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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas for the Ninth Judicial Circuit

The Honorable Jennifer B. McCoy, Circuit Court Judge
Charleston County

Appellate Case No.: 2024-000768
Trial Court Case No.: 2023-CP-10-02575

Martin Alloy, Michael Laughlin, and Henry Grimball, — Appellants Below,

v.

City of Charleston, South Carolina Board of Architectural Review – Small and 117 SOB Project, LLC, — Respondents,

of whom Martin Alloy is the Appellant.

INITIAL REPLY BRIEF OF APPELLANT MARTIN ALLOY

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Respondents' Initial Brief is largely devoted to the alleged failure to preserve the issues on appeal. Respondents argue that Appellant has not preserved any of the issues on appeal because, in Respondents' estimation, a motion for reconsideration was necessary to preserve the issues. (Resp'ts Initial Br., p. 10.) As discussed below, the materials in the record demonstrate that the issues on appeal to this Court were raised to and ruled on by the circuit court.

Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide this Court with a platform for meaningful appellate review. *See 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) ("The rationale for the rule is that until the trial court considers the matter and makes a ruling, an appellate court is unable to find error."). Appellant was not required to seek reconsideration of issues raised to and ruled on by the circuit court in order to preserve the issues on appeal to this Court.

I. THE CIRCUIT COURT ERRED IN DISMISSING THE TIMELY APPEAL ON STATUTORY AND JURISDICTIONAL GROUNDS

A. Section 6-29-900(A) Does Not Prohibit an Amendment to a Timely Notice of Appeal.

Section 6-29-900(A) is clear that "[t]he appeal must be filed within thirty days after the affected party receives actual notice of the decision of the board of architectural review." *See* S.C. Code § 6-29-900(A). The original Notice and Petition of Appeal was filed with the circuit court on May 26, 2023 (the "Original Petition"), twenty-eight (28) days after the April 27, 2023 decision of the BAR-S. (Pet.) On June 2, 2023, Appellant filed the Amended Notice and Petition of Appeal (the "Amended Petition") naming Respondent 117 SOB Project, LLC ("SOB Project") as a party to the appeal. (Am. Pet.) The Original Petition was amended to include SOB Project in the case

caption along with a sentence identifying SOB Project as a party. (Am. Pet. p. 2, ¶ 5.) The allegations and grounds alleged in the Amended Petition are the same allegations and grounds that appeared in the Original Petition. (Pet.; Am. Pet.) Appellant did not amend the grounds that appeared in the original petition or seek leave to assert additional grounds.

Section 6-29-900(A) itself does not prohibit an amendment to a timely notice of appeal. However, the issue of whether Section 6-29-900(A) prohibits an amendment to a timely-filed petition for appeal became a point of contention in the proceeding before the circuit court. (SOB Project's Mot. to Dismiss and Omnibus Br.; BAR-S Mem. in Supp. Mot. to Dismiss; Opp. to Mot. to Dismiss pp. 3 – 7.) Respondents take the position that a petition "setting forth plainly, fully, and distinctly why the decision is contrary to law" filed within thirty days after the BAR-S's decision pursuant to Section 6-29-900(A) cannot be amended. (Resp'ts Initial Br. pp. 7 – 10.) Because the statute itself does not prohibit an amendment to a petition that satisfies the requirements provided in Section 6-29-900(A), Respondents rely on a combination of decisions that are distinct from the circumstances of this appeal. (Resp'ts Initial Br. p. 10; SOB Project's Mot. to Dismiss and Omnibus Br. pp. 9 – 16.)

Respondents cite to *Austin v. Board of Appeals* as part of the combination of cases that purportedly imply amendments to a petition for appeal pursuant to Section 6-29-900(A) are strictly prohibited. *See Austin v. Board of Appeals*, 362 S.C. 29, 38, 606 S.E.2d 209, 214 (Ct. App. 2004). Indeed, *Austin* states that the procedures governing appeals from zoning boards are prescribed by statute, and the statute makes no provision for "amendment of the grounds set forth in the petition." *Id*. at 37, 606 S.E.2d at 213. (Opp. Mot. to Dismiss p. 7.) The Amended Petition did not amend the grounds set forth in the Original Petition filed on May 26, 2023. (Pet.; Am. Pet.; Opp. Mot. to Dismiss p. 7.)

