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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

The Honorable 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

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RESPONDENTS' INITIAL BRIEF

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RESPONDENTS' STATEMENT OF ISSUES ON APPEAL

1. Whether the circuit court correctly affirmed the Board of Zoning Appeal's decision to deny Appellant a variance from the zoning ordinance's prohibition against chain link fences.

2. Whether the circuit court correctly found that Appellant's due process rights were not violated at the hearing before the Board of Zoning Appeals.

RESPONDENT'S STATEMENT OF THE CASE

This matter is an appeal from the City of Greer Board of Zoning Appeals ("BZA") pursuant to S.C. Code Ann. § 6-29-820(A).

Letchworth Properties, LLC owns the property known as the Historic Greer Depot in the city limits of Greer, South Carolina located at 300 Randall Street, Greer, South Carolina 29651. This property is in the heart of the Downtown Greer Overlay District, which is the area shown in blue on the below map identified below. (R. p. ____).

BZAV 22-06

Downtown Greer Overlay District

On or about April 13, 1999, the City Council for the City of Greer (the "City") adopted a zoning ordinance and within that zoning ordinance established several overlay districts, one of which was the Downtown Greer Overlay District (DT) (hereinafter "Downtown District") that applied to the properties highlighted in blue shown above. (R. p. _____). The Downtown District's regulations were codified in Section 5.18 of the City of Greer Zoning Ordinance[1] (hereinafter the "Downtown District Regulations"). Section 5.18.1 of the Downtown District Regulations provided the City's purpose for adopting the Downtown District Regulations as follows:

5:18.1.

Purpose. The purpose of the Downtown Greer Overlay District (DT) is to

[1] On November 28, 2023, the City of Greer adopted a Unified Development Ordinance that retained the use of the Greer Downtown Overlay District in Section 3.2 of the UDO, including the prohibition of chain link fences in the Downtown District. During all times relevant hereto, however, the applicable zoning ordinance is contained within the prior version of the City of the Greer Zoning Ordinance.

promote harmonious and compatible development within the Downtown Greer Central Business District which compliments the character and charm of this unique mixed-use center.

5:18.2.

Area Designation. The Downtown Greer Overlay District is delineated on the Official Zoning Maps for the City of Greer. (R. p. ____).

The Downtown District Regulations provide permitted and conditional uses, and provide for certain design and architectural standards, including standards that apply to accessory structures such as fences.

Fences are specifically allowed in the Downtown District provided that the fence meets the following standards:

5:18.4.5.

Accessory Structures.

...

B. Fences and Walls—Fences and walls shall be constructed of a permanent material such as masonry, brick, and wrought iron. Chain link fencing shall not be allowed. Fences and walls may extend to the property line. (underline added).

5:18.5.5.

Exterior Facade—Visible Attachments. Acceptable visible attachment (chimney, flues, decks, balconies, signs, awnings, railings) finish materials are:

...

G. Railings and Fencing—painted metal, brick or ornamental iron (no chain link fencing). (R. p. _____).

Sections 5:18.4.5 (B) and 5.18.5.5 (G) of the Downtown District Regulations are hereinafter referred to as the "Fence Regulations".

On or about July 19, 2022, Appellant began construction of a black powder coated chain link fence (R. p. _____) without first obtaining a permit for the construction of the fence from

the City (R. p. _____). Appellant admitted that he erroneously reviewed the "Residential Code" before construction of the fence on a commercial property. (R. p. _____). On or about August 2, 2022, the City notified Appellant that the fence did not comply with the Fence Regulations, which specifically prohibit chain link fences. (R. p. _____). On or about August 19, 2022, Appellant submitted his request for a variance to allow the chain link fence (R. p. _____).

On September 12, 2022, a hearing regarding the request for variance was held before the City of Greer Board of Zoning Appeals. At the outset of the hearing, Ashley Kaade, the City's Planning Manager, advised the BZA that the purpose of the hearing was to consider the Appellant's request to allow a chain link fence. Mrs. Kaade provided the BZA with a summary report of the request (R. pp. _____), the applicable standards, including Section 5.18.4.5 of the Downtown District Regulations and the criteria that the BZA must use to analyze a variance set forth in S.C. Code §6-29-800(A)(2), which provides as follows:

> (A) The board of appeals has the following powers:
> (2) to hear and decide appeals for variance from the requirements of the zoning ordinance when strict application of the provisions of the ordinance would result in unnecessary hardship. 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;
> (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 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.

