

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas  
J. C. Nicholson, Jr., Circuit Court Judge

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Appellate Case No.: 2012-213635

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MARY MELINDA BALLARD..... Respondent.

v.

CITY OF CHARLESTON BOARD OF ARCHITECTURAL REVIEW and THE CITY OF  
CHARLESTON ..... Appellants.

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**APPELLANTS' INITIAL BRIEF**

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## STATEMENT OF ISSUES ON APPEAL

1. Did the Circuit Court err when it reversed the decision of the BAR and ordered the BAR to approve demolition of the home?
2. Did the Circuit Court err by substituting its own judgment for the decision of the BAR which concluded that destruction of the home was not justified on the facts of the case?

## STATEMENT OF THE CASE

This is an appeal from a Circuit Court order signed by the Honorable R. Markley Dennis, Jr. dated November 13, 2012. (Dennis Order, p. 1). The Circuit Court was acting in its appellate capacity reviewing the decision of the City of Charleston Board of Architectural Review (hereinafter BAR) which rendered decisions on two separate applications on April 11, 2012, and May 23, 2012, respectively. (May 23 hearing, April 11 hearing). The April decision was as a result of a remand and concerned the removal of certain unauthorized changes to the structure. The May decision was a denial of an application to demolish the structure. Those BAR decisions were timely appealed by the property owner, Melinda Ballard to the Circuit Court as provided by City of Charleston Zoning Ordinance Sec. 54-248. (R. \_\_\_ Notices of Appeal to Circuit Court). Judge Dennis reversed the decision of the BAR rendered on May 23, 2012 and did not rule on the decision regarding the other application. The BAR and the City of Charleston received written notice of entry of the order on November 26, 2012 and timely filed this appeal with the Court of Appeals on December 21, 2012.

## FACTS

This matter arises out of request by Melinda Ballard, now deceased, to approve unauthorized exterior changes to and additionally for demolition of a residence at 15 Orange Street in downtown Charleston, South Carolina. Orange Street runs south from Broad Street to Tradd Street and is located entirely within the City of Charleston's Old and Historic District. City of Charleston Zoning Ordinance Sec. 54-231. Zoning regulations require the City of Charleston Board of Architectural Review (BAR) to review and approval all modifications or demolition of any structure in the Old and Historic District as well as modifications to structures of a certain age outside of the Old and Historic District. City of Charleston Zoning Ordinance Sec. 54-232 (a).

In 2010, the City of Charleston noted that certain changes had been made to the exterior of the structure without permission of the BAR. Some of the changes were in fact previously denied by the BAR. (April 2012 BAR Order). These changes included changes in the appearance of the doors including a highly ornamented mahogany front door in place of a plain wood and glass front door, changes to the french doors and windows, installation of hoods or surrounds over the top of the doors and windows, installation of decorative urns on top of historic columns, installation of metal grates on the second floor, and installation of a roof over a second floor patio. (April 2012 BAR Order). All of these changes were made by Ballard without approval and were determined to be visible from the street or sidewalk and thus within the jurisdiction of the BAR.<sup>1</sup> (April 2012 BAR Order)

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<sup>1</sup> The BAR only asserts jurisdiction over changes that are visible from the public ways, streets and sidewalks. The BAR does assert jurisdiction over changes that would be visible from the public ways and sidewalks but for foliage on the basis that the foliage is a condition of the property which changes as a result of plant disease and even the seasons.

Ballard made a petition for after-the-fact approval of changes to the BAR. (April 2012 BAR Order). That application was denied by the BAR. (April 2012 BAR Order).

By way of additional procedural history, but not particularly important to the appeal, the BAR decision was initially appealed to the Honorable J. C. Nicholson, Jr. who determined that the decision of the BAR and the record on appeal was insufficient to allow him to adequately review the matter. He remanded the matter to the BAR to make specific findings. (Nicholson Order). Ballard made an interlocutory appeal to the Court of Appeals which was dismissed upon motion of the City and the case was remanded to the BAR to prepare an order concerning its previous decision. (Court of Appeals Dismissal of Interlocutory Appeal). On April 11, 2012 the BAR issued a written decision setting forth reasons for its prior denial of after-the-fact changes, clarified the additions which needed to be restored to original condition, and partially reversed itself to allow the windows to remain. (April 2012 BAR Order). Ballard again appealed to the Circuit Court from this decision of the BAR denying her after-the-fact changes.

