variance would allow for a reduction in the noise produced by the sandblasting equipment, and would create "an improvement for the adjacent properties, the public good, and the character of the district."[48]

Likewise, Appellant in the present case constructed the fence not to increase profits but for the sole purpose of protecting the public and invitees to its property by creating a safety barrier between its property and the abutting rail line.

Section 6-29-800(A)(2)(d)(i) of the 1994 Comprehensive Act concerning profitability was briefly mentioned by staff at the Board hearing but neither discussed by the Board nor included in

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should not be ignored."); Natrella v. Board of Zoning Appeals of Arlington County, 345 S.E.2d 295, 231 Va. 451 (1986) (citing Azalea Corp. v. City of Richmond, 201 Va. 636, 112 S.E.2d 862 (1960) ("The authorities generally agree that financial loss, standing alone, cannot establish an extraordinary or exceptional situation or hardship approaching confiscation sufficient to justify the granting of a variance of a zoning regulation, *but* it is a factor or an element to be taken into consideration and should not be ignored.") (*emphasis added)*.

[47] Board Transcript, p. 9, ll. 4-21, p. 10, ll. 1-10, p. 22, l. 1, p. 23 ll. 1-6, p. 40, ll. 8-18; Appellant's Petition, p.1; Appellant's Supp. Brief, pp. 6-9; Circuit Court Transcript, p. 5, ll. 2-18, p. 6, ll. 1-19.

[48] See Black v. Lexington Cnty. Bd. of Zoning Appeals, 396 S.C. 453, 459, 722 S.E.2d 22, 25 (Ct. App. 2012).

the Board's Findings of Fact or Conclusions of Law as required by Section 6-29-800(F) of the Act.[49] And yet it appears in the lower court's Order. The trial court abused its discretion by going outside of the Board's Conclusions of Law in ruling as a matter of law that cost could not be considered and ruling as a matter of fact that Appellant constructed the fence to enhance profitability in determining the variance request.

III. THE CIRCUIT COURT ABUSED ITS DISCRETION IN RULING APPELLANT WAS SOLELY RESPONSIBLE FOR CREATING THE HARDSHIP FROM WHICH IT SEEKS RELIEF.

A. Knowledge of a Regulation prior to Seeking a Variance, whether Constructive or Actual, should not Constitute Grounds for Denying a Variance.

The lower court found Appellant created the hardship from which it seeks relief, presumably by constructing fencing prior to seeking a variance.[50] But it should not be within the discretion of a board of zoning appeals to deny a variance solely because an owner possessed constructive or even actual knowledge of zoning restriction.[51]

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[49] Order, pp. 6, 9; S.C. Code § 6-29-800(F) ("All final decisions and orders of the board must be in writing and be permanently filed in the office of the board as a public record. All findings of fact and conclusions of law must be separately stated in final decisions or orders of the board which must be delivered to parties of interest by certified mail.").

[50] Order, p. 6 (The court's conclusion is not found in the Board's Findings of Fact and Conclusions of Law).

[51] Arden H. Rathkopf & Daren A. Rathkopf, Rathkopf's The Law of Zoning and Planning § 58:22 (Edward H. Zeigler, Jr., ed., 2006); Spence v. Board of Zoning Appeals, 255 Va. 116, 496 S.E.2d 61, 63-64 (1998) (rejecting the argument the purchase of property with knowledge a variance was needed to build a house constituted a self-inflicted hardship that barred a lot owner's variance request).

For example, in the *Black* case, above, this Court upheld the grant of a variance where a variance was sought after construction of a non-conforming shed with the owner's actual knowledge the structure was nonconforming.[52] Likewise, Appellant should not be precluded from seeking a variance from regulations of which it had, at most, constructive knowledge.

B. The Court Failed to Address Additional Hardship Factors Beyond Appellant's Control.

1. Prohibition on Fencing in the Public Parking Lot.

The lower court upheld Respondents' contention "is not prohibiting the Appellant from having a fence [but rather] merely regulating the type of fence".[53] But as stated above, Appellant is foreclosed from erecting any type of fencing in the most critical section of its property, the public parking lot abutting CSXT right of way. The restriction benefits the City but burdens Appellant with liability for an ultrahazardous condition not of its making that impacts public safety without an effective remedy.

The circuit court abused its discretion in failing to make any findings of fact or conclusions of law regarding the deed restriction or those sections of fencing located on neighboring property despite Appellant's abundant briefing of the issue and subsequent arguments made at the circuit court hearing. Failure to exercise any discretion constitutes an error

[52] See Black, 396 S.C. at 456, 722 S.E.2d at 24; Cf. Rush v. City of Greenville, 246 S.C. at 278, 143 S.E.2d at 532 ("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.") (Appellant in the present case did not purchase the property with knowledge of the fence regulations or the intention of seeking a variance therefrom.).