The City's Planning Staff also included its analysis of the variance request considering the criteria set forth by S.C. Code §6-29-800 (A)(2), and considering its analysis, its recommendation of denial of the request (R. p. _____).

Steven Hawkins, the owner of Letchworth Properties, LLC, and its attorney, J. Marshall Lawson, appeared on behalf of the Appellant. Mr. Lawson presented Appellant's argument and Mr. Hawkins testified as to why Appellant should be entitled to a variance (R. pp. _____). Appellant argued that it was entitled to a variance considering the criteria provided by S.C. §6-29-800. It further argued that it was cost prohibitive for the Appellant to have to remove and replace the fence with a fence allowed under the Fence Regulations. At the conclusion of Appellant's case, the BZA asked questions of the City and the Appellant. Appellant admitted that it constructed the fence without a permit (R. p. _____). It further admitted that it made a mistake by not consulting the City's zoning ordinance prior to construction and that the fence violated Section 5.18.4.5 (R. p. _____).

Following some discussion, Board Member, Ms. Tsemeloglou, made a motion to deny the variance, followed by a second, and the motion passed by a vote of 5-1 (R. pp. _____).

On September 28, 2022, Appellant filed its appeal to the Circuit Court, and on October 4, 2022, its Petition for Appeal, setting forth two (2) grounds for reversal – (1) that the BZA misapprehended or ignored the correct legal standards in analyzing each of the criteria set forth in S.C. Code §6-29-800(A)(2) and (2) that it was afforded insufficient due process. (R. p. _____). Accordingly, these are the only two (2) issues preserved for this appeal. (*See Newton v. Zoning Bd. of Appeals for Beaufort Cnty.*, 396 S.C. 112, 117, 719 S.E.2d 282, 284 (Ct. App. 2011) "[T]he sole preservation requirement for a first-level appeal of a zoning board's decision is that an appellant must set forth his issues on appeal in a written petition and file that petition with the circuit court before the thirty-day filing period expires").

Respondent filed its reply brief on January 8, 2024. (R. p. _____). The Circuit Court heard oral arguments on January 10, 2024. On January 22, 2024, the Circuit Court issued a Form 4 Order

denying the Appellant's Petition for Appeal, and on February 5, 2024, the Court issued its Final Order. (R. p. ____). On February 12, 2024, Appellant filed a motion for reconsideration (R. p. _____) and on March 1, 2024, Respondent filed its Reply to said motion. (R. p. ____). On April 3, 2024, the Circuit Court issued a Form 4 Order denying Appellant's motion for reconsideration. (R. p. ____).

STANDARD OF REVIEW

The standard of review for decision by a zoning board appeal is as follows:

In reviewing the questions presented by a zoning appeal, the court shall determine only whether the decision of the Board is correct as a matter of law. Furthermore, "[a] court will refrain from substituting its judgment for that of the reviewing body, even if it disagrees with the decision." *Restaurant Row Assocs. v. Horry County*, 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999). "However, a decision of a municipal zoning board will be overturned if it is arbitrary, capricious, has no reasonable relation to a lawful purpose, or if the board has abused its discretion." *Id.*; *Austin v. Board of Zoning Appeals*, 362 S.C. 29, 606 S.E.2d 209 (Ct. App. 2004).

South Carolina Code §6-29-840 prescribes the standard of review a circuit court should apply when considering an appeal from a local zoning board. In pertinent part, the statute provides: "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. It is well-settled that "the factual findings of the jury will not be disturbed unless a review of the record discloses that there is no evidence which reasonably supports the jury's findings." *Sterling Dev. Co. v. Collins*, 309 S.C. 237, 240, 421 S.E.2d 402, 404 (1992).