The promptness with which Appellant filed the Amended Petition adding SOB Project as a party is relevant in light of the function of the circuit court when reviewing a decision of the BAR-S. When reviewing the decision of the BAR-S, the circuit court's review is strictly limited to the facts and arguments raised to the Board below. *See Austin* at 38, 606 S.E.2d at 214; *see also* S.C. Code § 6-29-930(A). Upon the filing of a petition for appeal pursuant to Section 6-29-900(A), "the clerk of the circuit court must give immediate notice of the appeal to the secretary of the board and within thirty days from the time of the notice." *See* S.C. Code § 6-29-920(A). Section 6-29-900(A) is clear that it is the BAR-S that is to be provided "immediate notice" of the appeal. *See* S.C. Code § 6-29-920(A). It is, after all, the decision of the BAR-S that is the subject of an appeal pursuant to Section 6-29-900(A). *See* S.C. Code § 6-29-930(A). The BAR-S had not yet filed the certified record of the proceeding with the clerk of the circuit court at the time the Amended Petition was filed on June 2, 2023. The lapse of time between the filing of the Original Petition and the Amended Petition a week later was inconsequential, as the circuit court "may not take additional evidence" from Appellant or Respondents. *See* S.C. Code § 6-29-930(A).

Respondents continue to rely on the vacated decision in *Friends of McLeod, Inc. v. City of Charleston* notwithstanding the fact it is "not binding," as Respondents acknowledge. (Resp'ts Initial Br. p. 9.) *See Friends of McLeod, Inc. v. City of Charleston*, 376 S.C. 610, 612, 658 S.E.2d 544, 545 (Ct. App. 2008), vacated by 384 S.C. 438, 682 S.E.2d 488 (2009). The substantial passage of time between the filing of the initial appeal and the appellant's request to add the applicant as a party to the appeal was noted by the Court in *Friends*. *See Friends of McLeod, Inc. v. City of Charleston*, 376 S.C. 610, 612, 658 S.E.2d 544, 545 (Ct. App. 2008), *vacated,* 384 S.C. 438, 682 S.E.2d 488 (2009) ("Several months later, Friends filed a motion to amend the complaint and, pursuant to a consent order, joined the [applicant] as a party."). (Opp. Mot. to Dismiss p. 5.) In

Blind Tiger, LLC v. City of Charleston, this Court noted the passage of time in affirming the circuit court's dismissal of an appeal as untimely under Section 6-29-900(A) where the appeal was filed "some 82 days after actual notice under [S]ection 6-29-900." *See Blind Tiger, LLC v. City of Charleston*, 366 S.C. 182, 186, 621 S.E.2d 361, 363 (Ct. App. 2005). (Opp. Mot. to Dismiss p. 4.) In considering the issue of whether a permittee is a necessary party to an action to revoke a development permit, the South Carolina Supreme Court affirmed the circuit court's order, which granted the motion to dismiss but allowed the appellant fifteen days leave to join the permittee. *See Spanish Wells Prop. Owners Ass'n, Inc. v. Bd. of Adjustment of Town of Hilton Head Island*, 295 S.C. 67, 68, 367 S.E.2d 160, 161 (1988) (holding that a development permittee is a necessary party to an appeal of its permit). The permittee in *Spanish Wells* was never added as a party to the appeal. *Id*. at 67, 367 S.E.2d at 161. (Opp. Mot. to Dismiss pp. 4 – 5.)

The Order adopts Respondents' argument that these cases collectively imply that a timely petition "setting forth plainly, fully, and distinctly why the decision is contrary to law" under Section 6-29-900(A) cannot be amended. (Order pp. 6 – 7.)

