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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Circuit Court Judge

_____

Appellate Case No. 2022-000973
Case No. 2021-CP-10-0555

_____

Teresa Melhado and Dane Neller,……Appellants,

v.

City of Charleson, City of Charleston Board of Zoning Appeals, George Wallace, Erika Wallace, and Erika R. Wallace, Trustee of the Erika R. Hayes Revocable Trust u/a/d 8-4-2016,……..Respondents.

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RESPONDENTS GEORGE WALLACE, ERIKA WALLACE, AND ERIKA R. WALLACE, TRUSTEE OF THE ERIKA R. HAYES REVOCABLE TRUST U/A/D 8-4-2016'S REPLY IN SUPPORT OF THEIR MOTION TO DISMISS APPEAL

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October 28, 2024
Charleston, South Carolina

Respondents George Wallace, Erika Wallace, and Erika R. Wallace, as the Trustee of the Erika R. Wallace Revocable Trust u/a/d 8-4-2016 (the "Wallaces"), submit the following in reply to the Appellants' return to the Wallaces' Motion to Dismiss and in further support of dismissal of this appeal on mootness grounds.

This case involves a neighboring homeowners' appeal of Board of Zoning Appeals – Zoning of the City of Charleston (the "BZA") decisions granting the Wallaces a variance and special exception to enable them to construct a small, rear addition on their home in Charleston's old and historic district. The BZA's decisions were issued in fall of 2021. **(R. p. 3, Order dated Sept. 7, 2021; R. p. 4, Order dated October 19, 2021).** The BZA's decisions were unanimous, 7-0 in the Wallaces' favor. **(Id.).** Appellants appealed the BZA decisions to the circuit court who affirmed the BZA's decisions. **(R. pp. 5-18).** Appellants did not accept that result, but instead, initiated an appeal to this Court.

During the pendency of the successive appeals, now spanning over the course of three years, the Wallaces proceeded with their project, as was their right. They were not automatically stayed from proceeding with construction; S.C. Code Ann. § 6-29-830(B) explicitly provides that the filing of an appeal of a zoning board's decision to the circuit court does not ipso facto act as a supersedeas, and critically, Appellants did not seek a supersedeas at the time of initiating their appeal. Further, they did not object to the Wallaces' application for architectural review approval or building permits. Appellants had notice the Wallaces were proceeding with their project yet Appellants waited five months – i.e., until *after* the Wallaces had commenced construction – to seek a stay or otherwise act to preserve the status quo. This fact alone should be determinative of the matter.

A finding of mootness is also appropriate in this instance, because the Wallaces proceeded with the requisite authority and in reliance on the BZA's issuance of the variance and special exception. The Wallaces commenced construction in reliance on the issuance of all necessary government approvals and permits and in the absence of Appellants' request for a supersedeas. They continued the construction in further reliance on Appellants' failure to obtain a stay from either the circuit court or this Court.[1] At all times pertinent hereto, the Wallaces were duly authorized to proceed with the project, acting lawfully, and in accord therewith, made substantial investments into their property and the construction of this addition.

The project is now complete. The City has no authority to require the Wallaces to tear down a structure the City approved a variance and special exception for, permitted to be built, and to which no stay applied. Even if this Court were to reverse the circuit court's orders affirming the BZA's unanimous decisions and remand this matter to the circuit court for a new *de novo* hearing (which should not be the case), the City cannot find the Wallaces to have acted in violation of its zoning ordinances where the Wallaces in good faith, made substantial expenditures in improving and modernizing their property in reliance on the City's prior approvals and issuance of a building permit. The Wallaces acquired a vested right in the variance, special exception, and building permits the City issued to them.

As such, this appeal is moot. Any judgment issued by this Court in Appellants' favor would have no practical legal effect. Byrd v. Irmo High Sch., 321 S.C. 426, 431, 468 S.E.2d 861, 864

[1] When Appellants eventually petitioned for a writ of supersedeas, they were denied such relief. Both the circuit court and this Court denied Appellants' petitions for a writ of supersedeas. **(R. pp. 5-18; Order entered Aug. 1, 2022).** The Wallaces' objection to Appellants' petition for a writ of supersedeas was largely based upon the progression of construction, their investment into the project, and the harm they would suffer from the imposition of a stay. **(Return to App. Mot. for a Supersedeas, filed July 25, 2022).**

(1996); Mathis v. South Carolina State Hwy. Dep't, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973).

1. Appellants cannot be afforded any practical relief because the City granted the Wallaces a special exception, variance, and a building permit to proceed with construction of their project; no stay applied; and the Wallaces made substantial investments into the project and have now completed the project.