Variance

As to a zoning board's decision of a variance and the appellate court's review of the same, the following standards apply:

The decision to grant a variance depends on the BZA's analysis pursuant to the criteria established in S.C. Code §6-29-800(A)(2). In reviewing a zoning board's decision on a request for a variance from a zoning ordinance's requirements, the circuit court must consider not only the general standard of review from a zoning board's decision but also the specific standards for granting a variance. S.C. Code §6-29-800(A)(2) prohibits the granting of a variance unless "strict application of the provisions of the ordinance would result in unnecessary hardship" to the applicant and the board "makes and explains in writing the following findings:

> (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 the particular piece of property would effectively prohibit or unreasonably restrict the utilization of the property; *and*
>
> (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.

"Granting a variance is an exceptional power which should be sparingly exercised and can be validly used only where a situation falls fully within the specified conditions." *Id.* at 215, 516 S.E.2d at 445-46; *see also Hodge v. Pollock,* 223 S.C. 42, 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."). The general rule is that variances are to be granted sparingly, only in rare instances and under peculiar and exceptional circumstances. 8 *McQuillin, Municipal Corporations* § 25:179.32 (3d ed. 2010).

A variance should be strictly construed and granted only in cases of extreme hardship where the requirements of the ordinance are present. *Id.*

An applicant bears the burden of proving its entitlement to a variance and the board correctly denies a variance if the applicant fails to meet the requirements of *each element* of the ordinance. *Restaurant Row,* 335 S.C. at 215, 516 S.E.2d at 445 (emphasis added). A board's decision will not be disturbed if there is evidence in the record to support it. *Id.* at 215, 516 S.E.2d at 446.

Furthermore, an owner is not entitled to relief from a self-created or self-inflicted hardship. A claim of unnecessary hardship cannot be based on conditions created by the owner nor can one who purchases property after the enactment of a zoning regulation complain that the nonconforming use would work a hardship upon him. *Rush v. City of Greenville*, 246 S.C. 268, 143 S.E.2d 527 (1965); *Georgetown County Building Official v. Lewis*, 290 S.C. 513, 351 S.E.2d 584 (1986). "Generally, a self-created hardship, viz., arising from the conduct, acts, or omissions of the owner of property and not directly consequent upon zoning regulations, is insufficient to establish difficulty or unnecessary hardship." 8 *McQuillin Mun. Corp.* §25:226 (3d ed.).

Finally, the fact that the property may be used more profitably if a variance is granted may not be considered as grounds for a variance. *See Groves v. Charleston*, 226 S.C. 459, 85 S.E.2d 708 (1955); S.C. Code §6-29-800(A)(2)(d)(i).

ARGUMENT

A. THE CIRCUIT COURT DID NOT ERR IN AFFIRMING THE BOARD OF ZONING APPEAL'S DECISION TO DENY APPELLANT A VARIANCE FROM THE ZONING ORDINANCE'S PROHIBITION AGAINST CHAIN LINK FENCES.

Appellant fails to meet its burden of proof that the BZA's decision to deny the variance request was arbitrary, capricious, had no reasonable relation to a lawful purpose, or that the BZA abused its discretion." *See Austin v. Board of Zoning Appeals*, 362 S.C. 29, 606 S.E.2d 209 (Ct. App. 2004). The BZA applied the correct law, and its decision was supported by the evidence.

In Part I (A), Appellant argues that the Circuit Court abused its discretion in affirming the BZA's finding that Appellant failed to meet its burden of proving that its property suffered from an unnecessary hardship pursuant to the criteria set forth by S.C. Code Ann. §6-29-802(A)(2). Appellant claims unnecessary hardship exists due to (a) the costs of replacing the fence; (b) the existence of a deed restriction preventing Appellant from constructing any fence in the public parking lot; (c) city-sponsored trespass on private property; and (d) the City's negligent delay in notifying Appellant that its fence was nonconforming.

As an initial matter, Appellant never raised the issue of its property being subject to a deed restriction as evidence of unnecessary hardship to the BZA, or to the Circuit Court in its Petition for Appeal. (Likewise, the Appellant never offered into evidence the email referenced in fn. 7 of its Initial Brief). The evidence in this case should consist only of the testimony and other materials presented to or considered by the Board and the issues raised in the Petition for Appeal. Here, the BZA is the lower tribunal and the circuit court is sitting as an appellate court. *Austin* at 38, 606 S.E.2d at 214 ("When reviewing a Board decision, the circuit court sits as an appellate court. Its review is strictly limited to the facts and arguments raised to the Board below. Indeed, the circuit court is expressly forbidden from considering any new facts."). The first time raised the issue of the deed restriction was in its Supplemental Brief filed January 9, 2024.