In the meantime, Ballard filed a separate application with the BAR to completely demolish the home. Ballard claimed that improper installation of the windows and doors by a contractor resulted in water intrusion and resulting mold which justified tearing down the structure. (Transcript of Hearing of BAR May 23, 2012). The BAR denied the application for demolition and that decision. (Transcript of Hearing of BAR May 23, 2012). The Board cited in its hearing the lack of evidence supporting a demolition, the suitability of the home to the surrounding structures, the concern for nearby structures, and the need to preserve the architecture of the Randolph Martz, a Charleston architect of the modern area. That decision of the BAR was appealed by Ballard to the Circuit Court. (Transcript

of Hearing of BAR May 23, 2012).

The Honorable R. Markley Dennis, Jr. heard both the appeal on the BAR's denial of the after the fact modifications to the home and the BAR's denial of Ballard's request for a total demolition. (Dennis Order, Hearing). Judge Dennis bypassed the BAR's decision on Ballard's unauthorized changes. (Dennis Order). Judge Dennis reversed the decision of the BAR as to demolition and ordered that the BAR authorize the demolition of the home. (Dennis Order). The City and the BAR appealed the decision of Judge Dennis. Ballard did not appeal Judge Dennis' order. Accordingly, it is the City's position that the only issue on appeal is whether demolition should be granted or denied. If the Respondent intends to argue the issue of the denial of approval for the after-the-fact changes, the City will address that in its reply brief.

#### ARGUMENT

The Circuit Court erred when it reversed the decision of the BAR and directed the BAR to issue a demolition permit. While the home in question is not itself historic, it is located in the heart of the Old and Historic District. The home as originally designed, approved and constructed fits harmoniously with the surrounding historic homes in the neighborhood. There was insufficient evidence submitted by Ballard to justify the total demolition of the home, especially given the risk to surrounding structures on the property and immediately adjacent to it. It is a major undertaking to demolish an over 5000 square foot brick home on a historic, narrow, one-way street with historic structures both on the property and immediately adjacent to it. The BAR was concerned about all of these issues as well as the desire to protect structures of more recent origin which will be historic houses and landmarks of the future. The Circuit Court judge erroneously substituted his

judgment for that of the BAR in reversing the decision of the BAR.

In Talbot v. Myrtle Beach Bd. of Adjustment, 222 S.C. 165, 72 S.E.2d 66 (1952), the Supreme Court recognized the wide discretion granted to zoning boards and ruled zoning boards' decisions should not be interfered with unless the decision are arbitrary. In Hodge v. Pollock, 223 S.C. 342, 348, 75 S.E.2d 752, 754-55 (1953) the Supreme Court held: "The decision of the 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." Pursuant to S.C. Code Ann. § 6-29-840(A) "[t]he 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." A court should refrain from substituting its judgment for that of the reviewing body, even if it disagrees with the decision. Rest. Row Assocs. v. Horry County, 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999). However, a decision of a city 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. Clear Channel Outdoor v. City of Myrtle Beach, 372 S.C. 230, 235, 642 S.E.2d 565, 567 (2007); Rest. Row Assocs. v. Horry County, 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999). There is good reason for this standard as local boards—planning commissions, boards of zoning appeal and boards of architectural review—are well-acquainted with local conditions and interpretation of their own ordinances.

In the present case, the BAR held a hearing on May 23, 2012 to address Ballard's application for demolition of the entire structure at 15 Orange Street. The decision of the BAR was not reduced to an order as it is not the typical practice of the Board to reduce its

decisions to a formal order unless the reviewing court determines the record is insufficient pursuant to allow the reviewing court to render a decision consistent with the rule of Vulcan Materials Co. v. Greenville County Bd. of Zoning Appeals, 342 S.C. 480, 493-94, 536 S.E.2d 892, 899 (Ct. App. 2000). See also Wyndham Enters., LLC v. City of N. Augusta, 401 S.C. 144, 735 S.E.2d 659 (S.C. Ct. App. 2012).

At the hearing, Ballard presented evidence that the building sustained mold and moisture damage as a result of leaks around windows. Photos were shown of damage in various locations. In opposition, multiple persons spoke at the BAR meeting against the Ballard application including nearby property owners and the Preservation Society of Charleston. The Preservation Society expressed concerned that mold is a common condition in both historic and non-historic structures and that a finding of mold and rot should not and does not necessitate tearing down of structures. (BAR Transcript May 23, 2012, p. 11). The Preservation Society also expressed concern that the current building as originally designed was an appropriate, non-intrusive background building and that it should not be torn down. (Id.) Nearby and neighboring property owners similarly expressed concern that Ballard had not provided a structural engineer's report suggesting demolition is necessary. Other nearby property owners testified before the Board as to the probability of damage to both nearby properties and historic structures on Ballard's property including a historic masonry wall that runs along Orange Street, just a few yards from the building itself. More than one person presented the position that heavy truck traffic associated with demolition and reconstruction activities would have an adverse impact on surrounding neighborhood historic properties. (Id. P. 15-16). In fact, there was testimony that construction traffic of various types has in the past caused damage to

nearby historic properties. (p. 17). There was also concern by witnesses that Ballard had already willfully disregarded the jurisdiction of the BAR when she made unapproved modifications and that no consideration should be given to her application until such time as she complied with the prior decisions of the BAR.