[53] Order, p. 8, ll. 6-8.

of law.[54]

2. City's Arbitrary and Capricious Fence Code

The fence regulations applicable to the City's Downtown Overlay District are purely esthetic in nature and were not, therefore, drafted in consideration of the unique safety and security issues presented by an urban rail corridor slicing through the Downtown Overlay District.[55] The regulations, as they apply to the rail corridor, directly conflict with the preamble to the Greer zoning code which states: "[t]he zoning regulations and districts as herein set forth are designed … to secure safety from fire, panic, and other danger [and] to promote health and the general welfare …"[56] The dichotomy between the purely esthetic fence regulations and the public purpose of the code calls into question the fairness of applying the fence regulations to the rail corridor in general and Appellant's property in particular.

3. City's Delegation of Public Duties to a Private Party.

Public safety is a core responsibility of government.[57] Where other municipalities have worked with railroads to erect security fencing in urban rail corridors, the City of Greer ignores the issue. By refusing to erect its own fencing in the public parking lot and turning a blind eye to

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[54] Fontaine, 291 S.C. at 354 (1987) ("When the trial judge is vested with discretion, but his ruling reveals no discretion was, in fact, exercised, an error of law has occurred.").

[55] Board Transcript, p. 46, ll. 14-23, p. 47, ll. 1-5 (The staff director admitted the City never considered public safety in drafting the fence code).

[56] ARTICLE 1 PURPOSE, AUTHORITY Section 1:1.

[57] See Williams v. Town of Hilton Head Island, S.C., 429 S.E.2d 802, 804, 311 S.C. 417, 422 (1993) (holding pursuant to the Home Rule Act, the power of local governments should be interpreted broadly to legislate and exercise powers for the public health, safety and welfare).

safety within the rail corridor in general, the City effectively abrogated its responsibility to a private property owner with complete indifference to the attendant burden on that owner.

4. City's Promotion of Trespass.

Chronic trespassing onto the abutting railroad right of way from Appellant's property and onto Appellant's property from the right of way played a major role in Appellant's need for "optional" security fencing.[58] While threatening Appellant with fines and jail time for failure to know and follow the letter of the law regarding fence regulations, the City cavalierly violates the general railroad law of this State by repeatedly directing mass trespass onto private property with knowledge of the negative effects of such practice on Appellant.[59]

5. City's Negligent Role in Exacerbating Compliance Costs

The City exacerbated Appellant's compliance costs by negligently failing to notify Appellant the fence was nonconforming within a reasonable time after the start of construction. The Historic Greer Depot, which is arguably the most recognized structure in downtown Greer, is located within the heart of the City's Downtown Overlay District, literally two blocks from the Greer planning staff's offices and yet staff waited fifteen days until the final day of fence construction to notify Appellant the fence was nonconforming. Had planning staff provide timely

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[58] See Board Transcript, p. 14, ll. 8-23, p. 15, ll. 1-8; Appellant's Supp. Brief, pp.7-13; Mot to Reconsider, pp. 2, 6.

[59] S.C. Code § 58-17-4095 (stating in relevant part that no person may park or operate a vehicle on a railroad right-of-way where there are existing tracks unless the person has authority from the railroad which owns the right-of-way and a person violating the provisions of this section, upon conviction, shall pay a fine of not more than two hundred dollars or serve a term of imprisonment for not more than thirty days in jail); Email from CSXT (confirming Respondents did not have the railroad's permission to trespass or direct the public's trespass on its right of way.).

notice, Appellant's compliance costs would have been substantially reduced and the need for litigation potentially avoided.[60]

In summary, staff's erroneous instruction to the Board implying Appellant was solely responsible for creating the hardship was not discussed in any meaningful way at the hearing and does not appear in the Board's Findings of Fact or Conclusions of Law. Moreover, the circuit court abused its discretion by failing to address any of the hardship factors cited above in ruling Appellant was solely responsible for creating the hardship from which it complains.

IV. THE CIRCUIT COURT ERRED IN RULING APPELLANT RECEIVED ITS CONSTITUTIONTAL RIGHT TO DUE PROCESS.

A. Appellant's Right to Present its Case in Full.

The Fourteenth Amendment to the United States Constitution provides no State may deprive any person of life, liberty, or property, without due process of law."[61] "Due process requires (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses."[62] While due process does not require a trial-type hearing in every conceivable case of government impairment of a private interest, "[t]he fundamental requirements of due process include notice, an opportunity to be heard in a

[60] Record on Appeal to Circuit Court (Appellant's PPT shown and provided to the Board at the Hearing), pp. 14, 18, 19; Appellant's Supp. Brief, Part A, p. 17.

[61] U.S. Const. amend. XIV, § 1.