Nevertheless, even if the Court considered the deed restriction, this evidence actually hurts Appellant's arguments for unnecessary hardship. The deed restriction emanated from a 1987 deed

between Station One Partnership, LLC, a predecessor in title to the Appellant, and Greenville County Redevelopment Authority. The deed restriction does not preclude fencing. Rather, it requires parking spaces on the property to be available to the public.

Appellant repeatedly argues in its brief that the City was directing trespass onto its property by not allowing a chain link fence, but it was actually the Appellant who agreed to purchase its property subject to a deed restriction that allowed for public parking on its property.

Furthermore, as to Appellant's claim that it suffers from unnecessary trespass because the City of Greer "sponsors trespass," this claim is nonsensical and not supported by the record. There was no evidence before the BZA that the City encouraged or directed trespass on the Appellant's property, and of course, the City would never do this. Furthermore, as discussed below, and which bears mentioning over and over, the Fence Regulations do not prevent the Appellant from having a fence. It merely regulates the type of fence. Thus, Appellant's claims of "city sponsored trespass" are meritless. If the Appellant believes a fence would provide a good measure of safety for its property, then it can construct a fence consistent with the Fence Regulations.

As to the unnecessary hardship based upon the cost raised in Section I(A) Appellant would incur by replacing the fence, Respondent addresses this argument *infra*.

Finally, Appellant claims in Section I(A) that he suffers from unnecessary hardship based upon the City of Greer's negligence in failing to timely notify Appellant that his fence was out of compliance. The City owes no duty, and the Appellant fails to cite any legal standard giving rise to such duty, that a "delayed silence" by the City constitutes unnecessary hardship. This argument as to unnecessary hardship has no merit.

In Section I(B) of its Brief, Appellant argues that it satisfied each of the elements set

forth in Section 6-29-800(A)(2)(a). It does not.

As to the criteria set forth in S.C. Code §6-29-800(A)(2)(a) and (b), the evidence supports the BZA's findings that extraordinary and exceptional conditions do not pertain to the Appellant's property and that the same conditions apply to other property in the vicinity. Appellant believes that its property is disadvantaged because it is a commercial venue that borders a railroad. However, as shown by the zoning map of the Downtown District (R. p. _____), the Appellant's property is one of many that border the railroad. Two (2) rail lines run through the Downtown District owned by Norfolk Southern and CSX. There are many commercial properties that border or are adjacent to these railroads. Furthermore, the Fence Regulations do not prevent Appellant from having a fence, only the type of fence.

At the hearing, City staff stated as follows:

> And so staff now -- since staff is recommending denial of this variance, we do disagree with the -- the analysis that's been brought forward by the applicant for the criteria for the variance, one being that they're extraordinary or exceptional conditions pertaining to this particular piece of property. As you saw from the overlay map, there are many properties that have a boundary with the railroad. This is not unique in that factor. And again, we're not saying that they cannot have a fence. It is purely about the material of the fence that is laid out. (Transcript p. 28, ln. 17 – p. 29, ln. 6; R. p. _____)

Appellant further argues the Circuit Court went outside the scope of the BZA's findings and conclusion when it held that it failed to present sufficient evidence that its property suffers a *singular* disadvantage through the operating of the zoning regulation. *See Colbert v. Krawcheck*, 299 S.C. 299, 384 S.E.2d 710 (1989); *Restaurant Row Assocs.*, 335 S.C. 209 at 216, 516 S.E.2d 442 at 446 (1999). But this standard is well-settled law, and it simply encompasses the elements the BZA must consider in evaluating a variance, i.e., that the property suffers from a peculiar and an extraordinary and exceptional circumstance and that the conditions do not

apply to other property in the vicinity. The Circuit Court did not err in citing relying upon this well-settled law. Furthermore, Appellant did not raise this issue in his Rule 59(e), *SCRCP* motion. (_____)