B. Issues Relating to the Ability to Amend a Timely Appeal Were Raised by Appellant and Ruled on by the Circuit Court.

South Carolina law recognizes two basic situations in which a party may file a motion for reconsideration under Rule 59(e), SCRCP. First, "[a] party *may* wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it." *See Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). Second, "[a] party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review." *Id*. In other words, where a party raises an issue, but the issue is never ruled on

by the lower court, and the party fails to file a motion to alter or amend, the issue is not preserved. *See Summersell v. S.C. Dep't of Pub. Safety*, 337 S.C. 19, 552 S.E.2d 144 (1999).

The issue of whether Section 6-29-900 can be read to prohibit an amendment to a timely notice of appeal where the language of the statute contains no such restriction was raised with specificity to the circuit court and ruled upon in the Order. Although Appellant could have sought reconsideration of the circuit court's ruling on this issue, he was not required to do so. *See Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). Having reviewed the parties' briefs, oral arguments, and submissions, the circuit court conclusively found that the failure to name SOB Project in the original Notice of Appeal filed on May 26, 2023, was a "fatal, statutory, jurisdictional defect." (Order pp. 1, 7.) Requesting reconsideration of the same issue was not warranted under the circumstances of the appeal to the circuit court. *See Staubes v. City of Folly Beach*, 339 S.C. 406, 415, 529 S.E.2d 543, 547 (2000) (recognizing that a party need not engage in futile actions in order to preserve issues for appellate review).

II. THE CIRCUIT COURT ERRED IN FINDING NO MERIT TO APPELLANT'S ARGUMENT THAT THE BAR-S CONVENED AN IMPROPER EXECUTIVE SESSION

The Original Petition filed May 26, 2023, alleges that the BAR-S "violated the South Carolina Freedom of Information Act ("FOIA"), South Carolina Code § 30-4-10, *et seq*." (Pet., p. 3; Am. Pet., p. 3.) Specifically, Appellant alleged that the "BAR-S convened an improper executive session to discuss an issue that should have been addressed in open session," as the citizens in attendance at the public meeting stated their objection to the applicant's expansion of the agenda item. (Pet., p. 4; Am. Pet., p. 4.) Upon returning from the executive session, a chairperson announced that "we are willing to consider the full application as submitted," indicating that the BAR-S had apparently deliberated about whether the BAR-S should proceed

with a decision as to the unnoticed items presented by the applicant. (Pet., p. 3; Am. Pet., p. 3; BAR-S Meeting Minutes, p. 12, lines 19 – 23.)

FOIA mandates that every meeting of all public bodies shall be open to the public unless closed pursuant to Section 30-4-70. South Carolina law is clear that "[t]he members of a public body may not commit the public body to a course of action by a polling of members in executive session." *See* S.C. Code § 30-4-70(b). (Mem. Supp. Pet. p. 8.) No action may be taken in executive session except to adjourn or return to public session. *See* S.C. Code § 30-4-70(b). After a meeting begins, "an item upon which action can be taken only may be added to the agenda by a two-thirds vote of the members present and voting." *See* S.C. Code § 30-4-80(A). The BAR-S did not vote on the issue during the public meeting and simply proceeding with a decision on items that were not on the agenda. (Mem. Supp. Pet. pp. 8 – 9.)

As indicated by the Order and the record of the proceeding, the circuit court was aware of, and ruled on, the ground for appeal relating the FOIA violations during the April 27, 2023 meeting. The BAR-S's failure to follow FOIA during the April 27, 2023 meeting was also raised during to the circuit court during the hearing held on February 29, 2024. (Hearing Tr., p. 15, lines 5 – 13; p. 17, lines 8 – 21; p. 19, line 15 – p. 20, line 2; p. 24, lines 2 – 18; p. 34, lines 9 – 22.). The circuit court ruled on the merits of Appellant's claim that the BAR-S violated FOIA and found that "[t]here is simply no evidence that the Board acted improperly in executive session." (Order pp. 8 – 9.) The circuit court accepted the BAR-S's assurance that "no action or votes had been taken in executive session." (Order p. 9.) Despite the evidence in the record demonstrating the failure to follow the mandates and procedures set forth in FOIA, the circuit court determined that it "cannot infer that someone making a motion immediately upon coming out of executive session engaged in any voting on the matter while in executive session." (Order p. 9.)