Appellants' suggestion that they could, theoretically, be afforded practical relief lacks merit. The ordinance Appellants cite to contemplates a landowner constructing buildings or structures without proper approvals or permits or otherwise using a property in violation of applicable use regulations. **(Return at 8).** It is not applicable in this case, as the Wallaces obtained all requisite approvals and permits before commencing with construction and they were not stayed from proceeding with their project upon Appellants' appeal of the zoning board's decisions. The plain language of City of Charleston Zoning Ordinance, § 54-950 as well as the doctrines of estoppel and vested rights prevent the City from changing their positions on the Wallaces in the unlikely event that this Court reversed the circuit court and remanded this matter to the BZA for a new, *de novo* hearing.

A. There is a specific statutory exception to Rule 241, SCACR's automatic stay for appeals of local zoning board decisions. This project was not stayed pending Appellants' appeals. The Wallaces were authorized to proceed with construction.

It is important to distinguish this type of appeal from others. First, this is an appeal of a zoning board decision. The General Assembly intended for zoning boards to have broad discretion in this area of local planning. See S.C. Code Ann. § 6-29-840 (mandating that a reviewing court is to "determine only whether the decision of the board is correct as a matter of law."); see also Kurschner v. City of Camden Planning Comm'n, 376 S.C. 165, 174, 656 S.E.2d 346, 351 (2008) ("We refuse to apply a standard of review different from the any evidence standard in this case,

for any other standard of review would be contrary to the legislature's intent in granting a planning commission broad discretion in this area.").

In addition to providing broad deference to the zoning board's decisions (which, here were **unanimous** decisions to grant the requested variance, special exception, and to deny Appellants' motion for reconsideration), the General Assembly has expressed its intent for zoning boards' discretionary decisions to take effect despite the pendency of an appeal. See S.C. Code Ann. § 6-29-830(B). This is an exception from the general rule of an automatic stay under Rule 241, SCACR.

S.C. Code Ann. § 6-29-830(B) of the South Carolina Local Government Comprehensive Planning Enabling Act of 1994 (the "Enabling Act") expressly provides:

> The filing of an appeal in the circuit court from any decision of the board **does not ipso fact act as a supersedeas**, but instead, the judge, in his discretion, may grant a supersedeas upon such terms and conditions as may seem reasonable and proper.

S.C. Code Ann. § 6-29-830(B) (emphasis added). The statutory exception to the general rule makes sense considering the significant deference that is to be afforded to the zoning board's discretionary decisions. Absent this statutory exception to the general rule, losing parties could have effective control over local planning matters by tying-up projects for years simply through the filing of successive appeals. That is not what the General Assembly intended.

All the Wallaces have done is exactly what the law permitted them to do. They followed the required processes, took care in the design and construction of this project,[2] and obtained all necessary approvals. Appellants seem to argue that the Wallaces had some duty to impose a stay

[2] Beyond obtaining BZA and City of Charleston – Board of Architectural Review ("BAR") approval, the Wallaces collaborated with Charleston's two historic preservation organizations as it relates to the design of this addition over a number of years. **See (R. pp. 106:23-107:12).**

upon themselves where a stay was not automatically in place and Appellants' petitions for a writ of supersedeas were twice denied. The Wallaces had no such obligation.

B. The Wallaces have not acted in violation of City of Charleston Zoning Ordinance, § 54-950.

In an effort to avoid a finding that there is no practical relief the BZA can provide in this case, Appellants cite to the City's enforcement ordinance and claim that if this Court were to reverse the circuit court and grant Appellants' their requested relief (remand to the BZA for a new, de novo hearing), the Wallaces would immediately be in violation of the City's ordinances. **(Return at 8).** Appellants go so far as to suggest that they would have standing to seek monetary damages or injunctive relief to correct or abate the alleged violations. **(Id.).**

This is outrageous and unsupported by the plain language of the ordinance Appellants cite to, Section 54-950 of the City of Charleston Zoning Ordinances. Section 54-950 provides enforcement powers where there is a violation of an ordinance or where a building is constructed *without* a permit or appropriate approval. There is neither here.