[62] See In re Vora, 354 S.C. 590, 595, 582 S.E.2d 413, 416 (2003).

meaningful way, and judicial review.[63] "Where important decisions turn on questions of fact, due process often requires an opportunity to confront and cross-examine adverse witnesses."[64]

Here, Respondents violated Appellant's constitutional right to due process by denying Appellant the right to rebut planning staff's arbitrary and capricious factual and legal conclusions as to each element of Appellant's variance request. The circuit court's Order simply restated Respondents' conclusory argument made in its Reply Brief, "[a]appellant did not raise any objection as to a due process violation at the hearing".[65] The record is clear, however, that Appellant repeatedly requested the right to rebut Staff's erroneous factual and legal conclusions and the Board refused to hear them.[66]

Since the court's Order conflicts with the facts, the Order would seem to imply either Petitioner was not legally entitled to question staff's erroneous conclusions or was required, instead, to use magic words such as "due process" or some other pro forma legal verbiage to state

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[63] Kurschner v. City of Camden Planning Com'n, 656 S.E.2d 346, 376 S.C. 165 (2008) (*emphasis added*) (citing S.C. Const. art. 1, § 22); Stono River Envtl. Protection Ass'n v. S.C. Dep't of Health and Envtl. Control, 305 S.C. 90, 94, 406 S.E.2d 340, 342 (1991).

[64] See Dept. of Social Services v. Wilson, 352 S.C. 445, 574 S.E.2d 730 (2002) see also, Turik, 642 S.E.2d at 253 ("When reviewing a decision of a municipal board the circuit court should: (1) review the record for errors of law; (2) ensure that procedures specified by law in both statute and ordinance are followed; (3) ensure that appropriate due process rights of the petitioner are protected, including the right to offer evidence, cross-examine witnesses, and inspect documents; (4) ensure that the decision is supported by competent, material, and substantial evidence in the whole record; and (5) ensure that the decision is not arbitrary and capricious.").

[65] Order, p. 9.

[66] See Board Hearing Transcript, p. 49, ll. 2-23, p. 50, ll. 1-23, p. 51, ll. 1-16, p. 52, ll. 10-14; Appellant's Petition for Appeal, p. 6-7; Appellant's Sup. Brief, Part B, P. 23-26; Appellant's Motion for Reconsideration, p. 7-8.

an objection. Appellant is not aware of any legal authority requiring the utterance of magic words to preserve error at a board of zoning appeals hearing and the Order cites none.[67] As such, the lower court abused its discretion in arbitrarily ruling Appellant was accorded its full due process rights at the hearing.

B. Failure to Ensure the Board's Decision was Supported by Competent, Material, and Substantial Evidence.

It is clear from the forgoing, the Board's decision to deny the variance was not supported by competent, material, and substantial evidence in the whole record regarding each element of Petitioner's variance request. And as stated above, the record is incomplete. The circuit court should have granted the variance or remanded the matter to the Board for further proceedings commensurate with the facts and law of the case.[68]

C. Respondents' Late Filing of the Board's Final Decision.

After denying Appellant's request for a variance at the hearing, the Board served a document on Appellant entitled "Official Action" by certified mail on September 15, 2022. The document contained no findings by the Board. The Board did not notify Appellant of the Board's final decision, "Findings of Fact and Conclusions of law", until February 8, 2023 when the

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[67] B.B. v. A.C.B., No. 14-21-00288-CV (Tex. App. Aug. 15, 2023) (citing Laws v. State, 640 S.W.3d 227 (Tex. Crim. App. 2022) (Due process does not require a litigant to use "magic words" to preserve error.), see also, R.C.S. v. A.O.L. (In re Baby Girl T.), 298 P.3d 1251 (Utah 2012). ("Although we recognize that Mr. Shaud failed to expressly articulate the due process clause as the basis of his constitutional claim, we will not penalize him for failing to use the magic words 'due process' when the record clearly demonstrates his argument was founded in the due process clause.").

[68] Massey, 341 S.C. at 199 (The Court remanded the matter to the Board for rehearing on the basis on an incomplete record).

document was filed with the circuit court under the title, "Record on Appeal". Filing of the Board's final decision, therefore, occurred some five months after the date of the Board's notice of "Official Action" and over four months after Appellant filed its Notice of Appeal on September 28, 2022.[69]

Respondents' late filing left Appellant with only a garbled transcript on which to file and initially argue its appeal. Pursuant to this Court's holding in *Massey v. City of Greenville Bd.*, the Board's late notice to Appellant of the final decision was fundamentally unfair and failed to provide Appellant with sufficient due process. Accordingly, the present case should be remanded to the Board for *de novo* proceeding comporting with the 1994 Comprehensive Act.[70]