The issue relating to the BAR-S's violation of FOIA during the April 27, 2023 meeting by convening an improper and unnoticed executive session in which the members of the BAR-S committed the BAR-S to a course of action without voting on the issue was raised in the Original Petition, the Amended Petition, and Appellant's Memorandum in Support of Petition of Appeal. (Pet., pp. 3 – 5; Am. Pet., pp. 3 – 5; Mem. Supp. Pet. 8 – 9.) The issue was ruled on in the Order. (Order pp. 8 – 9.) The lack of transparency in the BAR-S's decision to procced on the unnoticed items was raised with specificity to the circuit court. (Mem. Supp. Pet. 8 – 9.) Notwithstanding the procedural history behind this ground for the appeal, Respondents argue that Appellant's argument relating to the BAR-S's violation of FOIA, and the improper executive session is unpreserved. (Resp'ts Initial Br. pp. 15 – 17.) Respondents argue that Appellant was required to seek reconsideration of the circuit court's finding that no action or votes had been taken in executive session in violation of FOIA. (Order pp. 8 – 9.)

Respondents note that Appellant's Initial Brief cites to caselaw that had not been previously cited in briefing to the lower court. (Resp'ts Initial Br. p. 16.) The procedural requirements governing this appeal of the circuit court's decision were not applicable to the proceeding before the lower court. *Compare* Rule 208(b)(1)(E), SCACR (providing that the particular issue to be addressed in an initial brief shall be set forth in distinctive type, followed by discussion and citations of authority) *with* Rule 8(a), SCRCP (requiring a pleading which sets forth a cause of action contain (1) a short and plain statement of the grounds including facts and statutes upon which the court's jurisdiction depends, unless the court already has jurisdiction to support it, (2) a short and plain statement of the facts showing that the pleader is entitled to relief, and (3) a prayer or demand for judgment for the relief to which he deems himself entitled). It is well-settled that an issue raised in a brief but not supported by authority is deemed abandoned and will not be

considered on appeal. *See Hunt v. Forestry Com'm*, 358 S.C. 564, 573, 595 S.E.2d 846, 851 (Ct. App. 2004).

Respondents' suggestion that Appellant has impermissibly expanded the scope of appellate review is not supported by the record or applicable law. As the record reflects, the issue of whether the BAR violated FOIA by improperly convening an executive session in which the members of the BAR committed the BAR to a course of action was raised to the circuit court from the outset of the appeal. The issue has been preserved for appellate review. *See Holy Loch Distributors, Inc. v. Hitchcock*, 340 S.C. 20, 531 S.E.2d 282 (2000) (holding issue was preserved where it was alleged in the second amended complaint and ruled upon in order of dismissal with prejudice).

III. THE ISSUE OF WHETHER THE BAR-S FAILED TO FOLLOW THE CITY'S ZONING ORDINANCE WAS RAISED TO AND RULED ON BY THE CIRCUIT COURT

As a ground for the appeal to the circuit court pursuant to Section 6-29-900(A), Appellant alleged that the decision of the BAR-S was contrary to applicable criteria and standards and incompatible with the interests of the Historic District. (Pet., p. 3; Am. Pet., p. 3.) The BAR-S allowed the applicant to proceed with changes, including the partial demolition, to a historic property listed on the National Register of Historic Places. (Pet., p. 3; Am. Pet., p. 3.) Among the unnoticed items presented by the applicant during the public hearing were changes to the unique architectural features of the Edward Rutledge House, including the partial removal of a portion of the historic wall and pedestrian gate along Orange Street. (Opp. Mot. Dismiss p. 2; Mem. Supp. Pet. pp. 9 – 10.)