The full text of the ordinance reads as follows:

> a. To enforce this chapter, the administrative officer is authorized to withhold building or zoning permits, or both, and issue stop orders **against any work undertaken by an entity <u>not having a proper building or zoning permit</u>, or both**. **It is unlawful to construct**, reconstruct, alter, demolish, change the use of or occupy **any** land, **building**, or other structure **<u>without first obtaining the appropriate permit or permit approval</u>**. No permit may be issued or approved unless the requirement of this chapter or any ordinance adopted pursuant to it are complied with. It is unlawful for other officials to issue any permit for the use of any land, building, or structure, or the construction, conversion, demolition, enlargement, movement, or structural alteration of a building or structure without the approval of the administrative officer. A violation of any ordinance adopted pursuant to the provisions of this chapter is a misdemeanor. **In case a building, structure, or land is used, or is proposed to be used <u>in violation of any ordinance</u>** adopted pursuant to this chapter, the zoning administrator or other appropriate administrative officer, municipal or county attorney, or other appropriate authority of the municipality or county or an adjacent or neighboring property owner **who**

> **would be specially damaged by the violation may in addition to other remedies, institute injunction, mandamus, or other appropriate action or proceeding to prevent <u>the unlawful erection</u>, construction, reconstruction, alteration, conversion, maintenance, or use, <u>or to correct or abate the violation</u>, or to prevent the occupancy of the building, structure, or land**. Each day the unlawful erection, construction, reconstruction, alteration, conversion, maintenance, or use continues is considered a separate offense.
>
> b. In case a building, structure, or land is or is proposed to be used in violation of an ordinance adopted pursuant to this chapter, administrative officer or other designated official may in addition to other remedies issue and serve upon a person pursuing the activity or activities a stop order requiring that entity stop all activities in violation of the Zoning Ordinance.

City of Charleston Zoning Ordinance, § 54-950 (emphasis and double emphasis added).

The Wallaces had a proper building permit and zoning approval before commencing with construction. They also had BAR approval. They did not commence construction "without first obtaining the appropriate permit or permit approval"; they did not proceed with their work without "having a proper building or zoning permit[s]"; they have not used the property and the constructed addition "in violation of any ordinance." City of Charleston Zoning Ordinance, § 54-950. To the contrary, they took each of these acts, in the order required.

City of Charleston Zoning Ordinance, § 54-950 is not applicable in this case and does not provide a means by which Appellants can be afforded any practical relief.

C. The doctrines of vested rights and estoppel prevent additional barriers to the City hypothetically providing Appellants the relief they seek (i.e., demolition of the subject addition).

For the reasons set out in the Wallaces' briefs, including the standard of review noted above, should this Court take up the issues in this appeal, the Wallaces will prevail on the merits. It is worth note, however, for the purposes of exploring the practical effect of a hypothetical ruling by this Court in Appellants' favor, the City's ability to provide Appellants any practical relief is also constrained by the doctrines of vested rights and estoppel.

The Wallaces spent four years designing the subject addition, adding modern functionalities including a laundry room, linen storage, and master bedroom closet, applied for a variance and special exception, barely increasing the property's non-conformity as to side setback and lot occupancy requirements, hired counsel and appeared before the BZA on their applications. **(R. pp. 19-20, 101-127).** Mr. Wallace answered the on-the-spot questions the board posed to him. **(R. pp. 122-125).** The BZA decided to unanimously grant the Wallaces application, subject to one condition: the BZA conditioned the Wallaces take steps to reduce the sound emanating from the air conditioning units and generators. **(R. p. 3-4).**

The Wallaces met this condition. **(Aff. of George M. Wallace, Jr., at ¶ 31).** They purchased new, commercial-grade air compressors, at a cost of $17,580.00, and upgraded dampers and controls that reduce the sound of the equipment. **(Id.).** The Wallaces have also defended the City's process and decisions in these appeals.[3] The City, like Appellants, were aware that the Wallaces were proceeding with construction. The City issued BAR approval, a building permit, and electrical permit after Appellants appealed the BZA's decisions to the circuit court. **(Aff. of George M. Wallace, Jr., at ¶¶ 21(a)-(c) and Exs. F & G).**

It would be inequitable for the City, on remand, if that were to occur, to find that they were in error in issuing the approvals and permits and require the Wallaces to demolish or deconstruct the subject addition. The Wallaces, at all times hereto, have acted in good faith reliance on the zoning approvals and building permits and spent substantial sums of money in reliance thereupon. **(Supp. Aff. of George M. Wallace, Jr., at ¶ 12).**

[3] In footnote 1 of the Appellants' Return, they note that the City of Charleston and its Board did not join in the Wallaces' Motion to Dismiss. To be clear, the City has not participated in this appeal. It did not file any briefs or otherwise take a position on Appellants' Petition to Confirm Automatic Stay or in the Alternative, for Writ of Supersedeas.