The Board addressed several concerns including that there had been an insufficient showing of structural problems that would justify a total demolition. The Board noted that it had not been provided a report of a structural engineer. (Id. P. 23). The Board noted the concerns of the neighbors that had been expressed at the hearing. (Id. P. 21). Finally, the Board noted that while the architecture was of recent origin, it was a good example of a modern designer of good reputation. (P. 21).

The burden of proof and persuasion rested on the applicant to demonstrate that there was reason to justify demolition of the home that outweighed the risks to surrounding structures. The applicant failed to meet that burden. The applicant did not satisfy the BAR that there was sufficient cause to demolish the entire building. There was information provided as to areas where repairs needed to be made, but there was no information suggesting that a wholesale demolition of the structure was warranted. (Transcript of Hearing of BAR May 23, 2012).

In contrast, there was some evidence that the demolition did not sufficiently take into account the harm to surrounding historic structures from vibration and accidental damage during demolition. (Transcript of Hearing of BAR May 23, 2012). In particular, it is reasonable to be concerned that demolition of a brick home with over 5000 square feet of living space would be a major construction project causing disruption of the street and heavy equipment that will potentially harm surrounding structures. (Transcript of Hearing

of BAR May 23, 2012). There was some evidence damage had occurred in the past to historic properties in the area from heavy equipment in the area which was unrelated to the applicant's activities. (Transcript of Hearing of BAR May 23, 2012).

The BAR was also entitled to consider that the current structure fits harmoniously within the existing collection of historic structures. Even where the BAR allows a structure to be demolished, it is typically conditioned on approval of a replacement structure so that there is not a missing hole in the landscape and so that it can be assured that the replacement structure will be at least as beneficial for the aesthetics of the community.

While the architectural review boards in all communities have important task, the Charleston BAR has a particularly important role in preserving the aesthetic character in the Old and Historic District where the appearance of buildings and streets is important business. Aesthetics of building not only influence tourism, the beauty of the Old and Historic District serves as an important asset for the local community.

In the present case, the Circuit Court judge substituted his own judgment in the place of the BAR. In fact, the Circuit Court made clear that its position was that if the City was not willing to allow Ballard to keep her illegal additions "and the person [Ballard] says 'I don't want to spend the money to make it better, I want to demolish it.' I think an individual in this country ought to have the right to do that. So that is what I think is arbitrary and capricious." (Transcript of Dennis Hearing). Clearly the Circuit Court's ruling reflects a standard that persons should be able to tear down any structure if they don't want to fix it. That is an inappropriate standard in many places, but especially in Charleston's Old and Historic District. Surely, individuals should not have right to change their structures in any manner they desire or have the alternative right to simply tear down.

the structure. And those buying property in the Old and Historic District have an expectation of the existing environment of regulations and procedures that govern changes in the District.

The City of Charleston Zoning ordinances provides that the Board of Architectural review shall consider "among other things, the historic, architectural and aesthetic features o such structure, the nature and character of the surrounding area, [and] the use of such structure and the importance to the city." City of Charleston Zoning Ordinance Sec. 54-240(a). Indeed, the Board itself has the authority to "require correction of defects or repairs to any structure covered by this article so that such structure shall be preserved and protected in consonance with the purpose of this article and the public safety and housing ordinance." City of Charleston Zoning Ordinance Sec. 54-241.

#### CONCLUSION

The decision of the Circuit Court rendered in its opinion of November 13, 2012 should be reversed and the decision of the Board of Architectural Review reinstated. Of course, this is without prejudice to Ms. Ballard's Estate or a subsequent purchaser to reapply for the requested relief based on passage of time and additional information.

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**CERTIFICATE OF SERVICE**

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I certify that I have served the Appellants' Initial Brief on all counsel by depositing a copy of it in the United States Mail, postage prepaid, on October 2, 2013, addressed to all attorneys of record as follows:

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