D. Issue Preservation.

The court's Order states "… issue preservation requires that an issue be raised to and ruled upon by the trial judge" (presumably meaning the Board) without specifically listing what those issues were.[71] In so ruling, the court effectively upheld the City's desire to have it both ways by denying Appellant its constitutional right to fully present its case before the Board while ruling Appellant failed to preserve unspecified error. It is axiomatic that various arguments and issues that go to the heart of a variance request under the 1994 Comprehensive Act and that Appellant could have raised at the Board hearing were not raised as the result of the Board's refusal to allow

[69] Order, p. 4 (referencing the late filing, stating Appellant filed its appeal on September 28, 2022 and in the next paragraph stating Respondents filed its findings of fact and conclusions of Law on February 8, 2023) (This issue was admittedly not raised to the court below as Appellant's counsel only became aware of the holding in Massey following the lower court's denial of the Appeal.)

[70] Massey, 341 S.C. at 199-202.

[71] Order, p. 10, ll. 12-23.

further argument. Where the certified record is insufficient for review, the court should remand the matter to the zoning board of appeals for *de novo* review.[72]

V. THE CIRCUIT COURT ABUSED ITS DISCRETION IN FAILING TO CONSIDER APPELLANT'S ARGUMENTS AND REQUESTS FOR RELIEF CONCERNING SECURITY FENCING LOCATED ON NEIGHBORING PROPERTY.

Appellant asked the circuit court to address the issue of those sections of security fencing Appellant constructed on neighboring CSXT right of way so as not violate the deed restriction affecting public parking.[73] The zoning Enforcement Notice is addressed to "owner and/or occupant".[74] Appellant is neither the owner nor the occupant of neighboring property. As such, Appellant argues it is immune from the City's enforcement action as to this section of fencing. Assuming, *arguendo*, the present enforcement action applies to neighboring property, Appellant argues it is entitled to a variance. In either case, Appellant is entitled to some type of ruling from the lower court as to this issue.

Respondents' counsel represented to the court that the City first learned of the fence location at the hearing.[75] Had planning staff, however, made a cursory examination of the parking

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[72] Massey, 341 S.C. at 202 (citing S.C. Code Ann. 6-29-840(A) (Supp. 2003) (providing that in the event the judge determines that the certified record is insufficient for review, the matter may be remanded to the zoning board of appeals for rehearing).

[73] Appellant's Supp. Brief, Part B, p. 26-27; Circuit Court Transcript, p. 7; ll. 3-12, Mot. for Reconsideration, p. 3, par. 4.

[74] Appellant's Mot. for Reconsideration, Ex. A, Cert. Violation Notice, August 2, 2022.

[75] Circuit Court Transcript, p. 17, ll. 21-25 ("Mr. Lawson presented a new argument today for the first time, that CSX is not a part – it's not a – it's – part of the fence is on the – it's not on their property, but they constructed it and installed it. I'm assuming on CSX property – this statement is true.").

lot prior to bringing the enforcement action, they would have noticed that no part of the fence was located thereon. In addition to constructive notice, the City received actual notice of fence location on several occasions prior to the hearing.[76]

The lower court abused its discretion by failing to make findings of fact or law regarding the deed restriction and accompanying fence construction in the CSXT right of way. The court in fact, omitted any mention of the matter in its Order. A failure to exercise any discretion constitutes an error of law.

Finally, equity will not suffer a wrong to be without a remedy.[77] The appeal of a zoning variance is an action at law but in cases where a litigant has no legal remedy for a wrong, equity should step in. Had the circuit court exercised discretion and recognized it was not within Appellant's power to construct fencing within the public parking lot, the court had the inherent power and duty to render a legal ruling or refer the matter to the master to fashion an equitable remedy.[78]

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the circuit court and grant

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[76] Email from Appellant with attached Letter to Greer City Council dated December 1, 2023, referencing the CSX fence location. Appellant notified the City about the fence location again on April 14, 2023 in a meeting held on Depot property attended by the Greer City Manager, Andrew Merriman, Respondents' attorney, Daniel Hughes, Esq., Letchworth Properties, LLC's President, Steven C. Hawkins and Appellant's attorney, J. Marshall Lawson, Esq.; Appellant's Supp. Brief, Part B, p. 26-27.

[77] Spitz, South Carolina Law Review, Vol 55, Issue 1 (2003) SUEM - Spitz's Ultimate Equitable Maxim: In Equity, Good Guys Should Win and Bad Guys Should Lose.

[78] Rule 53 (b), SCRCP.

the requested variance, or in the alternative, remand the matter to the Board for *de novo* proceedings comporting with the law and facts of this case. In addition, this Court should either grant the variance as to sections of fencing located on neighboring property, find the enforcement action does not apply to those sections, or remand the matter to the circuit court for appropriate legal or equitable relief.

Respectfully submitted,

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