The Wallaces possessed a vested right in the subject approvals and building permits. Variances and special exceptions from zoning ordinances are within the scope of the Vested Rights Act and the City of Charleston Zoning Ordinances. See S.C. Code § 6-29-1520 (providing that a "site specific development plan," by definition, may be in the form of a variance or special exception); City of Charleston Zoning Ordinance, §§ 54-960 to 54-969 (incorporating into the definition of a "site specific development plan" a variance and special exception). A landowner with a site specific development plan for which a variance or special exception is required obtains vested rights when the landowner obtains the variance or special exception and approval from the local governing body. City of Charleston Zoning Ordinance, § 54-963. The landowner is held to have acquired a vested right in the construction of a building or structure where prior to any change (here, the revocation of the zoning approvals) the landowner has made a substantial expenditures in reliance on the permit validly issued. Friarsgate, Inc. v. Town of Irmo, 290 S.C. 266, 349 S.E.2d 891 (Ct. App. 1986) (citing A. Rathkopf, The Law of Zoning and Planning § 50.03 (1986) for the general majority rule).

Further, it is well-accepted that "a government body is not immune from the application of equitable estoppel where its officers or agents act within the proper scope of their authority. Oswald v. County of Aiken, 281 S.C. 298, 302, 315 S.E.2d 146, 149 (Ct. App. 1984). Equitable estoppel can be applied to zoning boards. See McCrowey v. Zoning Bd. of Adjustment of City of Rock Hill, 360 S.C. 301, 599 S.E.2d 617 (Ct. App. 2004); Landing Development Corp. v. City of Myrtle Beach, 285 S.C. 216, 329 S.E.2d 423 (1985).

These issues are not before this Court at this juncture. They are mentioned because they reinforce that the City's issuance of the zoning approvals and then building permits and a Certificate of Completion during the pendency of this appeal are events that have made it

impossible for this Court to grant effectual relief to Appellants in this case. This case has become moot based on these developments and should be dismissed as such. Byrd v. Irmo High Sch., 321 S.C. 426, 431, 468 S.E.2d 861, 864 (1996); Mathis v. South Carolina State Hwy. Dep't, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973).

2. Appellants delay in seeking a stay supports a finding of mootness.

This Court should strongly factor into its analysis the fact that Appellants did not immediately seek a stay or otherwise seek to prevent construction from commencing for a period of almost five months after issuance of the decisions they challenge. Importantly, the Wallaces commenced construction within this same period. It was only *after* the Wallaces commenced construction that Appellants attempted to halt the Wallaces' project.

While Appellants emphasize in their return that they petitioned for supersedeas, they play down *when* they sought a stay. The facts of the matter are that Appellants did not seek a stay until after the Wallaces had obtained all necessary approvals, permits, and commenced with the construction of their small, rear addition. The pertinent timeline is as follows:

The BZA initially issued their decisions in the Wallaces' favor on September 7, 2021. Appellants thereafter petitioned for rehearing, which the BZA denied on October 19, 2021. Appellants had the right to appeal the BZA decisions at this juncture. *See* S.C. Code Ann. § 6-29-820(A) ("A person who may have a substantial interest in any decision of the board of appeals . . . may appeal from a decision of the board to the circuit court in and for the county, by filing with the clerk of the court a petition in writing setting forth plainly, fully, and distinctly why the decision is contrary to law. The appeal must be filed within thirty days after the decision of the board is mailed."). Appellants also had the right to seek the imposition of a stay within the same timeframe. *See* S.C. Code Ann. § 6-29-830(B) ("The filing of an appeal in the circuit court from any decision

of the board does not ipso facto act as a supersedeas, but the judge of the circuit court may in his discretion grant a supersedeas upon such terms and conditions as may seem reasonable and proper.").

Despite possessing the right to seek a stay of the commencement of construction as early as October 19, 2021, Appellants waited until March 16, 2022 – i.e., almost five months later – to first petition for supersedeas.

Appellants did not do anything else during this five-month period to prevent construction from commencing or to otherwise preserve the status quo, despite having the opportunity to do so.[4] They sat idle.

Appellants inexplicably and unreasonably delayed its filing of petition for supersedeas. As a result, the Wallaces obtained BAR approval, electrical and building permits during this period and, in reliance on the issuance of all necessary governmental permits and approvals and operation of S.C. Code Ann. § 6-29-820(B)[5], moved forward with their project. The Wallaces had no obligation to impose a stay upon themselves.

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[4] The Wallaces applied for approval of their final plans by the Board of Architectural Review of the City of Charleston ("BAR") they day after the BZA denied Appellants' petition for rehearing. Appellants did not object.

The Wallaces also applied for a building and electrical permit. Again, no objection.

While suggesting the Wallaces "were lying in wait" or otherwise acted surreptitiously, the facts are just to the contrary. The Wallaces sought these additional approvals and permits after obtaining the requisite zoning approvals. They placed these notices in conspicuous locations and for the appeal period. At all times, they have been open and honest about the fact that they were proceeding with the project upon obtaining BZA approval.