The issue before the circuit court was whether the BAR-S abused its discretion by allowing SOB Project to circumvent the required procedures applicable to requests to "wholly or partially demolish any structure" set forth in City's Zoning Ordinance. (Pet., pp. 3 – 4; Am. Pet., 3 – 4;

Mem. Supp. Pet. pp. 9 – 10.) The City's Zoning Ordinance defines "demolition" as the "removal of an entire structure or a substantial portion of a structure visible from the public right-of-way or a substantial portion of features of a structure that are visible from the public rights-of-way that define its historic architectural character, such as roofs, columns, balustrades, chimneys, siding, windows, doors, shutters, site walls, fences and other unique architectural features, which if lost, would compromise the historic architectural character of the structure." *See* Sec. 54-231(d) (emphasis added). (Mem. Supp. Pet. p. 10.)

The City's Zoning Ordinance sets forth specific requirements that govern a request, like the applicant's, to demolish part of a structure. *See* Sec. 54-234. (Pet., p. 4; Am. Pet., p. 4; Mem. Supp. Pet. p. 10.) These requirements include the filing of application for a permit to demolish any structure in whole or in part, a public hearing upon the application, and least five (5) days' notice of the time and place of each such hearing. *Id*. These requirements were not met when the BAR-S decided to proceed with the applicant's unnoticed items, including a "Demolition & Salvage Plan" and a "Preliminary Site Plan." (Pet., p. 4; Am. Pet., p. 4; Mem. Supp. Pet. pp. 9 – 10.)

The Order found that the project includes alterations to the current state of the property that are within the purview of the BAR-S under Part 6 of the City's Zoning Ordinance. (Order p. 3.) *See* Sec. 54-230, *et seq*. Part 6 of the ZLDR, entitled "Old and Historic District and Old City District Regulations," codifies the regulations and procedures applicable to the City's Historic District, which was created for the purpose of the preservation and protection of old historic or architecturally worthy structures and quaint neighborhoods which impart a distinct aspect to the city and which serve as visible reminders of the historical and cultural heritage of the city, the state, and the nation. *See* Sec. 54-230. While Respondents refer to the Secretary of the Interior's Standards for Historic Preservation as an obscure, "lengthy guiding reference," the Standards for

Historic Preservation are incorporated by reference into the City's Zoning Ordinance. Section 54-236 of the City's Zoning Ordinance, entitled "Guidance standards; maintenance of consistent policy," states that the BAR-S "shall be guided by the Secretary of the Interior's Standards for Historic Preservation." *See* Sec. 54-236.

The fact that the Order does not specifically refer to the Secretary of the Interior's Standards for Historic Preservation by name does not render this issue unpreserved, as Respondents suggest. (Resp'ts Initial Br. p. 18.) The ultimate goal behind preservation of error rules is to ensure that an issue raised on appeal has first been addressed to and ruled on by the trial court. *See State v. Nelson*, 331 S.C. 1, 6, 501 S.E.2d 716, 718 (1998). The record establishes that the issue of the BAR-S's failure to follow the City's Old and Historic District and Old City District Regulations set forth in the Zoning Ordinance was raised to and ruled on by the circuit court. (Order p. 3; Mem. Supp. Pet. pp. 4 – 7.) The BAR-S's decision to approve the conceptual plan that offends the very standards by which the BAR-S is to be guided was an error that warrants reversal. (Mem. Supp. Pet. pp. 4 – 7.)

CONCLUSION

For these reasons, Appellant Martin Alloy respectfully requests that this Court reverse the circuit court's decision, or in the alternative, remand the case for further proceedings.

Respectfully submitted,

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PROOF OF SERVICE

I certify on this date that I have served a copy of the Initial Reply Brief of Appellant Martin Alloy to the following counsel of record via electronic mail dated October 21, 2024, at the following addresses:

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