In Part I(2) of its Brief, Appellant argues that the BZA "failed to discuss or (i)nquire about evidence of another property or properties in the applicable zoning district similar to Appellant's. However, it is not the BZA's duty to prove Appellant's case for him, and furthermore, the BZA reviewed several GIS Maps and the Downtown District Map at the hearing which showed multiple properties adjacent to the rail lines (R. p. ____). Appellant could have presented additional evidence showing that its property suffered a singular disadvantage as compared to all others but did not. Rather, Appellant simply argues, without evidentiary support, that its property is the only "special event" property abutting the rail corridor. Therefore, Appellant fails to show how its property suffers from a singular disadvantage.

Based upon the foregoing, Appellant fails to show how the Board's conclusions as to S.C. Code §6-29-800(A)(2)(a) and (b) are arbitrary, capricious or an abuse of discretion.

In Section I(3), Appellant argues again that the City is asking for or encouraging trespass onto Appellant's property as proof that it suffers from unnecessary hardship pursuant to the criteria established in S.C. Code §6-29-800(A)(2)(c). Respondent is not sure how – even if it were somehow true – that the Fencing Regulation constitutes an encouragement of trespass that prevents Appellant from utilizing its property. This argument is quite a stretch by the Appellant and has no merit.

On the other hand, the BZA correctly analyzed the criteria as it was intended. It found that Appellant had not satisfied this criterion because the Appellant was able to continue utilizing its property as a commercial venue despite the Fencing Regulation. (R. p. ____). This is true.

Appellant offered no evidence that its business or operation were curtailed based upon the Fencing Regulation.

Appellant also attempts to introduce evidence of a study from the USDOT (See App. Brief, fn. 32) that was not presented to the BZA or in its Petition for Appeal, and is therefore, not preserved for appeal. Regardless, Appellant's arguments under these criteria fail. First, the zoning regulations do not prevent Appellant from having a fence. Second, pursuant to the actual evaluation of the criteria, the fencing regulation does not prevent Appellant from utilizing its property as a commercial venue.

In Part I(4), Appellant argues that the BZA failed to consider the fence related to adjacent properties or the public good. The BZA concluded that the "variance request [did] not meet this requirement" because "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." (R. p. _____). The BZA's conclusion as to these criteria is also proper and supported by the evidence. It is well within the BZA's discretion to determine that a chain link fence, which is specifically and unambiguously prohibited by the Fence Regulations, are contrary to the stated purpose of the Downtown District Regulations to preserve and promote certain designs and appearances desired by the City (*See* Greer Zoning Ordinance Section 5.18.1; R. p. ____).

Based upon the foregoing, Appellant fails to make any showing that would make the BZA's decision to deny the variance pursuant to the criteria established by S.C. Code §6-29-800(A)(2) arbitrary, capricious, with no reasonable relation to a lawful purpose, or an abuse of discretion.

In Section II of its Brief, Appellant argues that the Circuit Court abused its discretion by ruling that cost cannot be considered in granting a hardship variance. The lower court did not draw

this conclusion. The Final Order provided as follows: "However, as set forth *supra*, S.C. Code §6-29-800(A)(2)(d)(i) specifically provides that the BZA "may not grant a variance, the effect of which would be to allow the establishment of a use not otherwise permitted in a zoning district, to extend physically a nonconforming use of land or to change the zoning district boundaries shown on the official zoning map. The fact that property may be utilized more profitably, if a variance is granted, *may not be considered* grounds for a variance." (italics added)." It did not rule that cost cannot be considered. This particular statute is relevant to the case due to the evidence Appellant presented at the BZA hearing that moving the fence was "cost prohibitive" (R. p. ____). Furthermore, the BZA considered Appellant's arguments regarding its "cost" in context with S.C. Code §6-29-800(A)(2)(c), i.e., "the application of the ordinance effectively prohibits or unreasonably restricts the utilization of the property". The Appellant's cost to remove and replace the chain link fence with a compliant fence does not create a prohibition or unreasonable restriction of the property, and furthermore, this is not basis for the BZA to grant Appellant's variance.