[5] A zoning board's decision is not automatically stayed during an appeal. *See* Rule 241(b), SCACR; S.C. Code Ann. § 6-29-820(B) (providing the statutory exception to the automatic stay rule).

It would be extremely inequitable and turn S.C. Code Ann. § 6-29-820(B) on its head to penalize a party who went forward with a fully approved and permitted project, that was not stayed pending appeal, and for which no supersedeas had been sought (or later granted). See Maybank 2754, LLC v. Zurlo, 906 S.E.2d 94, 113 (Ct. App. 2024), reh'g denied (Sept. 17, 2024) (quoting Strickland v. Strickland, 375 S.C. 76, 83, 650 S.E.2d 465, 469 (2007)) (""Laches is an equitable doctrine defined as 'neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done.'").

3. Dismissal of this appeal will not be of consequence to other challengers of local zoning board decisions, nor will it deprive this Court of its jurisdiction to hear such appeals. The facts bearing on mootness analysis in this case are unique and the equities weigh in the Wallaces' favor.

In enacting S.C. Code Ann. § 6-29-820(B), the General Assembly clearly expressed its intent that local planning board's decisions would not be held up by appeals. By way of the same enactment, however, the General Assembly provided challengers of a board's decisions rights and a procedure by which to obtain a stay. As outlined above, Appellants did not promptly seek to employ that procedure or obtain such relief.

A decision to dismiss this case would not "create new precedent that would effectively deprive parties with standing of their statutory right to take zoning appeals." (Return at 6). First, an order granting the Wallaces' motion is unlikely to have any precedential effect. Second, it would only bear application in the limited subset of cases where each of the following conditions are true: (1) the subject application before the local planning commission or board involved construction of a structure; (2) the local board approved the application; (3) the appellant is an objector to the application; (4) the appellant did not seek a stay or did not promptly seek a stay; (5) all other governmental approvals necessary for the construction were issued; (6) the property owner or occupant commenced construction during the pendency of the appeal; (7) construction was

substantially or totally completed prior to appellate consideration; (8) respondent filed a motion to dismiss on such grounds; and (9) the appellate court found dismissal appropriate based on the circumstances that presented.

The Wallaces are not imploring this Court to adopt a rule where completion of construction is determinative in every case. They are saying that this Court should find this appeal moot based upon the particular circumstances that present in this case. In addition to Appellants failure to promptly seek a stay of commencement of construction or to otherwise preserve the status quo prior to the commencement of construction, the following factors weigh in favor of a finding of mootness:

The Wallaces proceeded openly, in good faith, and with the requisite authority. The Wallaces commenced construction only after obtaining all necessary approvals and permits. They continued construction upon the denial of Appellants' petitions for a writ of supersedeas.

There are no novel issues or public interests that warrant continuing review. The Wallaces do not agree that the BZAs procedures were defective or deprived Appellants of due process. They note the reversion to pre-pandemic procedures to make the point that there are no novel issues or public interests at play (e.g., environmental concerns) that warrant continuing review.

Lastly, the challenged modification is not readily undone without undue hardship to the Wallaces. The Wallaces have outlined the significant investment they have made in constructing the subject addition, with care to mitigating the effects of the construction and keeping with the historic character of the property, through their filings, including the two Affidavits of George "Skip" Wallace. The addition is a tasteful addition that modernizes this historic home. They have also incurred significant costs in defending the BZA decisions throughout the course of two appeals. It would subject the Wallaces to unfair and burdensome hardship to make them alter, or

deconstruct the subject addition, on top of it all. See Christ Central Ministries v. City of Columbia Bd. of Zoning Appeals, 424 S.C. 358, 361, 818 S.E. 2d 30 (Ct. App 2018) (considering the fact that "CCM has constructed the billboard at significant cost").

Conclusion

This appeal should be dismissed as moot based upon Appellants' failure to timely seek a supersedeas or otherwise prevent construction from commencing during the pendency of their successive appeals of the BZA decisions. Construction is now complete and any judgment in Appellants' favor will have no practical effect. The City cannot require the Wallaces to tear down a structure they approved and permitted the Wallaces to build and which the Wallaces were not stayed from constructing.

Respectfully Submitted,

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PROOF OF SERVICE

I certify that the foregoing **Reply in Support of Motion to Dismiss** submitted by Respondents George Wallace, Erika Wallace, and Erika R. Wallace, Trustee of the Erika R. Hayes Revocable Trust u/a/d 8-4-2016 were served on the following counsel of record by electronic mail on this 28th day of October, 2024.

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