In Section III (A), Appellant argues that the Court erred in its determination that the Circuit Court abused its discretion in ruling "appellant was *solely* responsible for creating the hardship from which it seeks relief." The Court did not use the word "solely." Rather, the Court found that the Appellant created the hardship, and there is sufficient evidence to support this finding based upon the Appellant's own admissions. Appellant admitted that it made a mistake by failing to consult the City's Zoning Ordinance prior to construction of the fence and that the fence violates the Fence Regulations. (R. p. _____). Appellant admitted that it did not obtain a permit before constructing the fence. (R. p. ____). And, Appellant now admits that it purchased the property that requires the parking lot remain open to the public, which the Appellant now claims are an unnecessary hardship.

If Appellant had obtained a permit, the City would have alerted him to the fence restriction. And, if Appellant had consulted the applicable code, then he would have known a chain link fence was prohibited. This is not the fault of the City or anyone else. Therefore, there is ample and sufficient evidence then to support the Court's finding that the Appellant's hardship is self-inflicted, and therefore, Appellant is not entitled to claim unnecessary hardship based on conditions created by the owner nor can one who purchases property after the enactment of a zoning regulation complain that the nonconforming use would work a hardship upon him. *See Rush* , 246 S.C. 268, 143 S.E.2d 527 (1965); *Georgetown Cty Bldg. Off.*, 290 S.C. 513, 351 S.E.2d 584 (1986).

In Section III(B)(1), Appellant claims that the Court failed to address additional hardship facts due to the deed restriction on its property. As stated above, no evidence of the deed restriction preserved for appeal because it was not presented to the BZA or in the Petition for Appeal Furthermore, the existence of the deed restriction further undercuts Appellant's argument that it the City is responsible for the alleged hardship.

In Section III(B)(2), Appellant appears to claim that the zoning ordinance is invalid because it is arbitrary and capricious. As an initial matter, Appellant only sought the relief of a variance before the BZA. It did not submit or file a challenge to the legality of the City's zoning ordinance. Moreover, the City has a right to determine through its zoning ordinances in an overlay district what type of fence is harmonious with the surrounding areas. This issue has no merit, and furthermore, is not preserved for appeal.

Section III(B)(3) and (B)(4) also have no merit. In (B)(3), the Appellant claims that the City has a duty to erect fencing in the public parking area. The City has no such duty to erect fencing in a public parking area. In (B)(4), the Appellant claims the City is violating "general railroad law" by directing "mass trespass." There is no evidence to support these statements, and

none was presented to the BZA or in the Petition for Appeal Accordingly, the arguments are not preserved for appeal.

In Section III(B)(5), Appellant again repeats the claim that the city owed a duty to the Appellant to notify it sooner that it was in violation of the zoning ordinance. The law imposes no duty upon the City to notify a property owner that they are violating a zoning ordinance.

In Section V, Appellant returns to the same argument that the Court abused its discretion in preventing the Appellant from having security fencing in the CSX right-of-way. Appellant never raised the issue of the fence (that Appellant constructed) as being located on the CSX right-of-way before the BZA, and therefore, the issue is not preserved for appeal. CSX is not a party to this litigation and CSX' position as to the fence has no bearing on this appeal. Furthermore, Appellant once again claims that the City owed some duty to determine if the fence was located on CSX property. The law imposes no such duty, and the Appellant fails to cite any law in support of its position.

B. THE CIRCUIT COURT CORRECTLY FOUND THAT APPELLANT'S DUE PROCESS RIGHTS WERE NOT VIOLATED AT THE BZA HEARING.

Appellant raises his due process claims in Section IV of its Brief. 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. *Clear Channel v. Myrtle Beach*. 642 S.E.2d 565,372 S.C. 230 (2007). These elements were clearly satisfied at the BZA hearing. It is clear from the record that there was no hindrance of Appellant's right to present its case. There was no limitation as to time imposed and no interruption of its presentation. Appellant never requested to cross-examine the City Planning Staff and was even allowed to interject additional arguments during the Board's consideration of the motion to deny their request. (R. p. ____). Furthermore, as shown by the Record on Appeal (R. p. ____), the Planning Staff presented all

the applicable law, standards, photographs, and historical information offered by the Appellant. Furthermore, Appellant presented testimony through Mr. Hawkins, arguments of its legal counsel, and voluminous information contained in the record (R. p. _____). Appellant never advised the BZA that it was prevented from introducing any evidence or that it would like more time.

Appellant cites the BZA hearing transcript (*See* fn. 66 of the Appellant's Brief) as evidence that his due process rights were violated. However, the transcript actually demonstrates that Appellant was able to fully present its claims and arguments. The colloquy between Appellant's counsel and the BZA is as follows:

> MARSHALL LAWSON: Would it be helpful to the Board if I just briefly addressed staff's conclusions as to each one of the criteria...."
> STEVE GRIFFIN: Is this just basically a repeat of what you have already covered originally.
> MARSHALL LAWSON: It's a repeat in the fact that *we made our case*;... (emphasis added) (R. p. ____).

Appellant admits that it was able to present its case, and the BZA was satisfied it had heard all the evidence that Appellant planned to present. Nevertheless, after the brief exchange above, Appellant and his attorney were still given multiple opportunities to address the BZA regarding the BZA's questions (See R. pp. _____). Then, the chairman, Mr. Griffin, asked the Board if they had any other questions of either the applicant or its staff, and the BZA did not and proceeded to a vote. (R. p. ____). Based upon the foregoing, Appellant was afforded due process.

In Section IV(B), Appellant claims the Circuit Court erred by its failure to ensure the board's decision was supported by competent, material, and substantial evidence. As set forth herein, there is sufficient evidence to support the BZA's decision. The BZA is bound to analyze a variance request pursuant to S.C. Code §6-29-800(A)(2) and make its findings of fact and conclusions of law, which occurred in this case. The Appellant failed to meet its burden of proof

to show unnecessary hardship.

In Section IV(C), Appellant argues it was prejudiced by the late filing of the "Findings of Fact and Conclusions of Law." The Appellant cites no law that the timing of filing constitutes a procedural error. Furthermore, this issue was never raised before the Circuit Court so it is not preserved for appeal to this Court. Finally, after the issuance of the Findings of Fact and Conclusions of Law, the Appellant was allowed to submit its "Supplemental Brief" (R. p. ____) which is made part of the record at which point Appellant had the full opportunity to address any matters or issues raised by the BZA Decision. Therefore, any alleged error was harmless.

Finally, any alleged due process issues must have been raised by the Appellant before the BZA. If the Appellant was entitled to additional due process, it should have stated so at the hearing. The Circuit Court is acting within its appellate authority over the decision of the Board in the same way that the Court of Appeals acts within its appellate authority over the decision of the Circuit Court. "Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review." *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.,* 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct.App.2006). At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge. *Wilder Corp. v. Wilke,* 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). It is "axiomatic that an issue cannot be raised for the first time on appeal." *Id.* Imposing such a requirement on the appellant "is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments." *I'On, L.L.C. v. Town of Mt. Pleasant,* 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000); *Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011).

Respondent provided Appellant with all the due process to which it was entitled, and its

due process arguments fail as a matter of law.

CONCLUSION

This Court should also affirm the BZA'S decision. An applicant bears the burden of proving its entitlement to a variance and the board correctly denies a variance if the applicant fails to meet the requirements of *each element* of the ordinance. *Restaurant Row,* 335 S.C. at 215, 516 S.E.2d at 445 (emphasis added). A board's decision will not be disturbed if there is evidence in the record to support it. *Id.* at 215, 516 S.E.2d at 446.

The Appellant has failed to establish its burden of proof by showing that the BZA's decision was arbitrary, capricious, with no reasonable relation to a lawful purpose, or an abuse of discretion. The Board properly evaluated the variance request in light of the criteria provided by S.C. Code §6-29-800(A)(2). Furthermore, the Appellant admits that it made a mistake by failing to consult the City of Greer Zoning Ordinance and it further admits that the fence violates the regulation prohibiting chain link fences and the Appellant cannot obtain a variance based upon a hardship it created.

The record also reflects that the BZA provided Appellant with sufficient due process. Furthermore, Appellant never raised the issue regarding due process to the BZA, and therefore, this argument is not preserved for review by this Court.

Based on the foregoing, Respondents ask this Court to affirm the Circuit Court.

Respectfully submitted,

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